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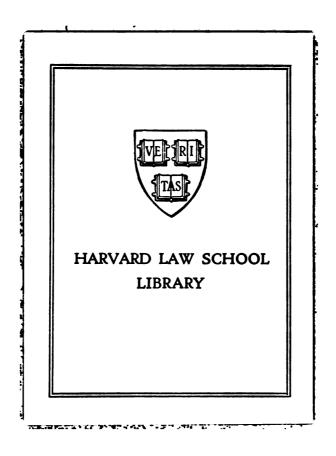
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CONVEYANCING PRACTICE

ACCORDING TO

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CONVEYANCING PRACTICE

ACCORDING TO

THE LAW OF SCOTLAND

BY

JOHN BURNS
WRITER TO THE SIGNET

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My thanks are gratefully accorded to the profession for their reception of the book when it first appeared four years ago. If it now prove to be better worthy of their favour, it is very largely the result of suggestions kindly communicated to me in response to the prefatory note to the first edition. I hope that those who may find the volume practically useful will continue to be so good as to draw attention to omissions, and more especially to errors, which come under their notice.

As on the former occasion, my very special thanks are due, and are now expressed, to my partner Mr Kerr for the great and valuable assistance which he has so willingly given. The responsibility continues mine.

The various critical notices of the first edition I have found most helpful.

J. B.

16 HILL STREET, Edinburgh, January 1904,

TABLE OF CONTENTS .

GENERAL AND PERSONAL

	INDEX OF CASES.	•		•		•		ix
SECT.								
	Execution of Deeds .	•	•	•	•	•		1
II.	Personal Bonds .	•	•	•	•	•		10
III.	BILLS AND NOTES .	•	•	•				27
IV.	REGISTRATION, EXECUTION	N						3 8
V.	INDENTURES OF APPRENT	ICE8HIP			•			44
VI.	FACTORIES AND COMMISSION	ONS, AN	D Power	s of At	TORNEY			48
VII.	ARBITRATION .	•						68
VIII.	PARTNERSHIP .				. •			90
IX.	MISCELLANEOUS .			•	•			125
	IRREDEEMAB	SLE HE	ERITAB	LE RIC	HTS			
X.	SALE AND PURCHASE OF I	HRRITAR	LE PROF	BRTY				146
	Examination of Herita				•	•	•	179
	FEUS					•	•	199
	T				•	•	•	225
	Subsequent Alteration				•	•	•	243
	Contracts of Ground-A				•	•	•	
	SEARCHES .	INNUAL		•	•	•	•	261
		•	•	•	•	•	•	276
			•				•	292
	BURGAGE PROPERTY					•	•	340
	Assignations of Unreco	ORDED (CONVEYA	NCES	•	•	•	343
	Consolidation .		•	•	•	•	•	349
	Transmissions of Recor		ASES	•		•		354
	NOTARIAL INSTRUMENTS	•	•	•	•		•	359
	Entails .	•	•	•				388
	CONTRACTS OF EXCAMBION	N	•		•			404
XXV.	Servitudes .		•	•				407
		v	4.					

	REDEEMABLE HE	KITAB	LE KIG	H12			
SECT. XXVI	Ordinary Heritable Secui	פתוחום					PA (
	Entail Securities .						44
	SECURITIES FOR FUTURE ADV						46
	1. Cash-Credits				•		46
	2. Ex facie Absolute			•	•		47
XXIX.	Bonds of Relief .			•			48
	Exclusion of Executors			•			48
	REAL BURDENS .						49
	Enforcement of Securities			•			5(
	Bonds of Corroboration						53
	Assignations .		•				54
	NOTARIAL INSTRUMENTS				•		56
	POSTPONEMENT AND EXTINCT						58
	LEA	SES					
							60
XXXVII	URBAN Agricultural	•	•	•	•		6:
	(AGRICULTURAL .	•	•	•	•	•	U.
	REVERSIONS AN	חוופר	DOLIG	ure.			
				JIEAS			
	REVERSIONARY INTERESTS			•	•		6
XXXIX.	LIFE POLICIES .	•	•	•	•	•	6
		3/1/27/037					
	SUCCI	ESSION					
	SUCCESSION AND SERVICES						70
XLI.	PERSONAL RIGHT AND PETIT	ions uni	ER THE	1874 A	CT		7
XLII.	COLLATION			•			7
	MARRIAGE CONTRACTS,	, WILLS	S, AND	TRUS	TS		
XLIII.	MARRIAGE CONTRACTS						7
	WILLS						
XLV.	DREDS OF APPOINTMENT			•			84
	Assumption, Appointment,	and Res	IGNATIO:	N OF TR	USTEES		
	Completion of Title on						
	LAPSED TRUSTS .		•	•			8'
XLVIII.	INDEMNITIES TO TRUSTEES				•		88
	DISCHARGE OF TRUSTEES		•				89
	INDEX						9:

	PAGE		PAGE
	38, 34	Anderson, Campbell v	. 52
Abbott, Wyse v	859		. 644
Abdy, Lee v	693	,, Pollok's Trs. v	. 814
Abel v. Bothwell's Tr	305	,, Stephen v	. 816
Aberdeen Mags., Aberdeen, etc.,		Anderson's Exors. v. Anderson's Tra	. 662
Association v	25 8	Andrew, Buchanan v	. 204
,, Aberdeen Trades v	261	Anstruther, Wood v	. 696
,, Bisset v	157	Anstruther's Trs., Smith Cuning	•
"Edmond v	240	hame v. Antrobus, Petr.	858-4
,, Fife's Trs. v	341	Antrobus, Petr	519
,, Paull v	258	Argyll, M'Elroy v.	202
Aberdeen Tailors v. Coutts	204	Arkley, Stoddart v.	. 7
Aberdeen Trades v. Aberdeen Mags.	261	Arnott's Trs. v. Forbes	154, 419
Adair, Stevenson v.	44	Armal ITamble Man	617
Adair's Trs. v. Rankin 51	9, 591	Arthur, Hill v	. 2
Adams, Croom's Trs. v 64	9, 811	Ashburton v. Escombe	. 11
,, Gibson v	610	Assets Co. v. Shiress	864
Adamson's Trs. v. A.'s Exora	100	Athole Hydro. Co. v. Scot. Prov.	
Addison, etc., Petrs	3, 4	Ass. Co.	512
Ainslie, Cameron v .	808	Auld, Petr.	292
Airdrie Mags. v. Smith	189	Auld v. Hay	181
Aitchison's Trs. v. Aitchison .	7, 8	,, Black v	
	8, 339	Ayr Mags. v. Dobbie	
Alexander v. Johnstone	818	371	26, 594
,, Baird v 15		,,	20, 001
,, Lee v	802	BAIKIE'S TRS. v. Oxley	850
,, Logie v.	309	Baillie, Petr	
Alexander's Trs. v. Dymock's Trs.	76	,, v. Drew	
., v. Muir . 20		T .:41	493-5
,, v. Muir . 20 Allan v. MacLachlan	410	,, v. Pollock .	
,, Scot. Her. Secy. Co. v. 472, 50	7, 512	,, Hood v	
,, Smyth v		,, Macdonald v.	160
Allen's Tre Poins	297	TO 1111 1 TO	814
Allans, Livingstone v.	826		_
Allardice, Cathcart's Trs. v.	809	~ .	388, 398
Alliance Her. Sec. Co., Park v. 176, 47	7. 517	TO 1 11 1	15 6 , 398
Alston's Trs. v. A			
Anderson v. Buchanan		DL.1	-
,, v. Dick 147, 29	1. 318		156 809
	658	Baird's Trs. v. Murray	
v. Somerville & Co.	479	D-1 1 m	9
,, Bankes v 39 ,, Browne's Trs. v	7. 454	,, Robertson's Trs. v Balfour v. Scotts	-
" Browne's Trs. v.	682-5	Balfour v. Scotts	
,,		ix b	50,408
		- 0	

	PAGE		PAGE
Balfour's Trs. v. Scott	742	Bonner's Trs. v. Bonner	. 764
Balfour-Melville v. Mylne . 393,	756-7	Bonnington, etc., Co., Gibson v.	. 308
Bank of Ireland, Deering v	696	Bontine v. Graham	. 851
Bankes v. Anderson 39	7. 454	Booth, Gollan's Trs. v	. 227
Bannerman, Fraser v	34	Booth's Tr. v. B	. 650
Bannerman's Exors., Dalglish's	٠.	Boothby, Williamson v	. 766
_	240	Borthwick v. Glassford	. 390
	648		
n ,	76	,, v. Scottish Widows Fund	
Barclays v. Pearson	12	Bothwell's Tr., Abel v	. 305
Bargaly's Crs., Hannay v.	310	Bouch v. Sproule	. 652
Barneby, Greswolde-Williams v	803	Boucher v. Crawford	. 308
Barnetson, King v	407	Bowie's Trs. v. Paterson	. 85 4-6
Barr v. Queensferry Comrs	70		. 64 3
,, Struthers v	91	,, v. Richter	657, 812
Barras v. Scottish Widows Fund .	689	Boyd, Wyllie's Trs. v	. 768-4
Barry Par. Board, Mackay v	71	Boyes, Naismith v	. 805
Barstow v. Stewart 22	9, 232	Brand v. Charteris	. 817
Bartlett v. Buchanan	192	,, v. Scott's Trs	. 808
Baxter's Trs., Heath v 65	3, 833	Brand's Trs. v. Brand's Trs	. 662
	34, 809	Brander, Petr	. 896
Beattie v. Bain's Trs.	5	Breadalbane, M. v. M. Chandos	. 741
37	70	3371.54.3 3	. 611
		Wanter o	. 208-4
,, Cal. Ins. Co. v	6 93		. 205–4 . 687
	512	,, Stewart v British Linen Co. v. Rainey's Trs.	
Beattie's Tr. v. Cooper's Trs	642	Design Lines Co. v. Rainey 8 178.	
,, v. Meffan	395	Brodie v. Brodie	. 761
Beaumont v. L. Glenlyon	808	Brown v. Brown's Tutors .	. 742
Bebb v. Bunny	153	,, v. Duncan	. 4
	652	,, v. Kyd	. 310
Bedford, D. of, E. of Galloway v. 60	9, 610	,, v. Kyd	. 818
Bedwells v. Tod	23	,, Rodger v	. 290
Begg, Edinburgh Mags. v 20	5, 220	,, Simson's Trs. v	. 764
Beilby, Jamieson v	11	,, Stewart v 197, 514,	515, 517
Belhaven and Stenton, Lord, Petr.	756	Brown Bros., Sinclair v	. 156
Bell v. Bell	7 6 8	Brown's Tr. v. Brown	. 662
" v. Gordon	517	Danson to Man Vancour	. 816
Bell's Trs. v. Copeland	268	,, Mills v	. 835
Benhar Coal Co., Gray's Trs. v.	382	D 7	. 3
Bennie, Smith v	653		. 6 82–5
D Al D . TT 214		Bruce, Petr.	. 394
	203		
Berkeley v. Baird	156		199, 405
Berry v. Holden	308	,, Kindness v	. 803-4
Beveridge v. Wilson	517	Bruce's Trs. v. Bruce	. 649
,, Watson v	8	,, Stewart v	. 663
Biggart v. City Glasgow Bank .	426	Bryden, Hadden v. Brydon's c.b. v. B.'s Trs	687, 804
Birkbeck v. Ross	610	Brydon's $c.b.$ v. B.'s Trs .	238, 560
Birrell, Millar v	2	Brysson v. Mitchell	. 74
Bisset v. Aberdeen Mags	157	Buchan v. Livingstone	. 417
,, v. Walker	238	,, v . Mel $f v$ ille	. 72
Black v. Auld	394	,, v. Muirhead's Trs	198, 297
,, v. Clay	612	Buchanan v. Andrew	. 204
,, Park's c.b. v.	351	,, v. Harris and Sheldon	. 610
Blair v. Blair	741	,, Bartlett v	. 192
,, Dalrymple v	756	m	. 42
Blake v. White	15	Buist, Scot. Widows Fund v.	. 687
D1 16		D D 11	. 158
	612		
Bliss v. Putnam	660	Bunten v. Hart	. 10
Bolton v. Curre	886-7	,, Stewart v	. 208
Bonar, Paterson v	15	Burness, Forbes v	. 89

2.02	
Burns v. Martin 18	Chambers' Trs. v. Smith 816
,, Stewart v 5, 147-8	Chancellor's Trs
,,	Chandos, M., M. Breadalbane v 741
CADDALL'S TRS., Gibson v 652	Charlton's Tra., Petrs
Cairns, Nisbet v 516	Charteris, Brand v
Cairns, Nisbet v	Chassels, M'Connel v 189, 355
,, v. Edinburgh Merchant Co. 208	Cheyne and ors. v. Phillips 210
	,. Prudential Ass. Co. v. 263, 507
,, v. Pope 155 Caledonian Bank, Mowat v 147	Chillingworth v. Chambers 8°8-9
Caledonian Canal Comrs., Menzies v. 205	Christie, Petr 200
Caledonian Her. Sec. Co., Life Assn. v. 585	,, v. Fife Coal Co 610
Caledonian Ins. Co. v. Beattie . 693	,, v. Fife Coal Co 610 ,, v. Jackson 208
Caledonian Rail. Co., Darling's Trs. v. 310	Christie's Factor v. Hardie . 425, 808
" Farquharson v. 306	Chrystal's Tra., White's Tra. v 657
Callander v. Callander 754	Church of Eng. As. Co. v. Wink . 9
Callander, etc., Hydro. Co., Mar-	City Glasgow Bank v. Parkhurst 884-8, 898
shall v	,, Biggart v 426
Callander, etc., Ry. Co., Oban v 408	,, Oswald'a Trs. v. 288
Callum v. Goldie 301, 474	Clark v. Clarkes 801
Cameron v. Ainslie 308	,, v. Hume 681
v. Williamson . 198, 544, 594	" v. Perth School Board . 409, 418
Campbell, Petr., 1901 256	,. v. West Calder Oil Co 382
., , 1902 759	,, Glasgow, Trs. of Lord, v.
,, and ors., Petrs	150, 160, 802, 805
,, v. Anderson 52	Inglis v 407, 408
,, v. Campbell, 1880 808	,, Shrubb v 477, 517 Clarke, M'Nab v 506
, v. Campbell, 1789 . 807, 849	Clarke, M'Nab v 506
,, v. Campbell's Trs 765	Clarkson's Trs., Thomson v 8, 5
,, v. Clason 417	Clason, Campbell v 417
,, v. Dunn 202	Clason, Campbell v. 417 Clay, Black v. 612 Clyde Trs., Todd v. 308 Cochrane, Jackson v. 472
,, v. Paterson 309	Clyde Trs., Todd v 808
,, v. Purdie 7, 8	Cochrane, Jackson v 472
,, v. Steele 318	Cockburn v. Edward 76
,, Elibank v 851	Cockburn v. Edward
,, Hepburn v 310	Cohen, Scottish Prov. Institution v. 683, 693
., Hogg v 5	Collow's Trs. v. Connell
,, Malcolm v 146	Colquhoun v. Colquhoun's Trs 806
,, National Bank v 9	., v. Walker 202
Campbell's Trs. v. Campbell 806	,, v. Wilson's Trs 147
,, v. De Lisle's Exor 474	Colquhoun's Tr., Smith Ltd. v 208
,, v. Glasgow Mags. 409, 411	Colvill v. Colvill 888
,, v. Thomson 91	Connel's Trs. v. Connel 4
,, Currie v 310	Connell, Collow's Trs. v
Cappie v. Chalmers 806	Connell's Trs. v. Connell's Trs 804
Carrick v. Edin. and Glasg. Prop. Co. 141	,, Hinton v 182
,, and ors. r. Rodger and ors. 588	Connon, Traill v 152
Carron Co., E. Zetland v 209	Cooper v. Cooper
Carter v. Lornie 163	Cooper's Trs. v. Stark's Trs
Carter Campbell v. Lamont Campbell 392	,, Beattie's Tr. v 642
,, Lamont Campbell v. 756-8	" Stark's Tra. v 156
Casamajor, Pearson v 653	Copeland, Bell's Trs. v
Cassilis, E., Stewart v 153	Corbet v. Waddell
Cathcart's Trs. v. Allardice 809	Corbett's Trs. v. Pollock 645
Cattanach v. Thom's Exors 596	Corsane, Hughes' Trs. v 576
Cattanach's Trs. v. Cattanach 649, 849, 855	Corson, Petr
Ceres School Board v. M'Farlane . 320	Coulson's Trs. v. Coulson
Chalmers, Cappie v 306	Coutts, Aberdeen Tailors v 204
,, Smith's Trs. v 508	Cowan v. Cowan 662
Chambers, Chillingworth v 888-9	Cowan, Guthrie v 792

a	PAGE	.	P	AGE
Cowan's c.b., Par	297	Dempster v. Potts	•	51
Cowe, Standard Prop. Inv. Co. v.	•	", Thorburn v.	•	148
Cowie v. Cowie's Trs	492	Dempster's Trs. v. Dempster		511
Cox v. Willoughby	100			389
Craig v. Fleming	297	Dennistoun v. Macfarlane		295
", v. Picken's Trs	399	Dewar, Hallpenny v		204
Craig's Reps., Scott v	297	Dick, Petr		52
Craig's Tr. v. Malcolm, Lord	637	Dick, Petr. ,, and ors., Petrs. ,, Anderson v. Dick's Trans. Robertson		861
Crawford v. Paterson	74	,, Anderson v	147, 291,	818
,, Boucher v	808	Dick's Trs. v. Robertson		652
,, Rodger v	355	Dickson v. Dickson	648,	754
Tennant v.	29	v. Munro .		152
,, Tennant v		,, v. Munro	•	185
Croft, Fraser v	649	Dixon II K Life Ass a	•	683
0 1 · 7 D	742	Dixon Ltd., Neill's Trs. v.		204
	849, 811	Dobbie, Ayr Mags. v.		809
Crosbie v. Picken	4			82
Urosole v. Fickell		Dobson Molle & Co., Neill v.		
cruickshank v. Williams		Doig v. Lawrie		488
Cruickshank v. Williams	301	Donald, Scot. Life Ass. Co. v.	•	689
Cullen v. Thomsons		Donaldson v. Ord		683
Culross Mags. v. Geddes	3 08	,, M'Farlane v		898
Cuming, E. Fife's Trs. v	317	Dougan v. Macpherson .		665
Cumming v. Skeoch's Trs	5	Douglas v. Lyne , v. Thomson .		310
Cumming & Spence, Leslie v	646	,, v. Thomson .		227
Cumming's Trs. v. Anderson	644	5. .		158
v. White	657	Douglas & Co. v. Stiven .		71
Cunliff's Trs. v. Cunliff	652	Douglas' Trs	· .	848
Cunynghame, Ramsay v		Douglas' Trs Dow, Gray's Trs. v		4
Curre, Bolton v.	886-7	Downie v. Downie's Trs.		12
Curynghame, Ramsay v. Curre, Bolton v. Currie v. Campbell's Trs. , v. Macgregor	310	Drew a Lumeden		39
v. Macgregor	187	Raillia m		477
M Tannan	808	,, Baillie v	• •	75
,, v. M'Lennan	69	Drummond v. Muirhead and G		10
Cutinbertson, Woodside v	UB	Smith .		419
Desam a India and Landon As Co.	407	Smith .	• •	
DALBY v. India and London As. Co.	687	,, Kinnoull's Trs. v.	•	755
Dale, Vere v	292	,, Smith v Dryburgh v . Gordon .		38
Dalgleish v. Land Feuing Co	865	Dryburgh v. Gordon .	282, 289,	
Dalglish's Trs. v. Bannerman's		Duff, Dundee Calendering Co.	v	196
Exors	643	Duff & Co., Moir v Duffs v. Duff		76
Dalhousie v. Minister of Lochlee .	309	Duffs v. Duff		13
Dalhousie's Trs. v. Young	643	Dullatur Feuing Co., Ritch	nie &	
Dalley v. Phillips & Marriott Ltd	617	Sturrock v		588
Dallmeyer v. Dallmeyer	656	Dumbarton Mags., Lang. v.		189
Dalrymple v. Blair	756	Dumbarton Steamboat Co.,	Mac-	
Dalzell, Stodart v 199, 2	291, 682	farlane v		101
Dalziel Davidson v. 148, 1	72, 492	Dunbar v. Sinclairs .		317
Darling's Trs. v. Caledonian Ry	310	,, Macandrew v		11
Davidson v. Dalziel . 148, 1	172, 492	Dunbar's Trs. v. Dunbar		765
Davidson & Garden, Mackintosh's		Duncan v. Mitchell		477
Trs. v.	284	D	•	4
Davies, Wallace v		7:33-11	• •	205
Davis v. Murray	80	o:	• •	716
		31712	• •	
* *	284, 426	,, Wylie v		705
,, International Fibre Co.	00	Dundee Calendering Co. v. Du	п.	196
Ltd. v	22	Dundee Mags. v. Straton		208
	507, 5 12	" Keiller v.		808
Dawson's Trs. v. Dawson	12	Dundonald, Crs. of E., Prestor	1 v	202
De Lisle's Exor., Campbell's Trs. v.	474	Dunlop v. Greenlees' Trs.		4
Deering a Bank of Ireland	898	n Johnston	. 22.	798

	GE 204 Fer	guson v. Ferguson		PAGE 227, 890
- -		,, v. Paterson		. 818
Dunmore, E. v. M'Inturner	76	,, v. Rodger		. 516
		guson's Trs. v. Readr		
		rie v. Ferrie's Trs.		. 9
		rier v. Graham's Trs.		. 695
		des' Trs., Petrs.		. 297
Dupplin v. Hay		, D. of, G. N. of Sc		. 802
Dupplin v. Hay		· _ · · _ · · _		. 7
		, E., Tra. of v. Cum		. 817
Durie, Forsyth v		, ,, v. Aber		341
Durie, Forsyth v	398 F ife	Coal Co., Christie		. 610
	100 Fine	ilay, etc., <i>Petrs.</i> ,, Miller's Trs. v.		. 288
	76	" Miller's Trs. v.		. 848
•	Fin	lay, Thomson's Trs.	v	. 410
Propose Themsen's Tree	Fish	er's Trs. v. Fisher		. 740-6
Easson, Thomson's Trs. v	8 Fite	h, Engell v		. 818
	558 Fler	ning v. Baird .		. 809
	358	ning v. Baird . v. Wilson, etc.		. 76
Edinburgh and Glasgow Prop. Co., Carrick v	141 1	, Craig v		. 297
Edinburgh Glasshouse Co. v. Shaw.	I41 Flet	nings, Gray v		. 310
Edinburgh Life Ass. Co., Welch's	45 Fler	, Craig v nings, Gray v ning's Trs. v. M'Han	rdy .	. 139
Prop a	V ₀ ∞1	oes v. Burness .		. 395
Exor. v	100 100	Arnott's Trs. v.		154, 419
M N R R Co	109 ''	, Grierson, Oldhan	n, & Co. Ltd	. v. 22
,, v. N. B. Ry. Co., 4 ,, v. Warrender .	00 7	St Andrews Mag		428, 584
74: D	58	Skinner v bes' Tr. v. Forbes		. 7
	Forl	bes' Tr. v. Forbes		. 139
	558 Forl	oes' Trs. v. Macleod		. 472
	515 n	pes' Trs. v. Macleod ,, Fraser v. rest's Trs., Haydon		. 821
	40 For	est's Trs., Haydon a	r	. 22
D 1 21 M				. 69
	on Fore	yth v. Durie .		. 318 291, 682
Edward, Cockburn v	70)	, Petrie v		291, 682
	ios Fort	ch, etc., Co. v. Wilso		. 203
Eglinton, Gordon's Tra. v.	JBO'L OCT	er, Shaw v		. 318
	ter Fow	lie v. M'Lean .		. 609
Elibank v. Campbell	ras Liras	er v. Bannerman		. 84
<u></u>				. 649
		v. Forbes' Trs.	• •	. 821
	11	v. Lord Lovat	• •	. 181
Erskine v. Wright	101 11	Gilligan's Factor	v	. 292
_	L I'rae	er's Tr., Robinson v	• •	. 651
	, Free	r's Trs. v. Freer		. 100
Ewing v. Hastie 1	go Prog	3 Crs. v. His childr		. 228
		arton's Trs. v. James		. 865
,, & Co. v. Ewing	96 Fult	on's Trs. v. Fulton	• •	. 644
	a	BRAITH v. Graham		951
FAIRBAIRN, Williams and Son v 1	02	D		. 351 . 30, 426
Fairley, Scot. Un. and National Ins.	U Z	Walles -		
	_1	••	• •	. 198 . 75 6
	68 Gau	oway, E., <i>Petr</i> . v. D. of B		609 , 610
	08	T		
, , , , , , , , , , , , , , , , , , , ,	06	" Dahaman		. 308 . 15 6
		,, Roberts v. oway's Trs., Mitchel		
Deleton a G		lner v. Lucas .		147, 517
•		lner's c.b., Petr.	2,	. 292
.		and's Trs., Hickling	'a Tra	
Lenmu-TiainRowne a. LD	24 Uari	ence ris., Diering	D TID. V.	. 020

PAGE	PAGE
	Gordon's Trs. v. Eglinton 238
Garrett, Petr	Gordon's c.b., Petr 755
Gavin's Trs. v. Johnston's Trs. 648, 658, 849	Gould v. Paterson 612
Gaw, Turner v 649	Gow v. M'Ewan (D.) & Son 44
Geddes, Culross Mags. v 308	Graeme v. Graeme's Trs 9
Gedge v. Royal Exch. Corpn 687	Graeme's Tr. v. Giersberg . 682, 899
Gemmell, Matheson v. 285, 307, 813, 314	Graham v. E. March 596
Gentle, Smith v 546	,, v. Shiels 189
Gibbs, Thorne v 660	,, Bontine v 351
Gibson v. Adams 610	,, Durham's Trs. v 185
,, v. Bonnington, etc., Co 308	,, Galbraith v 351
,, v. Caddall's Trs 652	,, Harkness v 424, 596
,, v. Irvine 30	,, Ross v 13
" v. Trotter 428	Graham's Trs. v. Graham's Trs 808-9
" v. Walker 5	,, Ferrier v 695
Giersberg, Graeme's Tr. v 682, 899	Grandison's Trs. v. Jardine 152
Gilbert's Tra., Taylor v 810	Grant v. Girdwood 76
Gilfillan v. Monkhouse 69	,, v. Mackenzie 147
Gill, Hall-Maxwell v 147	,, v. Ramage & Ferguson 44
Gillies v. Gillies' Trs 805	,, Anderson v 658
Gilligan's Factor v. Fraser 292	,, Gordon v 808, 815, 317
Gillon's Trs. v. Gillon, 1890 850	,, Grant's Trs. v 658
,, 1908 792	,, Household Fire Ins. v 147
Gilmour v. Gilmour, 1809 740-6	,, Smith's Trs. v 656
., ., 1878 141	Grant's Trs. v. Grant 658
Girdwood, Grant v	,, v. Morison 147
Girvan, Mackenzie v 69	,, v. Ritchie's Exor 763-4
Glasgow, Trs. of L. v. Clark 150, 160, 802-5	Gray v. Flemings, etc 810
Glasgow Highland Soc., Muirhead v.	,, v. Gordon 12
408, 410	,, v. Gray's Trs., 1878 898
Glasgow Mags. v. Farie 208	,, ,, 1895 690
,, Campbell's Trs. v. 409, 411	,, ,, 1895 690 ,, v. Hamilton
,, Paterson v 78	,, v. Walker 12
Glasgow Royal Infirmary v. Wyllie 156	Gray's Trs. v. Benhar Coal Co 382
Glasgow University v. Yuill's Tr 537	,, v. Dow 4
Glassford, Borthwick v 390	,, Gray v., 1878 898
Glen v. Scales' Trs 182	,, ,, 1895 69 0
Glendonwyne v. Gordon 318	Great N. of S. Ry. Co. v. D. of Fife 302
Glenlyon, L., Beaumont v 308	Greenlees' Trs., Dunlop v 4
Globe Ins. Co. v. Mackenzie 21	Greenock Harb. Trs., Stewart v 308
Glover v. Glover's Trs	Gregory, Macrae v 566, 596-7
Glovers of Perth, E. Zetland v 351	Greswolde-Williams v. Barneby . 803
Goldie, Callum v 301, 474	Grierson, Oldham, & Co. Ltd. v. Forbes 22
Malcolm n 850 861	Grieve, Taylor v
Gollan's Trs. v. Booth	
Goodenough, in re 652	Griffin, Lynch's Factor v 651
	Griffin, Lynch's Factor v 651
	Griffith v. Hughes 887
Goodhart v. Woodhead 649	Griffin, Lynch's Factor v 651 Griffith v. Hughes 617 Guild v. M'Lean 617
Goodhart v. Woodhead 649 Gordon v. Gordon's Trs 815	Griffin, Lynch's Factor v. 651 Griffith v. Hughes 887 Guild v. M'Lean 617 Gunnis' Trs. v. Gunnis 652
Goodhart v. Woodhead 649 Gordon v. Gordon's Trs	Griffin, Lynch's Factor v. 651 Griffith v. Hughes . 887 Guild v. M'Lean . 617 Gunnis' Trs. v. Gunnis . 652 Guthrie, Petr 864
Goodhart v. Woodhead 649 Gordon v. Gordon's Trs 815 ,, v. Grant 308, 315, 317 ,, v. Maitland	Griffin, Lynch's Factor v. 651 Griffith v. Hughes . 887 Guild v. M'Lean . 617 Gunnis' Trs. v. Gunnis . 652 Guthrie, Petr 864 , v. Cowan . 792
Goodhart v. Woodhead 649 Gordon v. Gordon's Trs	Griffin, Lynch's Factor v. 651 Griffith v. Hughes . 887 Guild v. M'Lean . 617 Gunnis' Trs. v. Gunnis . 652 Guthrie, Petr 864 ,, v. Cowan . 792 ,, v. Smith . 245, 545
Goodhart v. Woodhead 649 Gordon v. Gordon's Trs	Griffin, Lynch's Factor v. 651 Griffith v. Hughes . 887 Guild v. M'Lean . 617 Gunnis' Trs. v. Gunnis . 652 Guthrie, Petr 864 , v. Cowan . 792
Goodhart v. Woodhead	Griffin, Lynch's Factor v. 651 Griffith v. Hughes . 887 Guild v. M'Lean . 617 Gunnis' Trs. v. Gunnis . 652 Guthrie, Petr 864 , v. Cowan . 792 ,, v. Smith . 245, 545 Guthrie's Trs., Shiell v 146
Goodhart v. Woodhead	Griffin, Lynch's Factor v. 651 Griffith v. Hughes . 887 Guild v. M'Lean . 617 Gunnis' Trs. v. Gunnis . 652 Guthrie, Petr 864 , v. Cowan . 792 , v. Smith . 245, 545 Guthrie's Trs., Shiell v. 146 Hadden v. Bryden . 687, 804
Goodhart v. Woodhead	Griffin, Lynch's Factor v. 651 Griffith v. Hughes . 887 Guild v. M'Lean . 617 Gunnis' Tra. v. Gunnis . 652 Guthrie, Petr 864 , v. Cowan . 792 , v. Smith . 245, 545 Guthrie's Tra., Shiell v. 146 HADDEN v. Bryden . 687, 804 Hagart's Trs. v. Hagart . 766
Goodhart v. Woodhead	Griffin, Lynch's Factor v. 651 Griffith v. Hughes . 887 Guild v. M'Lean . 617 Gunnis' Trs. v. Gunnis . 652 Guthrie, Petr 864 ,, v. Cowan . 792 ,, v. Smith . 245, 545 Guthrie's Trs., Shiell v. 146 HADDEN v. Bryden . 687, 804 Hagart's Trs. v. Hagart . 766 Haldane, Walker's Trs. v. 206
Goodhart v. Woodhead	Griffin, Lynch's Factor v. 651 Griffith v. Hughes . 887 Guild v. M'Lean . 617 Gunnis' Trs. v. Gunnis . 652 Guthrie, Petr 864 ,, v. Cowan . 792 ,, v. Smith . 245, 545 Guthrie's Trs., Shiell v. 146 HADDEN v. Bryden . 687, 804 Hagart's Trs. v. Hagart . 766 Haldane, Walker's Trs. v. 206 Haldane's Trs. v. Haldane . 858
Goodhart v. Woodhead	Griffin, Lynch's Factor v. 651 Griffith v. Hughes . 887 Guild v. M'Lean . 617 Gunnis' Trs. v. Gunnis . 652 Guthrie, Petr 864 ,, v. Cowan . 792 ,, v. Smith . 245, 545 Guthrie's Trs., Shiell v. 146 HADDEN v. Bryden . 687, 804 Hagart's Trs. v. Hagart . 766 Haldane, Walker's Trs. v. 206

•	2402		
Hall v. Hall	PAGE 656	Hinton v. Connell's Trs	PAGE 182
Hall v. Hall ,	147		
Halley, M'Rostie v		Hislop, Petr	
	34	,, v. M'Ritchie's Trs	207
Halliday v. D. of Hamilton's Trs	72	,, E. Zetland v 2	205, 208
Hallpenny v. Dewar	204	Hobson v. Garringe	416
Hamilton, Petr	755	Hodge, Stewart v	794
Hamilton, D. of, v. Bentley	203	Hodges v. Hodges' Trs	7
,, ,, v. Dunlop	204	Hogg v. Campbell	5
., ,, E. Selkirk v	351	Holden Berry "	808
The of D. Hallidan	72	Holden, Berry v 649, 6	8KQ 919
y, Ins. of D., Handay v			
Hamilton, Gray v	810	Holmes Oil Co. v. Pumpherston Oil	
" Orbiston v	53	Co	78
,, Turner v	207	Holt, in re	
Hannay v. Bargaly's Crs	810	Hood v. Baillie	. 75
Hardie, Christie's Factor v	125, 808	Hood v. Baillie	817
Hare. Petr	597 727	Hope-Johnstone v. HJ.	398
Harkness v. Graham	424. 596	Horsbrugh's Trs. v. Welch	423
	610	Hotohkia Karm	7
Uerricen in me		Hotchkis, Ker v	
Harrison, in re	698	Houditon v. Spaiding	229, 202
	682, 690	Household Fire Ins. Co. v. Grant .	
Harrogate Sch. Bd., Kirkby v	408	Howard & Wyndham v. Richmond's	
Harrowar's Trs. v. Erskine	203	Trs 197,	516, 517
Hart, Bunten v	10	Howatson, Wishart v	. 801
Hart's Trs. v. Arrol, etc	617		. 816
Harvey, Peterkin v.	290, 494	Howie's Tra. v. M'Lav	. 416
Harvey, Peterkin v	511	Hughes, Griffith v.	. 887
Hastie, Ewing v		Tughes, Orman v	
	189		. 576
Hawick Mags., N. B. Ry. v	308	Hume, Clark v	. 631
Hawthorns Ltd., Mathieson v .	. 8	Hunt, Lord Adv. v.	. 317
Hay v. Rafferty	1 4 0, 3 01	Hunt, Lord Adv. v. Hunter v. Lord Advocate	. 808
,, Auld v	181	,, v. Luke	. 156
Dupplin #	396	,, v. Weston	. 400
Hay's Trs. v. Hay Haydon v. Forrest's Trs. Heath v. Baxter's Trs.	648	Hunter Blair v. Hunter Blair 755-6-	7-8, 761
Heydon n Korrest's Tre	29	Hutchison v. Hutchison	. 234
Hoeth a Rester's Tre	#KQ 299		. 10, 15
Heatin V. Dakvot S 115.	101	II. M. D. D	. 10, 10
Heddle, Melrose Drover Ltd. v.	. 101	Hutton, N. B. Ry. v Hynd v. Soot	808
Heddle's Exor. v. Marwick &		Hynd v. Soot	. 11
Hourston's Tr	. 93		
Heiton v. Waverley Hydro. Co		IBBETSEN, ex parte, re Moore.	
Henderson v. Dawson	284, 426	India and London As. Co., Dalby a	. 6 87
,, v. Henderson's Trs. 81	8, 886-8	Inglis v. Clark	407, 408
" v. Stubbe 93,		Inglis' Trs. v. Inglis	. 4
v. Wallaca	512	Inglis v. Clark Inglis' Trs. v. Inglis Inglis & Weir v. Renny Inland Rev. v. N. B. Ry. , v. Tod , M'Kimmie's Trs. v. ,, Macleod v. Innes v. Coghill	. 54R
,, v. Wallace	784	Inland Pow at N B Rv	805
The James Comp & Co. of Wallace	. /04	. Tod	KOR KO7
Henderson, Sons, & Co. v. Wallace		,, v. 10d	520, 527
& Pennell	. 28	,, M'Alminie's Trs. v.	. 598
Henderson's Trs., Petrs	. 429	,, Macleod v	. 97
,, v. Henderson .	762	· · · · · · · ·	. 743
Hepburn v. Campbell	. 810	International Fibre Co. Ltd. v).
	308, 316	Dawson	. 22
Heritable Reversionary Co. v. Millan	•	Tandara Williamia	. 8
Heritable Sec. Inv. Ass. v. Miller		~ .,	. 80
		,, Gibson v	. 50
Heron v. D. Queensberry	. 851	Yearn or Yearle	-
Hervey, in re	. 654	JACK v. Jack	. 7
Heys v. Kimball & Morton	. 147	" v. Marshall	. 805
Hickling's Trs. v. Garland's Trs.	. 645	,, v. N. B. Ry. Co	. 596
Hill v. Arthur	. 2	T 1 0 1 .	. 472
. v. Millar	. 219	,, v. Nicoll	. 544
36(T))	. 659	Classical transfer	. 203
,, M. Pherson's Irs. v.	. 000	,, Unristie v	. 200

	PAGE		PAGE
Jacobs v. Morris	. 50	Lang v. Lang's Trs	. 8
James, Fullarton's Trs. v	. 865	Lawrie, Petr	. 393
Scot. IIn. and Natl. Ina	Co. v. 472	,, Doig v	. 483
Jameson v. Sharp Jameson v. Beilby	. 147	" Moncrieff v	. 4
Jameson v. Sharp	. 685	Learmonth, Nisbett's Trs. v	. 660
Jamieson v. Beilby	. 11	Lee v. Abdv	. 693
v. Walker	. 746	" v. Alexander	. 302
,, v. Welsh	154, 303	., Whyte v	146, 189
,, Thompson's Trs. v	. 648	,, Whyte v	. 663
Jardine, Grandison's Trs. v			465, 756
Jarvie's Trs. v. Jarvie's Trs.		Leith v. Leith	. 656
Johanson v. Johanson's Trs		T 13 M T	. 851
Johnson, Livingston v		Lennox, Ewing v	. 309
Johnson's Trs. v. Sandilands .		Leslie v. Cumming & Spence .	. 646
Johnston, Petr	. 226	., v. M'Indoe's Trs	. 428
,, v. Walker's Trs		// NA/T 1	. 760
,, v. walker s 11s	. 207		. 700
,, Dunlop v	. 22, 798 268, 507	Leven Police Comrs., Mackay v.	-
,, Somerville v	200, 007	Leyland and Taylor's contract, in r	
Johnston's Trs., Gavin's Trs. v.		Liddall v. Duncan	. 205
Johnstone, Alexander v		Liddell, Morton v	. 586
Justice, Ker's Trs. v	238, 444	Life Ass. of Scot. v. Cal. Her. Sec	
		Co	. 535
Keiller v. Mags. of Dundee .			. 643–4
Keith v. Reid	. 615	Lisle's (de) Exor., Campbell's Trs. v	. 474
,, v. Smyth	. 309	Liston v. Gallowsy Livie, Morris v Livingstone v. Allans	. 808
Keith's c.b., Petr	. 597	Livie, Morris v	. 654
Kennedy v. K	. 18	Livingstone v. Allans	
Kennedy's Trs. v. Sharpe .	689, 793		. 69
,, v. Warren .	. 808	,, v. Waddell's Trs. 228,	22 9, 23 2,
Keith's c.b., Pctr. Kennedy v. K. Kennedy's Trs. v. Sharpe , v. Warren Ker v. Hotchkis Ker's Trs. v. Justice Kerr v. M'Arthur's Trs , v. Redhead Kerr's Tr. v. Yeaman's Tr. Kimball & Marton Have a	. 7		759, 768
Ker's Trs. v. Justice	238, 444	,, Buchan v	. 417
Kerr v. M'Arthur's Trs	. 517	Lochlee, minister of, Dalhousie v.	. 809
,, v. Redhead	. 609	Locke, Palmer v Lockhart, Petr	. 690
Kerr's Tr. v. Yeaman's Tr.	859, 878, 727	Lockhart, Petr	. 200
Kimball & Morton, Heys v	. 147		. 754-7
Kindness v. Bruce	. 803-4	,, v. Mags. of N. Berwick	. 308
Kindness v. Bruce	. 407	36/25 13	. 756
"Edington v	. 515	Logan, Petr	. 292
Watt's Trs. v	. 190		. 741
,, Edington v	. 293	M'Kirlie v	. 851
Kinmond's Trs. v. Mess	. 816	Logie v . Alexander	. 809
Kinnoull's Trs. v. Drummond	. 755	Logie Den, etc., Co., Rankine v.	. 208
Kintore, E. v. Kintore	. 768	London, etc., Ass. Co., Snaddon v.	21
", v. Union Bank .		Lord Advocate v. Hunt	. 317
Kippen v. Stewart	. 588	,, v. Miller's Trs.	. 661
Kirkby v. Harrogate Sch. Bd.	. 408	D-14	
Kirkman a Pem	. 596	w Wathantan's One	
Kirkman v. Pym	. 596	W 100	308, 3 17
Kohler		Umnton a	. 308
Kyd, Brown v	. 526 . 31 0	Lornie, Carter v	. 308 . 168
Ayu, Diuwii v	. 010	Lovat, Lord, Fraser v.	. 103 . 181
Tarny Amy Baillia	400 =		
LAIDLAW, Baillie v	. 493-5	Low & Co., Sutherland v.	. 4
Laird v. Reid	. 810		147, 517
Lamb's Trs., Petrs	. 296	Luke v. Wallace	. 512
Lamond, Reid v	. 588		. 156
Lamont Campbell v. Carter C.	. 756–8	Lumsden v. Gordon	. 68
,, Carter C. v.	. 892	,, v. Stewart	. 203
Land Feuing Co., Dalgleish v.	. 865	Drew v	. 39
Lang r. Dumbarton Maga.	189	Lynch's Factor n Griffin	851

PAGE	Miller's Trs. Lord Adv. v 661
Lyne, Douglas v	Miller's Trs., Lord Adv. v 661 Mills v. Brown's Trs 885
Lyon v. Lyon's Trs 750	Minto's Trs. v. Minto 808
Machard & Son. Simpson's Trs. v. 2	Mitchell v. Brown 818
Machard & Son, Simpson's Trs. v. 2 Mackie v. Mackie's Trs 851	24 (1 11 000
,, St Monance Mags. v 308	,, v. Motherwell
Mailer, Easson's Trs. v 653	Duncan v 477
Mailer, Easson's Trs. v 653 Maitland v. Maitland 150, 758	,, Duncan v 477 ,, Maitland v 68
35': 1 11	,, Orr v 154, 302
. Gordon v 11	Mitchell's Trs. v. Galloway's Trs 247
,,	Mitchell Thomson, M'Intosh v. 187, 472
Malcolm v. Campbell 146	Moir v. Duff & Co
Malcolm, L., Craig's Tr. v 687	Molleson v. Hope 817
Malcolm's Trs., Veasev v 8	Molleson v. Hope 817 ,, v. Hutchison 10, 15
Malcolm's Trs., Veasey v 88 Mar v. Ramsay 202	Moncreiff, MP. (Murray's Trust) . 766
March, E., Graham v 596	Moncrieff v. Lawrie
Marshall v. Callander Hydro. Co 208	Moncrieff v. Lawrie 4 ,, v. Monypenny 4
,, v. Marshall 813	Moncur. M'Ghee v 74
,, Jack v 805	Moncur, M'Ghee v
" Simpson v 181, 182, 183, 642	Monkland, etc., Co., Elphinstone v. 611
Marshall's Trs., Petrs 297	Monteith r. Pattison 534
", v. Macneill & Co 472	Montgomery, Nelmes v 93
Martin n. Holgate	Montgomery-Fleming's Trs. v. MF. 652
Martin v. Holgate 649, 659, 812	Montrose, D., v. Stuart 816
Marwick & Hourston's Tr.,	,, Stewart v 191
Heddle's Exor. v 93	Monypenny, Moncrieff v 4
Matheson v. Gemmell 285, 307, 313, 314	Monypenny's Trs., Spens v 815
Matheson's Trs. v. Matheson's Trs. 648	Moody and Yates, re 186
Mathieson v. Hawthorns Ltd 8	Moon's Trs. v. Moon . 662, 741, 806-9
	NTRRECOM XIII
Matthews-Duncan's Tra. v. MD 850-1	,, N. B. Ry. Co. v 310
Matthew's Tre 807	Moore we are named Thheteen 690
Matthew's Tre 807	Moore we are named Thheteen 690
Matthew's Tre 807	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v 305, 899 Morison v. Morison
Matthew's Trs. 	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v 305, 899 Morison v. Morison
Matthew's Trs. . 897 Maule, Petr. . 227 Maxwell, Petr. . 465, 804 Maxwell's Trs. v. Maxwell . 860 Maxwell Heron v. Dunlop . 402	Moore, re, ex parte Ibbetsen
Matthew's Trs. 	Moore, re, ex parte Ibbetsen . 690 Morgan, Spiers v. . 305, 899 Morison v. . 757 ,, Blane v. . 612 ,, Grant's Trs. v. . 147 ,, Reid v. . 646
Matthew's Trs. . 897 Maule, Petr. . 227 Maxwell, Petr. . 465, 804 Maxwell's Trs. v. Maxwell . 860 Maxwell Heron v. Dunlop . 402 May's Trs. v. Paul . 810 Meffan, Beattie's Trs. v. . 395	Moore, re, ex parte Ibbetsen
Matthew's Trs. . 897 Maule, Petr. . 227 Maxwell, Petr. . 465, 804 Maxwell's Trs. v. Maxwell . 860 Maxwell Heron v. Dunlop . 402 May's Trs. v. Paul . 810 Meffan, Beattie's Trs. v. . 395 Meikle v. Meikle . 101	Moore, re, ex parte Ibbetsen
Matthew's Trs. . 897 Maule, Petr. . 227 Maxwell, Petr. . 465, 804 Maxwell's Trs. v. Maxwell . 860 Maxwell Heron v. Dunlop . 402 May's Trs. v. Paul . 810 Meffan, Beattie's Trs. v. . 395 Meikle v. Meikle . 101 Mein's Trs. v. Mein . 652	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690
Matthew's Trs. . 897 Maule, Petr. . . 227 Maxwell, Petr. . . 465, 804 Maxwell's Trs. v. Maxwell . . 860 Maxwell Heron v. Dunlop . . 402 May's Trs. v. Paul . . . 395 Meifan, Beattie's Trs. v. 	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 , Jacobs v. 50 Morrison v. Harrison 682, 690 ,, v. Morrison 124
Matthew's Trs. .897 Maule, Petr. .227 Maxwell, Petr. .465, 804 Maxwell's Trs. v. Maxwell .860 Maxwell Heron v. Dunlop .402 May's Trs. v. Paul .810 Meffan, Beattie's Trs. v. .395 Meikle v. Meikle .101 Meirse, Drover, Ltd. v. Heddle .101 Melrose, Drover, Ltd. v. Heddle .72	Moore, re, ex parts Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. 612 ,, Blane v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. 682, 690 ,, v. Morrison 124 Morron E. 2ttr 455
Matthew's Trs.	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 , v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586
Matthew's Trs. . 897 Maule, Petr. . 227 Maxwell, Petr. . 465, 804 Maxwell's Trs. v. Maxwell . 860 Maxwell Heron v. Dunlop . 402 May's Trs. v. Paul . 810 Meffan, Beattie's Trs. v. . 395 Meikle v. Meikle . 101 Mein's Trs. v. Mein . 652 Melrose, Drover, Ltd. v. Heddle . 101 Melville, Buchan v. . 72 Mensies v. Breadalbane, E. of 203, 204 , v. Cal. Canal Comrs. . 205	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 , v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100
Matthew's Trs. .897 Maule, Petr. .227 Maxwell, Petr. .465, 804 Maxwell's Trs. v. Maxwell .860 Maxwell Heron v. Dunlop .402 May's Trs. v. Paul .810 Meffan, Beattie's Trs. v. .395 Meikle v. Meikle .101 Mein's Trs. v. Mein .652 Melrose, Drover, Ltd. v. Heddle .102 Melville, Buchan v. .72 Menxies v. Breadalbane, E. of .203, 204 ,, v. Cal. Canal Comrs. .205 ,, v. Murray .149, 424	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 , v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300
Matthew's Trs. .897 Maule, Petr. .227 Maxwell, Petr. .465, 804 Maxwell's Trs. v. Maxwell .860 Maxwell Heron v. Dunlop .402 May's Trs. v. Paul .810 Meffan, Beattie's Trs. v. .395 Meikle v. Meikle .101 Mein's Trs. v. Mein .652 Melrose, Drover, Ltd. v. Heddle .101 Melville, Buchan v. .72 Menxies v. Breadalbane, E. of .203, 204 ,, v. Cal. Canal Comrs. .205 ,, v. Murray .149, 424 ,, M'Laren v. .2, 3	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 , v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Mottram, Walker v. 101
Matthew's Trs. .897 Maule, Petr. .227 Maxwell, Petr. .465, 804 Maxwell's Trs. v. Maxwell .860 Maxwell Heron v. Dunlop .402 May's Trs. v. Paul .810 Meffan, Beattie's Trs. v. .395 Meikle v. Meikle .101 Mein's Trs. v. Mein .652 Melrose, Drover, Ltd. v. Heddle .101 Melville, Buchan v. .72 Menxies v. Breadalbane, E. of .203, 204 ,, v. Cal. Canal Comrs. .205 ,, v. Murray .149, 424 ,, M'Laren v. .2, 3 Meredith, Trappes v. .646	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 , v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Mottram, Walker v. 101 Mowat v. Caledonian Bank 147
Matthew's Trs. .897 Maule, Petr. .227 Maxwell, Petr. .465, 804 Maxwell's Trs. v. Maxwell .860 Maxwell Heron v. Dunlop .402 May's Trs. v. Paul .810 Meffan, Beattie's Trs. v. .395 Meikle v. Meikle .101 Mein's Trs. v. Mein .652 Melrose, Drover, Ltd. v. Heddle .101 Melville, Buchan v. .72 Menxies v. Breadalbane, E. of .203, 204 ,, v. Cal. Canal Comrs. .205 ,, v. Murray .149, 424 ,, M'Laren v. .2, 3 Meredith, Trappes v. .646 Mess v. Sime's Tr. .141	Moore, re, ex parts Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 ,, v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Mottram, Walker v. 101 Mowat v. Caledonian Bank 147 Mowat's Trs., Dunn v. 525
Matthew's Trs. .897 Maule, Petr. .227 Maxwell, Petr. .465, 804 Maxwell's Trs. v. Maxwell .860 Maxwell Heron v. Dunlop .402 May's Trs. v. Paul .810 Meffan, Beattie's Trs. v. .395 Meikle v. Meikle .101 Mein's Trs. v. Mein .652 Melrose, Drover, Ltd. v. Heddle .101 Melville, Buchan v. .72 Mensies v. Breadalbane, E. of .203, 204 , v. Cal. Canal Comrs. .205 , v. Murray .149, 424 , m'Laren v. .2, 3 Meredith, Trappes v. .646 Mess v. Sime's Tr. .141 , Kinmond's Trs. v. .816	Moore, re, ex parts Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 ,, v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Mottram, Walker v. 101 Mowat v. Caledonian Bank 147 Mowat's Trs., Dunn v. 525 Moyes v. M'Diarmid 205, 410
Matthew's Trs. .897 Maule, Petr. .227 Maxwell, Petr. .465, 804 Maxwell's Trs. v. Maxwell .860 Maxwell Heron v. Dunlop .402 May's Trs. v. Paul .810 Meffan, Beattie's Trs. v. .395 Meikle v. Meikle .101 Mein's Trs. v. Mein .652 Melrose, Drover, Ltd. v. Heddle .101 Melrose, Drover, Ltd. v. Heddle .101 Melville, Buchan v. .72 Menxies v. Breadalbane, E. of .203, 204 , v. Cal. Canal Comrs. .205 , v. Murray .149, 424 , M'Laren v. .646 Mess v. Sime's Tr. .141 , Kinmond's Trs. v. .816 Metcalfe v. Purdon .407, 409	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 , Blane v. 612 ,, Grant's Trs. v. 147 , Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 ,, v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Mottram, Walker v. 101 Mowat v. Caledonian Bank 147 Mowat's Trs., Dunn v. 525 Moyes v. M'Diarmid 205, 410 Mudie, Russell's Trs. v. 544
Matthew's Trs. 897 Maule, Petr. 227 Maxwell, Petr. 465, 804 Maxwell's Trs. v. Maxwell 860 Maxwell Heron v. Dunlop 402 May's Trs. v. Paul 810 Meffan, Beattie's Trs. v. 395 Meikle v. Meikle 101 Mein's Trs. v. Mein 652 Melrose, Drover, Ltd. v. Heddle 101 Melville, Buchan v. 72 Mensies v. Breadalbane, E. of 203, 204 , v. Cal. Canal Comrs. 205 , v. Murray 149, 424 , m'Laren v. 2, 3 Meredith, Trappes v. 646 Mess v. Sime's Tr. 141 , Kinmond's Trs. v. 816 Metcalfe v. Purdon 407, 409 Millar, Napier's Tr., Petr. 397	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 , Jacobs v. 50 Morrison v. Harrison 682, 690 ,, v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Motherwell, Mitchell v. 101 Mowat v. Caledonian Bank 147 Mowat's Trs., Dunn v. 525 Moyes v. M'Diarmid 205, 410 Mudie, Russell's Trs. v. 544 Muir v. Snodgrass' Exor. 804
Matthew's Trs. 897 Maule, Petr. 227 Maxwell, Petr. 465, 804 Maxwell's Trs. v. Maxwell 860 Maxwell Heron v. Dunlop 402 May's Trs. v. Paul 810 Meffan, Beattie's Trs. v. 395 Meikle v. Meikle 101 Mein's Trs. v. Mein 652 Melrose, Drover, Ltd. v. Heddle 101 Melville, Buchan v. 72 Mensies v. Breadalbane, E. of 203, 204 , v. Cal. Canal Comrs. 205 , v. Murray 149, 424 , m'Laren v. 2, 3 Meredith, Trappes v. 646 Mess v. Sime's Tr. 141 , Kinmond's Trs. v. 816 Metcalfe v. Purdon 407, 409 Millar, Napier's Tr., Petr. 397 , v. Birrell 208	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 , Jacobs v. 50 Morrison v. Harrison 682, 690 ,, v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Motherwell, Mitchell v. 101 Mowat v. Caledonian Bank 147 Mowat v. Caledonian Bank 147 Moyes v. M'Diarmid 205, 410 Mudie, Russell's Trs. v. 544 Muir v. Snodgrass' Exor. 804 ,, Alexander's Trs. v. 209, 211
Matthew's Trs. 897 Maule, Petr. 227 Maxwell, Petr. 465, 804 Maxwell's Trs. v. Maxwell 860 Maxwell Heron v. Dunlop 402 May's Trs. v. Paul 810 Meffan, Beattie's Trs. v. 395 Meikle v. Meikle 101 Mein's Trs. v. Mein 652 Melrose, Drover, Ltd. v. Heddle 101 Melville, Buchan v. 72 Mensies v. Breadalbane, E. of 203, 204 , v. Cal. Canal Comrs. 205 , v. Murray 149, 424 , m'Laren v. 2, 3 Meredith, Trappes v. 646 Mess v. Sime's Tr. 141 , Kinmond's Trs. v. 816 Metcalfe v. Purdon 407, 409 Millar, Napier's Tr., Petr. 397 , v. Birrell 2 , Heirtable Reversionary Co. v. 682	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 , v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Mottram, Walker v. 101 Mowat v. Caledonian Bank 147 Moyes v. M'Diarmid 205, 410 Mudie, Russell's Trs. v. 544 Muir v. Snodgrass' Exor. 804 , Alexander's Trs. v. 209, 211 Muir's Trs., Scott v. 864
Matthew's Trs. 897 Maule, Petr. 227 Maxwell, Petr. 465, 804 Maxwell's Trs. v. Maxwell 860 Maxwell Heron v. Dunlop 402 May's Trs. v. Paul 810 Meffan, Beattie's Trs. v. 395 Meikle v. Meikle 101 Mein's Trs. v. Mein 652 Melrose, Drover, Ltd. v. Heddle 101 Melville, Buchan v. 72 Menxies v. Breadalbane, E. of 203, 204 ,, v. Cal. Canal Comrs. 205 ,, v. Murray 149, 424 ,, M'Laren v. 2, 3 Meredith, Trappes v. 646 Mess v. Sime's Tr. 141 ,, Kinmond's Trs. v. 816 Metcalfe v. Purdon 407, 409 Millar, Napier's Tr., Petr. 397 , v. Birrell 2 , Hill v. 219	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 , Jacobs v. 50 Morrison v. Harrison 682, 690 ,, v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Mottram, Walker v. 101 Mowat v. Caledonian Bank 147 Mowat's Trs., Dunn v. 525 Moyes v. M'Diarmid 205, 410 Muir v. Snodgrass' Exor. 804 ,, Alexander's Trs. v. 209, 211 Muir's Trs., Scott v. 864 Muirhead v. Glasgow Highland Soc. 408, 410
Matthew's Trs. 897 Maule, Petr. 465, 804 Maxwell, Petr. 465, 804 Maxwell's Trs. v. Maxwell 860 Maxwell Heron v. Dunlop 402 May's Trs. v. Paul 810 Meffan, Beattie's Trs. v. 395 Meikle v. Meikle 101 Mein's Trs. v. Mein 61 Melrose, Drover, Ltd. v. Heddle 101 Melville, Buchan v. 72 Menxies v. Breadalbane, E. of 203, 204 ,, v. Cal. Canal Comrs. 205 ,, v. Murray 149, 424 ,, M'Laren v. 2, 3 Mersdith, Trappes v. 646 Mess v. Sime's Tr. 141 ,, Kinmond's Trs. v. 816 Metcalfe v. Purdon 407, 409 Millar, Napier's Tr., Petr. 2 ,, v. Birrell 2 ,, Hill v. 219 ,, Westren v. 147, 162	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 , v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Mottram, Walker v. 101 Mowat v. Caledonian Bank 147 Moyes v. M'Diarmid 205, 410 Mudie, Russell's Trs. v. 544 Muir v. Snodgrass' Exor. 804 , Alexander's Trs. v. 209, 211 Muir's Trs., Scott v. 864 Muirhead v. Glasgow Highland Soc. 408, 410 , v. Muirhead 648, 858
Matthew's Trs. 897 Maule, Petr. 465, 804 Maxwell, Petr. 465, 804 Maxwell's Trs. v. Maxwell 860 Maxwell Heron v. Dunlop 402 May's Trs. v. Paul 810 Meffan, Beattie's Trs. v. 395 Meikle v. Meikle 101 Mein's Trs. v. Mein 601 Melrose, Drover, Ltd. v. Heddle 101 Melville, Buchan v. 72 Menxies v. Breadalbane, E. of 203, 204 ,, v. Cal. Canal Comrs. 205 ,, v. Murray 149, 424 ,, M'Laren v. 2, 3 Mersdith, Trappes v. 646 Mess v. Sime's Tr. 141 ,, Kinmond's Trs. v. 816 Metcalfe v. Purdon 407, 409 Millar, Napier's Tr., Petr. 2 ,, v. Birrell 2 ,, Hill v. 219 ,, Westren v. 147, 162 Miller v. Thorburn 93	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 , v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Mottram, Walker v. 101 Mowat v. Caledonian Bank 147 Moyes v. M'Diarmid 205, 410 Mudie, Russell's Trs. v. 544 Muir v. Snodgrass' Exor. 804 , Alexander's Trs. v. 209, 211 Muir's Trs., Scott v. 864 Muirhead v. Glasgow Highland Soc. 408, 410 , v. Muirhead 648, 858 Muirhead's Trs., Buchan v. 198, 297
Matthew's Trs. 897 Maule, Petr. 465, 804 Maxwell, Petr. 465, 804 Maxwell's Trs. v. Maxwell 860 Maxwell Heron v. Dunlop 402 May's Trs. v. Paul 810 Meffan, Beattie's Trs. v. 395 Meikle v. Meikle 101 Mein's Trs. v. Mein 652 Melrose, Drover, Ltd. v. Heddle 101 Melville, Buchan v. 72 Mensies v. Breadalbane, E. of 203, 204 ,, v. Cal. Canal Comrs. 205 ,, v. Murray 149, 424 ,, M'Laren v. 2, 3 Meredith, Trappes v. 646 Mess v. Sime's Tr. 141 ,, Kinmond's Trs. v. 816 Metcalfe v. Purdon 407, 409 Millar, Napier's Tr., Petr. 397 ,, Birrell 219 ,, Westren v. 147, 162 Miller v. Thorburn 93 ,, Her. Sec. Inv. Ass. v. 337, 428	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 , v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Mottram, Walker v. 101 Mowat v. Caledonian Bank 147 Mowat's Trs., Dunn v. 525 Moyes v. M'Diarmid 205, 410 Mudie, Russell's Trs. v. 544 Muir v. Snodgrass' Exor. 804 ,, Alexander's Trs. v. 209, 211 Muir's Trs., Scott v. 864 Muirhead v. Glasgow Highland Soc. 408, 410 , v. Muirhead 648, 858 Muirhead and Guthrie Smith, Drum-
Matthew's Trs. 897 Maule, Petr. 227 Maxwell, Petr. 465, 804 Maxwell's Trs. v. Maxwell 860 Maxwell Heron v. Dunlop 402 May's Trs. v. Paul 810 Meffan, Beattie's Trs. v. 395 Meikle v. Meikle 101 Mein's Trs. v. Mein 652 Melrose, Drover, Ltd. v. Heddle 101 Melville, Buchan v. 72 Menxies v. Breadalbane, E. of 203, 204 ,, v. Cal. Canal Comrs. 205 ,, v. Murray 149, 424 ,, M'Laren v. 2, 3 Meredith, Trappes v. 646 Mess v. Sime's Tr. 141 ,, Kinmond's Trs. v. 816 Metcalfe v. Purdon 407, 409 Millar, Napier's Tr., Petr. 397 ,, Hill v. 21 ,, Westren v. 147, 162 Miller v. Thorburn 93 ,, Her, Sec. Inv. Ass. v. 337, 428 ,, Newlands v. 860	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 , v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Mottram, Walker v. 101 Mowat v. Caledonian Bank 147 Mowat's Trs., Dunn v. 525 Moyes v. M'Diarmid 205, 410 Mudie, Russell's Trs. v. 544 Muir v. Snodgrass' Exor. 804 ,, Alexander's Trs. v. 209, 211 Muirhead v. Glasgow Highland Soc. 408, 410 ,, v. Muirhead 648, 858 Muirhead's Trs., Buchan v. 198, 297 Muirhead and Guthrie Smith, Drummond v. 419
Matthew's Trs. 897 Maule, Petr. 465, 804 Maxwell, Petr. 465, 804 Maxwell's Trs. v. Maxwell 860 Maxwell Heron v. Dunlop 402 May's Trs. v. Paul 810 Meffan, Beattie's Trs. v. 395 Meikle v. Meikle 101 Meirose, Drover, Ltd. v. Heddle 101 Melville, Buchan v. 72 Mensies v. Breadalbane, E. of 203, 204 ,, v. Cal. Canal Comrs. 205 ,, v. Murray 149, 424 ,, M'Laren v. 2, 3 Meredith, Trappes v. 646 Mess v. Sime's Tr. 141 ,, Kinmond's Trs. v. 806 Metcalfe v. Purdon 407, 409 Millar, Napier's Tr., Petr. 397 , v. Birrell 2 , Heritable Reversionary Co. v. 682 , Hill v. 147, 162 Miller v. Thorburn 93 , Her, Sec. Inv. Ass. v. 337, 428	Moore, re, ex parte Ibbetsen 690 Morgan, Spiers v. 305, 899 Morison v. Morison 757 ,, Blane v. 612 ,, Grant's Trs. v. 147 ,, Reid v. 646 Morris v. Livie 654 ,, Jacobs v. 50 Morrison v. Harrison 682, 690 , v. Morrison 124 Morton, E., Petr. 455 ,, v. Liddell 586 Mossend Iron Co., Neilson v. 100 Motherwell, Mitchell v. 300 Mottram, Walker v. 101 Mowat v. Caledonian Bank 147 Mowat's Trs., Dunn v. 525 Moyes v. M'Diarmid 205, 410 Mudie, Russell's Trs. v. 544 Muir v. Snodgrass' Exor. 804 ,, Alexander's Trs. v. 209, 211 Muirhead v. Glasgow Highland Soc. 408, 410 ,, v. Muirhead 648, 858 Muirhead's Trs., Buchan v. 198, 297 Muirhead and Guthrie Smith, Drummond v. 419 Munro v. Munro, 1826 390

	PAGE		PAGE
Munro, Dickson v	152	Macfarlane, M'Farlane's Trs. v.	. 816
Munro's Trs e Voung	859	M'Farlane's Trs. v. Oliver .	. 805
Murdoch, Stewart v.	201		647, 811
Mure v. Mure	889		149, 238,
Murison v. Templeton & Co	131	424.	808, 815
Murray v. M'Farlane's Trs. 22, 149		M'Ghee v. Moncur	. 74
424, 80		Macgill, Smith v	. 204
" v. N. B. Ry	75	M'Gregor v. Balfour	. 50, 408
,, v. Parlane's Trs	266	,, v. M'Lean's Tr	. 611
,, v. Smith	696		. 70
Dairdle Con	9		. 187
D!	30	M'Grigor, M'Donald v	0.50
~ ·	7	M'Hardy, Fleming's Trs. v.	. 853
M	19, 424		
3775 33		,, Irvine v M'Indoe's Trs., Leslie v	. 423
25.00		M'Intosh v. Mitchell Thomson	
,, M. Cosh v	77 910		
Murray's Trust (MP. Moncreiff)	700	M'Intosh's Exor., Petr	. 8
		Mackintosh, infra.	70
	464	M'Inturner, E. Dunmore v	. 76
35(4.3 35(4.3	756-7		883, 6 92–3
M'Adam v. M'Adam	758	Mackay v. Barry Par. Bd	. 71
Macandrew v. Dunbar	11	,, v. Leven Police Comrs.	. 70
M'Arthur v. Scott	96	,, v. Robertson	. 18
M'Arthur's Trs., Kerr v	517	,, Reis v	. 591
	547	M'Keddie v. M'Keddie	. 798
,, North Albion Co. v. 58	•	Mackenzie v. Girvan	. 69
M'Caig, Petr	877	,, v. Mackenzie	. 890
M'Call's c.b., Petr	877	,, Globe Ins. Co. v	. 21
M'Call's Tr. v. M'Call's c.b	746	,, Grant v	. 147
M'Call's Trs. v. Murray	811	,, Orr v	. 11
M'Connel v. Chassels 18	39, 355	Mackenzie and ors. v. Neill .	. 819
M'Cook v. M'Kissek	305	Mackenzie's Trs. v. Somerville	158, 159
M'Cosh v. Murray	99	,, Macrae v	. 208
M'Cowan, Roddan v	627	Mackessock v. Drew	. 75
M'Culloch's Trs	657	M'Kimmie's Trs. v. Inland Rev.	. 598
,, M'Whirter v	506	Mackintosh, Panton v	320, 637
• •	05, 410	Mackintosh's Trs. v. Davidson	
M'Donald v. Baillie	160	Garden	. 284
,, v. Lockhart	756	M'Kirdy v. Webster's Trs	. 420
,, v. M'Donald 39	97, 454	M'Kirlie v. Logan's Trs	. 851
,, v. M'Donald's Trs	850-2	M'Kissek, M'Cook v	. 805
,, v. M'Grigor	858	Macknight, Petr	. 876
,, v. Newall . 185, 18	39, 195	M'Lachlan, Allan v	. 410
,, v. Winkler	527	,, Ritchie v	. 131
M'Douall, M'Taggart v	309	M'Lagan, Petr	. 402
M'Dougall, Par 23	1, 876	,, Stocks v	. 15
" v. M'Dougall	228	Maclaine v. Stewart	. 157
	47, 811	M'Laren v. Menzies	. 2, 3
M'Dougall & Co's. Tr., Stephen's		,, Wright's Trs. v .	587, 588
Tr. v	93	M'Laren's Trs. v. National Bank	. 189
M'Dowal's Crs. v. M'Dowal	68	M'Laughlin, Nicholson's Tra. v.	. 522
M'Dowel's Trs. v. M'Dowel	201	M'Lay v. M'Queen	. 750
M'Elroy v. D. of Argyll	202	,, Howie's Trs. v	. 416
M'Ewan (D.) & Son, Gow v	44	,, King's Trs. v	. 293
Macfarlane v. Donaldson	898	M'Lean, Petr., 1892	. 727
" v. Dumbarton Steam-		" " 1895	. 864
boat Co	101	,, v. Rose	. 88
,, Ceres School Board v	320	,, v. Scott	147, 148
,, Dennistoun v	295	,, v. Soady's Trs	. 415
**		•	

PAGE	PAGE
M'Lean, Fowlie v 609	
,, Guild v 617	Inl. Rev. v 695
M'Lean's Tr., M'Gregor v 611	••
M'Lennan, Currie v 808	,, Murray v 75
Macleod v. Inland Rev 97	
,, Forbes' Trs. v 479	
,, Harvie's Trs. v 511	
,, Leslie v 760	
M'Millan & Son Ltd., Petrs 71	9
M'Nab v. Clarke 506	OBAN v. Callander, etc., Ry. Co 408
M'Nair's Trs. v. Roxburgh 74	
Macneill & Co., Marshall's Tra. v 479	
M'Pherson, Dougan v	
M'Pherson's Trs. v. Hill 659	Ogilvie & Son v. Taylor
M'Queen, M'Lay v	
Macqueen v. Tod 465	
Macrae v. Gregory 566, 596-7	
,, v. Mackenzie's Trs 208	
MacRitchie's Trs., Hislop v 207	
M'Rostie v. Halley 34 M'Taggart v. M'Douall 806	
M'Taggart v. M'Douall 800	Orr v. Mitchell 154, 802
Macvean, Robertson v 740	
M'Whirter v. M'Culloch's Trs. 506	
	Oswald's Trs. v. City Glasgow Bank 288
NAISMITH v. Boyes 808	
Napier v. Orr	
" Patrick v	
Napier's Tr., Petr	
,, v. de Saumarez 450, 712	Panton v. Mackintosh 320, 687
National Bank # Campball	Park v Allianca Her. Sec. Co. 176, 477, 517
National Bank v. Campbell	
,, v. Union Bank 291, 476	,, Walker v 207
,, v. Union Bank 291, 474 ,, M'Laren's Trs. v 189	,, Walker v
,, v. Union Bank 291, 474 ,, M'Laren's Trs. v. 183 Neill v. Dobson, Molle, & Co 33	,, Walker v
,, v. Union Bank 291, 474 ,, M'Laren's Trs. v. 136 Neill v. Dobson, Molle, & Co	,, Walker v
,, v. Union Bank 291, 474 ,, M'Laren's Trs. v. 183 Neill v. Dobson, Molle, & Co	,, Walker v
,, v. Union Bank M'Laren's Trs. v. 183 Neill v. Dobson, Molle, & Co	,, Walker v
,, v. Union Bank ,, M'Laren's Trs. v. 138 Neill v. Dobson, Molle, & Co. ,, Mackenzie and ors. v 319 Neill's Trs. v. Dixon Ltd 204 ,, v. Neill 851-5 Neilson v. Mossend Iron Co 106	,, Walker v
,, v. Union Bank ,, M'Laren's Trs. v. 138 Neill v. Dobson, Molle, & Co	,, Walker v
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobson, Molle, & Co. ,, Mackenzie and ors. v. Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery 291, 474 385 386 387 388 388 389 386 386 386 386 387 388 388 389 389 389 389 389	Walker v
,, v. Union Bank M'Laren's Trs. v. 183 Neill v. Dobeon, Molle, & Co	,, Walker v
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobson, Molle, & Co. ,, Mackenzie and ors. v. Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelson's Trs. v. Pullan v. Tod v. Tod 291, 474 281 8851 8851 8851 986 8851 986 8851 986 8851 987 8851 987 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 886 886 887 887 888 888 888	Name
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobson, Molle, & Co. ,, Mackenzie and ors. v. Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelson's Trs. v. Pullan v. Tod v. Tod 291, 474 281 8851 8851 8851 986 8851 986 8851 986 8851 987 8851 987 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 8851 988 886 886 887 887 888 888 888	Name
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobson, Molle, & Co. ,, Mackenzie and ors. v. , Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan , v. Tod Neville v. Shepherd Newall, Macdonald v. 185, 189, 19	Walker v. 207
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobeon, Molle, & Co. ,, Mackenzie and ors. v. Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan ,, v. Tod , v. Tod Neville v. Shepherd Newall, Macdonald v. Newlands v. His children 221 Newlands v. His children 222 185, 189, 190 Newlands v. His children	Walker v. 207
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobson, Molle, & Co. ,, Mackenzie and ors. v. Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan ,, v. Tod Neville v. Shepherd Newall, Macdonald v. Newall, Macdonald v. Newallson v. His children , v. Miller v. Miller 291, 474 851 861 862 863 864 865 866 866 866 866 866 866	Name
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobson, Molle, & Co. ,, Mackenzie and ors. v. Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan ,, v. Tod Neville v. Shepherd Newall, Macdonald v. Newall, Macdonald v. Newall, Macdonald v. Newlands v. His children ,, v. Miller , v. Miller	Name
,, v. Union Bank ,, M'Laren's Trs. v. 183 Neill v. Dobson, Molle, & Co. ,, Mackenzie and ors. v. , Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan ,, v. Tod Neville v. Shepherd Newall, Macdonald v. Newalls v. His children , v. Miller Nicholson's Trs v. M'Laughlin 52:	Walker v. 207 Parkhurst, City of Glasgow Bank v. 884-8, 898 Parlane's Trs. v. Parlane 648 Murray v. 266 Park's c.b. v. Black 351 Paterson v. Bonar 15 , v. Forret 69 , v. Glasgow Maga. 73 , v. Paterson, 1849 756 , v. Paterson, 1849 756 , v. Bonar 1898 761 , v. Bonar 1898 761 , v. Bowie's Trs. v. 854-6 , Bowie's Trs. v. 854-6 , Campbell v. 309 , Crawford v. 74 , Ferguson v. 818 , Gould v. 612 500 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 100 10
,, v. Union Bank ,, M'Laren's Trs. v. 183 Neill v. Dobson, Molle, & Co. ,, Mackenzie and ors. v. 316 Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. 100 Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan ,, v. Tod 245, 507 Neville v. Shepherd Newall, Macdonald v. 185, 189, 199 Newlands v. His children ,, v. Miller ,, v. Miller , v. Miller Nicholson v. Ramsay Nicholson's Trs. v. M'Laughlin Nicoll, Jackson, v. 183 Nevel 184 N'	Walker v. 207 Parkhurst, City of Glasgow Bank v. 884-8, 898 Parlane's Trs. v. Parlane 648 Murray v. 266 Park's c.b. v. Black 351 Paterson v. Bonar 15 , v. Forret 69 , v. Glasgow Maga. 73 , v. Paterson, 1849 756 , , , , 1888 761 , , , , 1893 858 , , Bowie's Trs. v. 854-6 , , Campbell v. 309 , Crawford v. 74 , Ferguson v. 818 , Gould v. 612 , , Pollock v. 52
,, v. Union Bank ,, M'Laren's Trs. v. 183 Neill v. Dobson, Molle, & Co. ,, Mackenzie and ors. v. 315 Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan ,, v. Tod 245, 505 Neville v. Shepherd Newall, Macdonald v. 185, 189, 19 Newlands v. His children ,, v. Miller Nicholson's Trs. v. M'Laughlin Nicoll, Jackson, v. ,, Ross's Trs. v. 189 189 187 186 187 187 188 189 180 186 187 186 187 187 188 188 188 188 188 188 188 188	Name
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobeon, Molle, & Co. ,, Mackenzie and ors. v. Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan ,, v. Tod , v. Tod Neville v. Shepherd Newall, Macdonald v. Newall, Macdonald v. Nicholson's Trs v. M'Laughlin Nicoll, Jackson, v. ,, Ross's Trs. v. 183 185 185 185 187 187 188 189 190 186 187 188 189 190 180 180 180 180 180	Walker v. 207 Parkhurst, City of Glasgow Bank v. 884-8, 898 Parlane's Trs. v. Parlane 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobeon, Molle, & Co. ,, Mackenzie and ors. v. Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan ,, v. Tod ,, v. Tod Neville v. Shepherd Newall, Macdonald v. Newall, Macdonald v. Nicholson's Trs. v. Miller ,, v. Miller Nicholson's Trs. v. M'Laughlin Nicoll, Jackson, v. ,, Ross's Trs. v. Nisbet v. Cairns Nisbett's Trs. v. Learmonth 133 134 245 257 366 378 389 391 391 392 393 394 395 396 397 397 397 397 397 397 397	Walker v. 207
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobeon, Molle, & Co. ,, Mackenzie and ors. v. Neill's Trs. v. Dixon Ltd. v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan ,, v. Tod , 245, 500 Newille v. Shepherd Newall, Macdonald v. Newlands v. His children ,, v. Miller Nicholson's Trs. v. M'Laughlin Nicoll, Jackson, v. ,, Ross's Trs. v. Nisbet v. Cairns Nisbett's Trs. v. Learmonth Niven v. Ayr Mags. 291, 474 476 476 476 851 851 851 851 851 852 864 866 866 866 867 867 868 868	Walker v. 207 Parkhurst, City of Glasgow Bank v. 884-8, 898 Parlane's Trs. v. Parlane 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobeon, Molle, & Co. ,, Mackenzie and ors. v. Neill's Trs. v. Dixon Ltd. ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan ,, v. Tod ,, v. Tod Neville v. Shepherd Newall, Macdonald v. Newall, Macdonald v. Nicholson's Trs. v. Miller Nicholson's Trs. v. M'Laughlin Nicoll, Jackson, v. ,, Ross's Trs. v. Nisbet v. Cairns Nisbett's Trs. v. Learmonth Niven v. Ayr Mags. Noble v. Noble, 1875	Walker v. 207 Parkhurst, City of Glasgow Bank v. 884-8, 898 Parlane's Trs. v. Parlane 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648 648
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobeon, Molle, & Co. ,, Mackenzie and ors. v. Neill's Trs. v. Dixon Ltd. , v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan , v. Tod , v. Tod Neville v. Shepherd Newall, Macdonald v. Newall, Macdonald v. Neilson v. Ramssy Nicholson v. Ramssy Nicholson v. Ramssy Nicholson's Trs. v. M'Laughlin Nicoll, Jackson, v. , Ross's Trs. v. Nisbet v. Cairns Nisbett's Trs. v. Learmonth Niven v. Ayr Mags. Noble v. Noble, 1875 , 1902 815	Walker v. 207
,, v. Union Bank ,, M'Laren's Trs. v. Neill v. Dobeon, Molle, & Co. ,, Mackenzie and ors. v. Neill's Trs. v. Dixon Ltd. , v. Neill Neilson v. Mossend Iron Co. Nelison's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan , v. Tod , v. Tod Neville v. Shepherd Newall, Macdonald v. Newall, Macdonald v. Newlands v. His children , v. Miller Nicholson v. Ramsay Nicholson's Trs v. M'Laughlin Nicoll, Jackson, v. , Ross's Trs. v. Nisbet v. Cairns Nisbett's Trs. v. Learmonth Niven v. Ayr Mags. Noble v. Noble, 1875 , 1902 North Albion Co. v. M'Bean's c.b. 534, 544	Name
,, v. Union Bank ,, M'Laren's Trs. v. 183 Neill v. Dobeon, Molle, & Co. ,, Mackenzie and ors. v. 316 Neill's Trs. v. Dixon Ltd. , v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan , v. Tod 245, 500 Neville v. Shepherd Newall, Macdonald v. 185, 189, 199 Newlands v. His children , v. Miller Nicholson v. Ramsay Nicholson's Trs v. M'Laughlin Nicoll, Jackson, v. ,, Ross's Trs. v. Nisbet v. Cairns Nisbett's Trs. v. Learmonth Niven v. Ayr Mags. Noble v. Noble, 1875 ,, 1902 North Albion Co. v. M'Bean's c.b. 584, 544 North Berwick Mags., Lockhart v.	Name
,, v. Union Bank ,, M'Laren's Trs. v. 183 Neill v. Dobeon, Molle, & Co. ,, Mackenzie and ors. v. 316 Neill's Trs. v. Dixon Ltd. 204 ,, v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan ,, v. Tod 245, 500 Neville v. Shepherd Newall, Macdonald v. 185, 189, 190 Newlands v. His children ,, v. Miller Nicholson v. Ramssy Nicholson's Trs. v. M'Laughlin Nicoll, Jackson, v. ,, Ross's Trs. v. Nisbet v. Cairns Nisbett's Trs. v. Learmonth Niven v. Ayr Mags. Noble v. Noble, 1875 ,, 1902 North Albion Co. v. M'Bean's c.b. 584, 54 North Berwick Mags., Lockhart v. North British Ry. v. Hawick Mags.	Walker v. 207 Parkhurst, City of Glasgow Bank v. 884-8, 898 Parlane's Trs. v. Parlane 648 Murray v. 266 Park's c.b. v. Black 351 Paterson v. Bonar 15 , v. Forret 69 , v. Glasgow Maga. 73 , v. Paterson, 1849 756 , v. Paterson, 1849 756 , v. Paterson, 1849 756 , v. Paterson, 1893 858 , Bowie's Trs. v. 854-6 , Campbell v. 309 , Crawford v. 74 , Ferguson v. 818 , Gould v. 612 , Gould v. 612 , Pollock v. 52 Paterson's Tutors, Petrs. 393 Paton v. Paton's Trs. 805 Paton's Trs. Obers v. 646 Patrick v. Napier 316 , Smith v. 885 Pattison v. Dunn's Trs. 351 , Monteith v. 534 Pattison's c.b., Petr. 608 Paul, May's Trs. v. 810
,, v. Union Bank ,, M'Laren's Trs. v. 183 Neill v. Dobeon, Molle, & Co. ,, Mackenzie and ors. v. 316 Neill's Trs. v. Dixon Ltd. , v. Neill Neilson v. Mossend Iron Co. Neilson's Trs. v. Henderson Nelmes v. Montgomery Nelson's Trs. v. Pullan , v. Tod 245, 500 Neville v. Shepherd Newall, Macdonald v. 185, 189, 199 Newlands v. His children , v. Miller Nicholson v. Ramsay Nicholson's Trs v. M'Laughlin Nicoll, Jackson, v. ,, Ross's Trs. v. Nisbet v. Cairns Nisbett's Trs. v. Learmonth Niven v. Ayr Mags. Noble v. Noble, 1875 ,, 1902 North Albion Co. v. M'Bean's c.b. 584, 544 North Berwick Mags., Lockhart v.	Name

			PAGE
Pearson, Barclays v		AGE 12	Reid v. Reid's Trs 848
Pender's Trs., Petrs	199,		,, Keith v 615
Pender's Tra., Petrs		298	,, Keith v 615 ,, Laird v 310
Perth Sch. Bd., Clark v	409,		,, Scott v 428
Peterkin v. Harvey	290,		,, Scott v
Petrie v. Forsyth	291,		Reimers, Oncken's Factor v 653
Philipps, Whitehead v	• ′	424	Reis v. Mackay 591
Phillips & Marriott Ltd., Dalley v		617	Reliance, etc., As. Soc. v. Halkett's
Phillips, Cheyne and ors v		210	
Picken, Crosbie v		4	Factor
Picken's Trs., Craig v		899	Rhind's Trs. v. Leith 656
Playfair's Trs. v. P		662	Riccart v. Riccart 742
Pollock v. Paterson		52	Richardson's Trs., Petrs 8
,, Baillie, etc. v		68	Richmond's Trs., Howard and Wynd-
" Corbett's Trs. v.		645	ham v 197. 516. 517
Poliok's Trs. v. Anderson .		814	ham v 197, 516, 517 Richter, Bowman v 657, 812
Polwarth, L., Riddell v		894	Riddell. Petr
Pope. Calder v.			Riddell, Petr
Pope, Calder v	199.	429	Ridehalgh, Raby v 888
Potts. Demoster v		51	Ritchie v. M'Lachlan
Potts, Dempster v Poulett, E., Somerset v	•	888	,, v. Scott 192, 427, 474, 476, 610
Pratt v. Knox	•	596	Ritchie's Exor., Grant's Trs. v 763-4
Preston v. E. Dundonald's Crs.	•	202	Ritchie & Sturrock v. Dullatur
Primrose v. Primrose	:	388	
Pringle v. Pringle	•	896	Feuing Co
~ ~ ~ ~	•		
,, Thomson's Trs. v Provident Bank, Galbraith v	. 90	404	Robertson v. Douglas
Prudential As. Co. v. Cheyne	089	507	77
Pullan, Nelson's Trs. v	200,	244	Dick's Trs. v 652
Pumpherston Oil Co., Holmes C	N:1	244	77 131:
		73	- 1 - 1
Co. v	•		10
Purden Matasifa		7, 8	77 040 678
Purdon, Metcalfe v Putnam, Bliss v	407,	660	
Pym, Kirkman v	•	5 96	- 1
rym, Kirkman v	•	280	
Ownerson W. Dete	909	750	
QUEENSBERRY, M., Petr ,, D., Heron v	090,		Robinson v. Fraser's Tr 651 Robison's Tr Petr 297
	•	851 70	
Queensferry Comrs., Barr v	•	10	D 11 35/0 00E
RABY v. Ridehalgh		000	Roddan v. M'Cowan 627 Rodger v. Brown 290
	•	888 740	
Rae Crawfurd v. Stewart . Rafferty, Hay v	140,	-	,,
Raines, Clark & Co. v. Swan's Tr.		139	
			,,
Rainey's Trs., B. L. Co. v.	•	28	Rose, M'Lean v
Ralston v. Farquharson	•	290	
Ramage & Ferguson, Grant v.	•	44	,, v. Ross's Trs
Ramsay v. Cunynghame	•	324	,, v. Thomson, etc 815
,, Mar v	•	202	,, Birkbeck v 610
,, Nicholson v		820	"Ross's Trs. v
Ramsay's Trs. v. Ramsay .		34-5	Ross's Trs. v. Nicoll 652
Rankin, Adair's Trs. v	519,		,, v. Ross 643
Rankine v. Logie Den, etc., Co.	•	208	,, Ross v
Rattray's Trs. v. Rattray .	•	848	Rossborough's Trs. v. Rossborough . 192
Readman's Exors., Ferguson's Trs.	v.	648	Rosslyn's Trs., Salamon v 301
Reddie's Trs., Petrs	•	199	Rothwell v. Stuart's Trs 22, 650, 808
Redhead, Kerr v	•	609	Rowlls v. Bebb 652
Reid v. Lamond	•	538	Roxburgh, M'Nair's Trs. v
,, v. Morison		646	Royal Bank, Petrs 69, 140, 297, 871

PAGE	PAGE
Royal Exch. Corpn., Gedge v 687	Shepherd, Neville v 656
Russell v. Russell 389	Shiell v. Guthrie's Trs 146
Russell's Exors., Aiton v 208, 339	Shiell's Trs. v. Scottish Prop. Inv. Soc. 585
Russell's Tra. v. Mudie 544	Shiells, appel 327, 588
Rutherford, Robertson v 189	Shiels, Graham v
On Ampresso Maga a Perhan 400 E04	Shiress, Assets Co. v
ST ANDREWS MAGS. v. Forbes 428, 534 St Monance Mags. v. Mackie	Shrubb v. Clark 477, 517
01 D 1 1 M	Sim v. Duncan
Salt v. M. Northampton	Simeock v. Scot. Imp. Ins. Co 687 Sime's Tr., Mess v 141
Saltoun, Lord, <i>Petr.</i> 455, 756	Simpson v. Marshall 181, 182, 183, 642
Sanders v. Sanders' Trs 655, 888-5	Simpson's Trs. v. Macharg & Son . 2
Sanderson's Trs. v. Yule . 160, 188	Simson, Howden v 816
Sandilands v. Sandilands 13	Simson's Trs. v. Brown 764
,, Johnson's Trs. v 854	Simsons v. Simsons 8, 5
Sandys v. Bain's Trs 388, 398	Sinclair v. Brown Bros 156
Saumarez (de), Napier's Tr. v. 450, 717	,, Young v 11
Scales' Tra., Glen v 182	Sinclair's Trs. v. Sinclair 741
Schumann v. Scottish Widows Fund 689	Sinclairs, Dunbar v
Scott, Petr., 1850	Skeoch's Trs., Cumming v 5
,, 1856 293, 596, 877	Skinner v. Forbes
,, v. Craig's Reps 297	Sloss, Gordon v
,, v. Muir's Trs 864 v. Reid 428	Smith v. Bennie
Dalfamala Man at MAO	,, v. Drummond
,, M'Arthur v	M
" M'Lean v 147, 148	,, v. Patrick
,, Ritchie v. 192, 427, 474, 476, 610	,, v. Soeder
Scotts, Balfour v 740	,, v. Wallace . 236, 860, 373, 727
Scott's Trs. v. Scott, 1887 424	,, Airdrie Mags. c 189
,, ,, 1895 651	" Chambers' Trs. v 816
,, Brand v 808 Scott Douglas, etc., Petrs 396	,, Guthrie, etc. v 245, 545
	,, Murray v 696
Scottish Her. Sec. Co. v. Allan 472, 507, 512	Smith's Trs. v. Chalmers 508
Scottish Imperial Ins., Simcock v 687	,, v. Grant 656
Scottish Lands and Bldgs. Co. v.	Smith Ltd. v. Colquhoun's Tr. 208
Shaw	Smith Cuninghame v. Anstruther's
Scottish Life Ass. Co. v. Donald . 689 Scottish Prop. Inv. Soc., Shiell's	Trs
Trs. v 585	Smyth v. Allan
Scottish Provident Inst. v. Cohen &	Snaddon v. London, etc., As. Co 21
Co 683, 698	Snodgrass' Exor., Muir v 804
Scottish Provincial Ass. Co., Athole	Soady's Tra., Maclean v
Hydro. Co. v 512	0.1.0.41
Scottish Un. and Nat. Ins. Co. v.	Somerset v. E. Poulett
Fairley 690–1	Somervell's Tr., Petr 397, 443
,, ,, v. James 472	Somerville v. Aaronson
Scottish Widows Fund v. Buist . 687	,, v. Johnston 268, 507
,, Barras v 689	,, Mackenzie's Trs. v. 158, 159
,, Borthwick v. 691	Somerville & Co., Anderson v. 478
", Schumann v. 689	Soot, Hynd v
Selkirk, E. v. D. Hamilton	South African Territories Ltd. v.
Seton, Edmonstone v 491 Seymonr Spottiswoode v	Wallington 415
Seymour, Spottiswoode v 191 Sharp, Jameson v 685	Spalding, Houlditch v 229, 282 Spens v. Monypenny's Trs 815
Sharpe, Kennedy's Trs. v 689, 798	Spier v. Officers of State
Shaw v. Foster	Spiers v. Morgan 305, 899
,, Edin. Glasshouse Co. v 45	,, v. Spiers
,, Scot. Lands and Bldgs. Co. v. 146	Spottiswoode v. Seymour 191

	PAGE		PAGE
Sproule, Bouch v	. 652	Sutherland v . Standard Ass. Co.	527, 528
Stables, Steuart v	. 612	,, v. Tait's Tra	. 306
Standard As. Co., Sutherland v.	527, 528	Sutherland's Trs. v. Sutherland	. 815
Standard Prop. Inv. Co. v. Cowe		Swan's Tr., Raimes Clark & Co. v.	
Stark v. Thom	. 76		
Stark's Trs. v. Cooper's Trs	. 156	TAIT v. Wilson	. 534
,, Cooper's Trs. v.	. 817	Tait's Trs. v. Lees	
Steel, Turner's Trs. v.	. 618	" Sutherland v.	
	044		. 806
Steel's Trs. v. Steel, 1888 .		Taylor v. Gilbert's Trs	. 810
,, 1902	. 645	,, v. Grieve	. 76
Steele, etc., Campbell v.	. 318	,, Ogilvie & Son v	. 189
Steel Co. of Scotland, Stevenson v.		Templeton & Co., Murison v	. 131
Stephen v. Anderson	. 316	Tener's Trs. v. Tener	
Stephen's Tr. v. M'Dougall & Co.'s		Tennant v. Crawford	. 29
Stephens, Straiton Estate Co. v.	. 805	Tennent's Trs., E. Zetland v	. 808
Steuart v. Stables	. 612	Thom, Stark v	. 76
Stevenson v. Adair	. 44	Thom's Exors., Cattanach v	. 596
,, v. Dawson . 506,	507, 512	Thompson's Trs. v. Jamieson .	. 648
" v. Steel Co. of Scot. Ltd	. 207	Thomson v. Clarkson's Tra	. 8, 5
Stewart, Petr	. 465	,, v. James	. 147
m Rroadelhana M	. 637	,, v. Norton	. 74
m Brown 107 514			. 22
~	220	Commballia Man	. 91
"	. 208	D	
			. 227
	5, 147-8	,, Falconer v	. 68
,, v. Cassillis, E. of .	. 158	,, Wemyss v	245, 258
,, v. Greenock Harb. Trs.		Thomson and ors., Ross v.	. 815
,, v. Hodge	. 794	Thomson's Trs. v. Easson .	. 8
,, v. Montrose, D. of .	. 191	,, v. Finlay .	. 410
,, v. Murdoch	. 201	,, v. Pringle .	. 848
,, v. Stewart	. 101	,, v. Thomson, 1879	. 765
,, v. Stewart's Trs	. 652	,, ,, 1897	. 296
Remtow a	229, 282	Thomsons, Cullen v	. 7
Bruce et 184-5	199, 405	Thorburn v. Dempster	. 148
Kinnen #	. 588	,, Miller v	. 98
I mmeden #	. 208	Thorne v. Gibbs	. 660
Wealeine #	. 157	Tod, Inl. Rev. v.	526, 527
,, maciaine v	. 740	Radmalla a	. 23
" ~		Meagnagn e	
,, Stewart's Trs. v.		NT 1 1 00	. 465
,, Wilson v	. 70	,, Nelson's Trs. v	245, 507
G,	. 517	Todd v. Clyde Trs	. 808
,, Wilsone's Trs. v.	. 819	,, v. Reid	. 2
Stirling's Trs. v. Stirling	. 855	Torry Anderson v. Buchanan .	. 425
Stiven, Douglas & Co. v.	. 71	Traill v. Connon	. 152
Garaka w Millaman	. 15	Trappes v. Meredith	. 646
Stodart v. Dalzell 199,	291, 682	Trotter v. Rochead	. 742
Stoddart v. Arkley	. 7	,, Gibson v	. 428
Strachan v. Dickson	. 185	Turner v. Gaw	. 649
Straiton Estate Co. v. Stephens	. 305	,, v. Hamilton	. 207
Straton, Dundee Mags. v.	. 208	Turner's Trs. v. Steel	. 618
Stronach, Walker v	. 881	Tweedie v. Beattie	. 512
Struthers v. Barr	. 91		. 014
Stuart, D. of Montrose v.	. 816	Union Bank, E. Kintore v	. 70
	. 4	37-421 D. 1	
,, v. Crawfurd's Trs	650, 808	United Kingdom As. v. Dixon	291, 474
		Onted Bingdom As. v. Dixon	. 688
Stuart-Gordon v. SG	. 656	Vm. com Mala-lant- than	_
Stuart & Stuart, Whitmore v.	. 161	VEASEY v. Malcolm's Trs.	
	538, 898	Vere v. Dale	. 292
Sutherland v. Low & Co	. 4	Virte (de) v. Wilson	. 454

	INDEX	OF CASES	xxiii
	PAGI		PAGE
WADDELL, Corbett v	. 768		. 4
Waddell's Trs. v. Waddell .	. 656		. 76
,, Livingstone v. 228		, Wilkinson, in re	. 23
	759, 763		. 803
Walden, Lady Howard de, Petr.	450, 789		. 301
Walker v. Galbraith	. 198		. 102
,, v. Mottram	. 101	Williamson v. Boothby	. 766
,, v. Park	. 207	Cameron v . 193	8, 544, 594
,, v. Stronach	. 83	l Willoughby, Cox v	. 100
,, Bissett v	. 238	Wills, Petr	. 596
,, Colquhoun v	. 202		. 517
,, Gibson v		,, Beveridge v	. 517
,, Gray v	. 19		. 4
,, Jamieson v	. 746	3 ,, Fleming v	. 76
Walker's Exor. v. Walker .	. 804	f ,, Forth, etc., Co. v.	. 208
Walker's Trs. v. Haldane .	. 200	3 ,, Tait v	. 534
,, Johnston v	. 207	7 de Virte v	454
Wallace v. Davies	. 688	Wilson's Tr. v. Watson & Co	. 11, 140
., v. Wallace	. 608		. 646
,, Henderson v	. 519		147
, Luke v	. 519	Wilson, etc. v. Stewart .	70
,, Smith v 236, 360	0, 878, 727	Wilsone's Trs. v. Stirling .	. 819
Wallace's Trs. v. Wallace .	. 851		. 9
Wallace & Pennell, Henders	on	Winkler, M'Donald v	. 527
Sons & Co. v		Wishart v. Howatson	. 301
Wallington, So. African Territor.	ies	w Wyllie	900
Ltd. v	. 418	Wood v. Anstruther	. 508
Walter's Tr. v. O'Mara	. 516	Murray's Tr 22	. 090 5 807 910
Wardlaw v. Wardlaw's Trs	. 768	Wood v. Anstruther ,, Murray's Tr. v. 238 Woodhead, Goodhart v.	840
Wardlaw's Trs., Petrs	. 297	Woodside v. Outhbertson	
	850-1-9		. 69
Warren, Kennedy's Trs. v.	. 808		. 491
Warrender, Edin. Mags. v	. 88	·	007, 008
Watherston's Trs., Lord Adv. v.		Wylie of Duncan	
Watson v. Beveridge	. 8		. 705
	2, 426, 750	Wylie's Exor. v. M'Jannet .	. 858
Watson's Trs. v. Watson .	. 662		000, 092-8
Watson & Co., Wilson's Tr. v.	11. 140	Wylie's Tra. v. Wylie Wylie v. Dunnett Glas. Royal Infirmary v.	. 849
Watt v. Watson 25	2 426 750	Cles Powel Informer.	. 206
Whyte v.	-, 120, 10	Glas. Royal Infirmary v.	. 156
,, Whyte v Watt's Trs. v. King	. 190	Wullia's Tre at Road	
Waverley Hydro Co., Heiton v.	. 147		. 763-4
Webster's Trs., M'Kirdy v.			. 85 9
Welch, Horsbrugh's Trs. v.	. 42	1	
Welch's Exor. v. Edin. Life Ass. (Co. 586	VPAMAN'S TO Vamily The or	9, 873, 727
Welsh, Jamieson v	154, 808	Vonng er Robertson	648, 657
Welsh's Trs. v. Welsh	. 86	e Sinclair	. 11
Wemyss v. Thomson	245, 258	Brown's The	816
	3, 308, 317	Dalhanaida //	. 643
west Calder Oil Co., Clark v.		Munro's Tre a	. 859
Weston, Hunter v	. 882	Voung's Tre # Voung	. 644
Westren v. Millar	147 189	" Vounde Tre	. 765
White, Blake v	147, 169	Vnill's Tr Glasgow University	587
,, Cumming's Trs. v.	. 18	Vula Sandarson's Tra	160, 188
	. 657		-00, 100
White's Trs. v. Chrystal's Trs.	. 657		
Whitehead v. Philipps	. 424	,	. 209
,, Breadalbane, M. v.	. 611	,,	. 851
Whether Toront & Stuart & Stuart .	. 161	,,	205 , 208
Whyte v. Lee	146, 189	,, v. Tennent's Trs.	. 308

SECTION I

EXECUTION OF DEEDS

Non-essentials.—The following have never been essential, namely—

- 1. The granter's signature except on the last page, when the deed is written on one sheet only, though folded so as to form four pages.
 - 2. The date.
 - 3. The place of execution.
- 4. The name of the writer of the testing clause (except as to deeds partly written and partly printed, under the 1858 and 1860 Acts, down to 1868, when this requirement in these cases was abolished, with retrospective effect).
- 5. The names of the witnesses in the testing clause, provided it was clear to whom the designations applied (except as to deeds partly written and partly printed under the 1858 and 1860 Acts, down to 1874, when this requirement was superseded, but not with retrospective effect).
- 6. The addition of the word "witness" after the witnesses' signatures.

Present Law.—Under the 1874 Act the law stands thus:—

- 1. No matter how many sheets there may be, the deed is not null though the last page only is signed, but neither is it in that case probative: a proof is necessary under sec. 39.
- 2. The designations of the witnesses are unnecessary in the testing clause, provided they are added to the signatures, and they need not be written by the witnesses themselves.
- 3. No testing clause is necessary, except for the purpose of authenticating alterations.

What must still be seen to.—It is to be remembered that all the changes have not been retrospective, and it is necessary, in examining deeds, to keep in view the former requirements, so far as not retrospectively abolished. Thus:—

Ordinary deeds dated before 1st October 1874-

- 1. Granter's signature on each page, if more than one sheet.
- 2. Mention in testing clause of number of pages, if more than one sheet.

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- 3. Name and designation of writer of body of deed, but not of testing clause.
 - 4. Designation of witnesses in testing clause.

Deeds partly written and partly printed or engraved, between 1858 and 1st October 1874—

In addition to the above,

- 1. The names of the witnesses in the testing clause.
- 2. The date and number of pages, if specified, must be "expressed at length in writing."

The 1874 Act Non-Retrospective.—The 1874 Act has no application to deeds dated before 1st October 1874.² But it is assumed that it would apply to testamentary instruments executed before that date but coming into operation on the testator's death subsequent to that date.

Section 38 provides that-

It shall be no objection to the probative character of a deed . . . that the witnesses are not named or designed . . . in the testing clause thereof, provided that where the witnesses are not so named and designed their designations shall be appended to or follow their subscriptions, and such designations may be so appended or added at any time before the deed . . . shall have been recorded in any register for preservation, or shall have been founded on in any court, and need not be written by the witnesses themselves.

There are thus two bars to the designations being added, namely, the fact that the deed has been (1) registered for preservation, or (2) founded on in any court. As to the first of these, it appears that registration in the register of sasines for publication only would be no bar, though no doubt it would be necessary to re-record the deed after the designations were added. As to what constitutes the second bar, namely, founding on in court, see the cases cited.³

Relief under sec. 39.—The provision is that—

No deed . . . subscribed by the granter . . . and bearing to be attested by witnesses subscribing . . . shall be deemed invalid . . . because of any informality of execution . . . but the burden of proving that such deed . . . was subscribed by the granter . . . and by the witnesses . . . shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed . . . is founded on or objected to, or in a special application to the Court of Session or to the sheriff within whose jurisdiction the defender in any such application resides.

¹ But a deed wholly printed, engraved, or typed is valid (Simpson's Trs. v. Macharg & Son, 1902, 9 S. L. T. 338). In point of fact when this occurs the designations of the witnesses will usually be found in MS. after their signatures, and these could hardly but be held to be part of the deed, though Lord

Kyllachy refused to hold that the mere signatures were.

² Gardner v. Lucas, 1878, 5 R. (H. L.) 105. ³ Hill v. Arthur, 1870, 9 M. 223; Millar v. Birrell, 1876, 4 R. 87; M'Laren v. Menzies, 1876, 3 R. 1151; Todd v. Reid, 1883, 20 S. L. R. 382.

- "Informality of execution."—The following have been held to be informalities of execution within the section:—
- 1. The omission to sign every page in a deed consisting of more than one sheet.¹
- 2. Such an interval between the acknowledgment by the granter of his signature, to the witnesses, and their own signatures, as would expose the deed to nullity under the Statute 1681.² (See p. 5.)
- 3. An omission to design the witnesses, either in the deed or after their signatures, assuming that the simpler remedy under sec. 38 has been lost. This is a very important point. The facts were: the witnesses were not designed; that might have been remedied under sec. 38 by adding the designations to the witnesses' signatures; but the deed had been registered and judicially founded on. The application for relief under sec. 39 was objected to on the ground that this particular matter of the witnesses' designations was specially and exclusively dealt with under sec. 38, and that sec. 39 did not extend to it. But it was laid down that it is "not necessary to hold that the 39th section refers to different informalities from those which are dealt with in the 38th section," and the application was granted.
- 4. An error in filling up the testing clause, e.g. in the name or designation of a witness.⁴
- 5. An omission to fill up the testing clause of a will in the lifetime of the testator.⁵
- 6. A will defective in the formalities of the law of Scotland, but valid according to the place of execution.⁶
 - 7. A will or deed written wholly or partly in pencil.7

And it is thought that the section would apply to the following also:—

- 8. Unauthenticated marginal additions, interlineations, and erasures 8
 - 9. Subscription of granter or witnesses, or both, on erasure.

But it is not so clear that in all of these cases the statutory relief is necessary at all. Thus in *Richardson's* case (name of witness) Lord M'Laren suggested a question whether "a blunder such as we have here would have invalidated the deed at common law." Then as to filling up the testing clause of a will after the testator's death, it has been expressly decided that the testing clause of a deed may be filled up after the granter's death.⁸ And, finally, as to the subscription of the granter or witnesses on erasure, it has been decided that a will

M'Laren v. Menzies, 1876, 3 R. 1151; Brown (M'Intosh's Exr.), Petr., 1883, 11 R. 400.

² Thomson v. Clarkson's Trs., 1892, 20 R. 59.

Thomson's Trs. v. Easson, 1878, 6 R. 141.
 Richardson's Trs., Petrs., 1891, 18 R.
 1131.

⁵ Addison and others, Petrs., 1875, 2 R.

⁶ Browne and others, Petrs., 1882, 20 S. L. R. 76.

⁷ Simsons v. S., 1883, 10 R. 1247.

⁸ Veasey v. Malcolm's Trs., 1875, 2 R. 748.

signed by the testator on erasure is ex facie probative, and that the onus is on the challenger.1

Some of these questions may arise between seller and purchaser, and it is thought to be clear that, for instance, in the sixth instance above stated, a purchaser would not be entitled to require a declarator.²

What sec. 39 does not cover.—It does not cover—

- 1. A deed registered for preservation or judicially founded on before the witnesses, or one of them, have signed.⁸
- 2. A non-holograph docquet (and perhaps any other defect) in notarial execution. (See p. 8.)
- 3. It is thought that the section does not cover the case of a deed signed by granter and by two others who sign as "witnesses" but who neither saw the signature adhibited nor heard it acknowledged. But this has been treated as an open and doubtful point.

It is obvious that the statute can give no aid to holograph documents signed by the granter without witnesses, for they do not bear "to be attested by witnesses subscribing."

Limits of Decree.—The purpose of the application under sec. 39 is for declarator "that such deed instrument or writing was subscribed by such granter or maker and witnesses." The Court will not give a declarator that it is a valid deed. But the opinion is stated by Lord Trayner that it is necessary to prove not only the adhibiting of the signatures but quo animo they were adhibited.

Granter's Signature.—It is fatal if the granter (1) simply blacken lines made by another,⁷ or (2) have his hand guided ⁸ (though it may be supported above the wrist),⁹ or (3) use a stamp,¹⁰ or (4) a cyclostyle,¹¹ or (5) make his mark.¹² Initials are sufficient (in the case of the granter) if genuine and accustomed.¹³ A married woman may sign her maiden name.¹⁴ It is not fatal that part of the deed is below instead of above the signature, nor that the signature was adhibited before the document or part of it was written, and this rule has been extended to a 'codicil' introduced between the end of the will and the original signature.¹⁵

Witnesses.—As to who are competent witnesses, (1) all persons (whether male or female) under fourteen years of age, (2) all persons non compos mentis, (3) blind persons, and (4) other signatories as prin-

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<sup>1</sup> Brown v. Duncan, 1888, 15 R. 511.
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² Connel's Trs. v. C., 1872, 10 M. 627.

^{*} Moncrieff v. Lawrie, 1896, 23 R. 577.

⁴ Per Lord Kincairney in Sutherland v. Low & Co., 1901, 8 S. L. T. No. 308.

⁵ Addison, supra. See also Richardson, supra; Garrett, Petr., 1883, 20 S. L. R. 756

⁶ Inglis' Trs. & I., 1901, 4 F. 865.

⁷ Crosbie v. Picken, 1749, M. 16814.

⁸ Moncrieff v. Monypenny, 1711, Rob. Ap. 26; 1710, Mor. 15936.

Noble v. N., 1875, 3 R. 74.

¹⁰ Stuart v. Crawfurd's Trs., 1885, 12 R.

¹¹ Whyte v. Watt, 1898, 21 R. 165.

¹² Crosbie v. Wilson, 1865, 3 M. 870.

¹³ Spiers v. S., 1879, 6 R. 1359.

¹⁴ Dunlop v. Greenlees' Trs., 1868, 2 M. 1.

Gray's Trs. v. Dow, 1900, 3 F. 79.

cipals to the same deed—these are all incompetent as witnesses. Then as to (5) persons interested in the deed, the interest is not a disqualification (nor does the person forfeit his interest), though it may be an element against the deed.¹ (6) No one may witness a party's signature "unless he then know that party,"² but credible information is enough. (7) It is not desirable that a married woman should witness her husband's signature, but it is thought to be clear that marriage is not legal incapacity in the sense of sec. 139 of the 1868 Act. (8) A "casual, accidental, or concealed witness" is not competent, but it is enough if the witnesses "are legitimately present and openly stand by and see what is done." ⁸

Presence or Acknowledgment.—The witnesses must either see the signature adhibited or the granter must "at the time of the witnesses subscribing acknowledge his subscription." The deed may be signed in presence of one witness and thereafter acknowledged to the other, or it may be acknowledged to both at different times. As to the case of acknowledgment, it has been decided that it need not be in words.

Witnesses' Signatures.—Initials will not do.⁷ Even where the granter merely acknowledges his signature, it is not fatal that the witnesses do not sign until after they have left his presence and nearly an hour afterwards,⁸ subject to a reasonable restriction in the matter of time. The witnesses may sign after the granter's death.⁹ Quære whether they may do so after one of the parties to the document has repudiated it.¹⁰

Companies under Companies Acts.—The 1874 Act (s. 56) provides that any deed executed after 1st October 1874 shall be validly executed in Scotland by any company registered under the Companies Acts, if (1) it is executed in terms of the provisions of those Acts (but the Companies Acts contain no such provisions), or (2) if it is sealed with the common seal and subscribed by two directors and the secretary; and witnesses are declared unnecessary. It is recommended that this latter method should be uniformly followed, even though the articles of association of the company have some other regulations, and that witnesses, being unnecessary, should be dispensed with. The advantage of this course is, that the statute proves the validity of the execution without the trouble of obtaining and examining the particular articles of association. The special provisions in the articles will either (1) prescribe something in addition to what the 1874 Act makes sufficient, e.g. the seal and the signatures of three directors

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<sup>1</sup> Simsons v. S., 1888, 10 R. 1247.
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^{2 1681,} c. 5.

³ Tener's Trs. v. T., 1879, 6 R. 1111.

^{4 1681,} c. 5.

⁵ Hogg v. Campbell, 1864, 2 M. 848.

⁶ Cumming v. Skeoch's Trs., 1879, 6 R. 540, 963.

Gibson v. Walker, 16 June 1809, F. C.
 Thomson v. Clarkson's Trs., 1892, 20

R. 59.

9 Tener, supra; Beattie v. Bain's Trs.,

^{1899, 6} S. L. T. No. 350.

10 Stewart v. Burns, 1877, 4 R. 427.

and the secretary, or (2) declare that something less shall be sufficient, e.g. the seal and the signatures of two directors without the secretary. In the former case it is clear that, notwithstanding the provision in the articles, the seal, two directors, and the secretary are enough, for the regulations of a private company cannot overrule a public Act of Parliament. In the latter case it is equally clear that a deed executed in terms of the articles is sufficient, for the 1874 Act does not say that deeds by companies must be executed as therein mentioned, and the company is entitled to make its own regulations so long as they do not conflict with the general law; indeed, before 1874 there could be no guide other than the company's articles, and the 1874 Act contains no prohibitory, but only an enabling, provision. But quære whether the company can by its articles dispense with witnesses, e.g. whether it can declare that the seal and one director without witnesses shall be sufficient.

Burghs.—All deeds, contracts, and writs of importance . . . shall be signed at a meeting of the council, by the provost or other magistrate or councillor presiding and the town-clerk, either with or without the common seal being adhibited.¹ Witnesses are not dispensed with.

Summary of Practical Suggestions.—1. That, even if the deed consists of one sheet, every page be signed, especially if the deed contains more than two pages, for the sheet might afterwards be cut up.

- 2. That wives be not chosen as witnesses to their husbands' signatures.
- 3. That wherever there is one granter only, or where both or all the granters sign at the same time, the witnesses add their designations to their signatures, and that in that case (assuming the signatures to be legible and the designations satisfactory) the witnesses' names and designations be *not* inserted in the testing clause, which may run "before the witnesses also hereto subscribing whose designations are appended to their signatures."
- 4. That the number of pages be omitted from the testing clause where the deed consists of two pages only; otherwise that it be retained, as being apparently in that case a real safeguard against fraud.
- 5. That no mention be made of the writer of the deed. If it should ever be of any moment to find him, that would be easy enough in most cases if the deed were at all recent; and if it were very old, he would probably be dead.

Notarial Execution is competent in two cases:-

- 1. When the granter is unable to write.
- 2. When he is blind. It is not necessary that a blind person should execute notarially; he may himself sign in the usual way. In the
- 1 63 & 64 Vict. c. 49. Burgh is defined by reference to the Burgh Police Act, regality.

latter case it is not necessary that the deed be read over to him; that is to say, reading is not a solemnity, but the want of it may go to show want of knowledge and consent on his part.¹

Prior to 1874.—The alterations made in 1874 in the matter of notarial execution are not retrospective, and therefore it is necessary to keep in view the requirements of the prior law.² The main points were:—

- 1. Two notaries and four witnesses except in the case of (1) deeds inter vivos dealing with moveables not exceeding £100 Scots; (2) corroborative obligations even in excess of that amount; and (3) wills dealing with moveable estate only, without any limit. In all these excepted cases one notary and two witnesses sufficed. In all cases of deeds dealing with heritage the rule of two notaries and four witnesses was inflexible.
- 2. The granter required to touch the notary's pen in presence of the witnesses.
 - 3. That fact required to be set forth in the docquet.
- 4. The docquet required to be holograph. If two notaries signed there might be two docquets, one by each and both holograph, or one docquet holograph of the one notary and signed by both, or at least by the notary who had not written it. With this last exception it was not necessary that the docquet should be signed.⁵

Present Law.—One notary (or one justice of peace) and two witnesses are sufficient in all cases. In the case of testamentary instruments the parish minister may act. Without going into authorities, it is sufficient to give the following statement of what ought to be attended to in cases of notarial execution, so as to obviate all question, and in the following order (it being assumed, for ease of expression, that it is a notary and not a justice who is to act):—

- 1. Granter, notary, and witnesses meet together, and all remain till everything is done and completed. Opinion per Lord Kincairney that the presence of the notary while the deed is being read is unnecessary.
- 2. The whole deed with anything annexed which is to be signed is read aloud *verbatim* by the notary or one of the witnesses.
- 3. The notary asks the granter whether he is able to write, and obtains answer in negative.
- 4. The notary asks the granter the cause of his inability to write, and obtains a sufficient answer.

Opinion per Lord Kincairney that Nos. 3 and 4 are unnecessary.7

- 5. The notary asks the granter whether he authorises him (the
- ¹ E. Fife v. F.'s Trs., 1823, 1 Sh. Ap. 498; Ker v. Hotchkis, 1837, 15 S. 983.
- ² See Aitchison's Trs. 'v. A., 1876, 3 R. 388.
 - ³ Jack v. J., 1671, Mor. 12975, 16836.
 - 4 Campbell v. Purdie, 1895, 22 R. 443.
- ⁵ Cullen v. Thomsons, 1731, Mor. 16842; Gordon v. Murray, 1765, Mor. 16818; Skinner v. Forbes, 1883, 11 R. 88.
- ⁶ Hodges v. H.'s Trs., 1900, 7 S. L. T. No. 306; Stoddart v. Arkley, 1799, Mor. 16857.

7 Hodges, supra.

notary) to execute the document on his behalf, and obtains an answer in affirmative.

- 6. The notary signs each page with his own signature, adding "notary public" or "N.P."
 - 7. The witnesses sign the last page.
 - 8. The testing clause is filled up then and there.
- 9. The notary writes his holograph 1 docquet in strict accordance with the statutory form,2 and signs it, adding "notary public."
 - 10. The witnesses sign the docquet.

The above, it will be observed, suggests that the notary and witnesses should sign the docquet as separate from, and in addition to, signing the deed. If the docquet be written on the same page as the deed, or the last part of the deed, it has been held that it is enough that the signatures both of notary and witnesses are appended below the docquet, the docquet in turn being below the deed. If these conditions were not fulfilled, e.g. if the docquet were on the margin of the last page or on the next page, there is nothing in the case referred to which would make it unnecessary for the signatures to be appended at both places; and, for greater security, that course is still recommended in all cases.

The docquet may not be written after the granter's death: 4 in the case noted the instrument was a will.

Relief under sec. 39 of the 1874 Act is not available in the case of a non-holograph docquet¹; and, indeed, one of the grounds of judgment in *Irvine's* case would go the length of the proposition that the section is not applicable to notarial execution at all, which, it is submitted, is too narrow an interpretation of the statute.

Form of Docquet.—By authority of the above-named and designed A., who declares that he cannot write on account of sickness and bodily weakness [or never having been taught, or loss of his right hand, or declares that he is blind and desires to execute these presents notarially], I, B., notary public [or justice of peace for the county of _____], subscribe these presents for him, he having authorised me for that purpose, and the same having been previously read over to him, all in presence of the witnesses before named and designed, who subscribe this docquet in testimony of their having heard [or seen] authority given to me as aforesaid, and heard these presents read over to the said A.

B., Notary Public [or Justice of Peace].

C., witness.

D., witness.

The testing clause runs in the usual form ("are subscribed by me,"

¹ Irvine v. M'Hardy, 1892, 19 R. 458;
³ Mathieson v. Hawthorns Ltd., 1899, 1 F. Campbell v. Purdie, 1895, 22 R. 443.

468.

² As to variations therefrom and the risks, see Aitchison, supra, and Watson v. Beveridge, 1883, 11 R. 40,

4 Campbell, supra,



etc.), just as if the granter had himself signed, and ignoring the notary altogether.

The notary must have no interest in the deed.¹ In the first of the cases cited the document was a will, and the notary was merely one of the testamentary trustees appointed under the will, but there was a power in the will to employ him as solicitor and to pay him the usual remuneration. In the second case the document was a marriage contract, and the notary who signed for the wife was the husband's law agent: held that whether the objection was good or bad, it was cured rei interventu by the marriage following on the contract.

If two or more parties are to execute notarially, there ought to be a separate notary for each.²

PERSONAL BARS.

Even assuming that a deed is defective in its execution, and so defective that it cannot be set up under s. 39 of the 1874 Act, the person interested to challenge it may be barred from doing so. Thus—

- 1. Latent Defect.—A person who has given forth a deed ex facie regular is not entitled to found on a latent defect (e.g. that the witnesses did not see him sign, or hear him acknowledge his signature) to the effect of cutting down his own deed.³
- 2. Rei interventus will set up defective deeds, e.g. an unattested guarantee to a bank by a cautioner, on the faith of which the bank has given credit,⁴ but this will not warrant summary diligence; or a marriage settlement followed by marriage.⁵ In like manner an unattested disposition followed by payment of the price would not give a title which could prevail in competition with a third party (unless the latter were barred as indicated on p. 290), but it would be evidence of an obligation on the seller's part to give a good conveyance.

⁵ Lang v. L.'s Trs., 1889, 16 R. 590.

¹ Ferrie v. F.'s Trs., 1863, 1 M. 291; Lang v. L.'s Trs., 1889, 16 R. 590.

 ² Cf. Graeme v. G.'s Trs., 1868, 7 M. 14.
 ² Baird's Trs. v. Murray, 1883, 11 R.
 153.

⁴ Ch. of England As. Co. v. Wink, 1857, 19 D. 414, 1079; National Bank v. Campbell, 1892, 19 R. 885.

SECTION II

PERSONAL BONDS

THE form of personal bonds may easily be adapted from the form of heritable securities, but it is convenient to give a few simple forms here, and to draw attention to certain matters, some of which do, while others do not, apply also to heritable securities. These matters briefly are—(1) the liability for remitting charges; (2) how compound interest may be secured; (3) what is covered by the penalty clause; (4) the rights of both parties in respect of compelling the making or acceptance of repayment; (5) the transmission of the debt in the succession of the creditor; and (6) its incidence in the succession of the debtor.

Remitting Charges.—The obligation is to pay at the place fixed in the bond. The debtor is accordingly bound to have the money there on the appointed day, free of charge to the creditor, and he is not bound to pay remitting charges to any other place. It is not usual to express any place of payment of interest, but the one place will rule both principal and interest.

Interest.—It has been laid down that there can be no valid obligation for compound interest.¹ The Act² founded on by Erskine is repealed,³ and it is difficult to see any ground for the dictum. It is admitted that accumulation may be expressly agreed to by the debtor under a bond of corroboration as regards arrears existing at its date;⁴ the Personal Diligence Act⁵ provides machinery for reaching the same result from time to time without the debtor's consent; and see the express terms of the judgment of the Court in Molleson's 6 case.

Compound interest is not allowed in ordinary cases on advances by law agents.⁷ The same case shews that lodging a business account in a process to which the client is also a party may not be sufficient to entitle the agent to any interest at all.

It is important in this connection to note the great difference which may be made according as payments on account of a debt are appro-

¹ Ersk. iii. 3. 81; Bell, Convey. 256.

² 1621, c. 28.

^{3 17 &}amp; 18 Vict. c. 90.

⁴ Bell, Convey. supra.

⁵ 1 & 2 Vict. c. 114, ss. 5 and 10.

⁶ Molleson v. Hutchison, 1892, 19 R. 581.

⁷ Bunten v. Hart, 1902, 9 S. L. T. No.

^{408.}

priated as between principal and interest. No creditor is bound to accept any part of principal except on condition of all interest on the debt being first paid to date. Accordingly, any partial payment ought to be imputed primo loco to the interest on the whole debt to date. This has practically the effect of compound interest, for if the payments were imputed to principal, the interest left unpaid would not bear interest, whereas, under the method suggested, the principal left unpaid will of course do so. In the case quoted the difference between the two methods, on a large debt, was over £1400.¹ Note that this is a matter as between debtor and creditor, and does not affect, nor is it to be affected by, the relation between parties with different interests in the debt, e.g. liferenter and fiar.

Penalty.—The penalty covers only actual expense, loss, and damage incurred by the creditor through the debtor's default. As to expenses which are covered, see the cases cited.² The usual form of personal bond includes no obligation for expenses. This appears to be an omission, and if wished, an express clause may be adapted from that on p. 676. The real value of the penalty is to entitle a secured creditor, in a competition, to his expenses in the same place in the ranking as his principal and interest. This is not necessarily limited to judicial expenses. An express obligation for expenses, if wide enough in its terms, should have the same effect, except where it comes into collision with the rule against indefinite charges on heritable property. That difficulty is avoided by the definite penalty; but then the penalty will limit, though of course it will not measure, the amount of expenses claimable. On this subject generally, see the authorities noted below.³

Repayment.—In the absence of any agreement to the contrary, the debtor under a personal bond is entitled to repay the loan at any time after the term of payment without notice, and in like manner the creditor may call it up at any time after the term of payment, giving the usual charge for payment, or proceeding by action if the bond should contain no consent to registration for execution. When a fixed endurance has been agreed to on both sides, the debtor cannot insist on making repayment against the will of the creditor otherwise than in terms of the agreement, any more than the creditor can in the same case force payment before the agreed-on term.⁴

Creditor's Succession.—(1) Where no exclusion of Executors.—At common law all bonds with a clause of interest were heritable after the first term of payment of interest, or if the term of payment of principal was distant or uncertain with interest running in the mean-

¹ Wilson's Trs. v. Watson & Co., 1900, 2

² Gordon v. Maitland, 1761, Mor. 10050; Young v. Sinclair, 1796, Mor. 10053.

³ Hynd v. Soot, 1826, 4 S. 686; Mac-

andrew v. Dunbar, 1828, 6 S. 382; Jamieson v. Beilby, 1835, 13 S. 865; Orr v. Mackenzie, 1839, 1 D. 1046; Bell, Com., i. 701, ii. 73.

⁴ Ashburton v. Escombe, 1892, 20 R. 187.

time. The test was the *interest*. Thus a bond without a clause of interest was always moveable.¹ And no matter whether the first term of payment of interest was earlier or later than, or simultaneous with, the term of payment of principal, the bond remained moveable until the first term of payment of interest had arrived.² Again, while a bond with a distant or uncertain term of payment of principal was heritable from the first if it bore interest,³ on the other hand, the bond remained moveable if it bore no interest until the distant or uncertain date.⁴ Gray's case was an instance of a bond of this kind. It was payable on the death of a third party until whose death it bore no interest, and accordingly it was found to be moveable.

This state of the law was altered by statute 5 in the middle of the seventeenth century. The Act of 1661 provides that personal bonds (not excluding executors) granted after 16th November 1641 are to be moveable except as regards (1) the fisk and (2) the rights of husband and wife. This latter exception excludes such bonds from (1) jus mariti, (2) jus relictæ, (3) jus relicti. These matters are still of great practical importance, and it is this that warrants the treatment of the question here.

It is to be understood that the Act 1661 does not exclude these conjugal rights further than they were excluded before 1641. Thus, as before 1641, the jus relictæ (and now the jus relicti) include personal bonds where the first term of payment of interest has not arrived at the death of the person whose succession is in question, unless the term of payment of principal be distant or uncertain, and even then if no interest runs till that term. And as regards the jus mariti, in those cases in which that right still exists as regards future acquisitions, it includes personal bonds acquired by the wife before the first term of payment of interest, but under the same exception and sub-exception as just stated with reference to distant or uncertain terms. Proceedings taken by the creditor to enforce payment may make the bond moveable to all effects.6 It has been held that when one spouse dies survived by the other and by children, and possessed of bonds which are heritable in a question with the surviving spouse but moveable in a question with the children, one-half and not only onethird of the sums thereby due falls to the legitim fund.7

(2) Where Executors are excluded.—The Act 1661 declares that bonds in this position are "to be heritable and to pertain to the heir." It has been doubted whether this makes them heritable as regards the rights of husband and wife, but it is difficult to see how any other conclusion could be reached. These bonds are heritable in the person

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<sup>1</sup> Ersk. ii. 2. 9.
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² Barclays v. Pearson, 1682, Mor. 5777; Gray v. Walker, 1859, 21 D. 709; Downie v. Downie's Trs., 1866, 4 M. 1067.

³ Gray v. Gordon, 1666, Mor. 3629.

⁴ Gray, 1859, supra.

⁵ 1641, c. 57; 1661, c. 32.

⁶ MP. Calder, 1901, 8 S. L. T. No. 258.

⁷ Dawson's Trs. v. D., 1896, 23 R. 1006.

of the heirs of the original creditor.¹ As regards assignations, (1) if it is assigned to the new creditor "and his executors," it is plainly made moveable; (2) if it is assigned to him "and his heirs and executors," the result is the same; but if (3) it is assigned to the new creditor simply, (4) or to him "and his heirs," there may be a question; but it will be observed that the only exclusion is of the executors of the original creditor, and therefore it is thought that after an assignation in these terms the bond is personal.⁴ The rule applied in Calder's case supra does not, as there pointed out, hold with regard to express exclusion of executors.

- (3) Special Destination.—A bond may be heritable destinatione without any express exclusion of executors. A destination to the creditor and his heir in heritage, or his heir of line, or his heir-male, must have this effect; but not a destination to the heirs of his body.⁵
- (4) Arrears.—Even where bonds are heritable altogether, or to certain effects, the interest to date of death or other event in question is moveable.

Debtor's Succession.—Even though the bond do not contain a renunciation of the benefit of discussion, the creditor has right of action against the successors in both the personal and heritable estates, and he can proceed against the latter in the first instance; but whether he do so first or not, he must observe a certain order, i.e. in attacking the successors in the heritable estate. The order is—(1) the heir specially bound or taking the property relative to which the obligation is granted; (2) heir of line; (3) formerly heir of conquest; (4) heirsmale; (5) other heirs of provision, and of these apparently the heir of a marriage is liable last.⁶ The difference resulting from a renunciation of the benefit of discussion is that not only may the creditor attack the heritable successors before he sues the personal representatives (as he always may), but he may take the former in any order he chooses. The opinion has been expressed that an obligation on "heirs and executors jointly and severally" imports an exclusion of the right of discussion.⁷

Although a bond may be heritable in the creditor's succession, it does not follow that it is heritable in the debtor's succession also. Thus there is no authority for holding that a bond excluding executors is heritable in the debtor's succession. But as regards jus relictæ (and jus relicti), bonds which, if due to the deceased, would not increase the relict's share, are not to be reckoned against her (or him) if due by the estate.⁸

¹ Mackay v. Robertson, 1725, Mor. 8224.

² Sandilands v. S., 1680, Mor. 5498.

² Kennedy v. Kennedy, 1747, Mor. 5499; Ersk. ii. 2. 12.

⁴ See Ross v. Ross's Trs., 4 July 1809, F. C.; and of. Consolidation Act, s. 117.

⁵ Duffs v. D., 1745, Mor. 5429.

⁶ Bell, Convey. 247, and cases cited; Bell, Prin. 1985; M'Laren, Wills, 1820.

⁷ Per Ld. Watson in *Burns* v. *Martin*, 1887, 14 R. (H. L.) 20.

⁸ Ross v. Graham, 14 Nov. 1816, F.C.; Fraser, 985. Where the creditor has taken proceedings for payment in the debtor's life, note the decision in *Calder*, supra, p. 12.

BOND FOR BORROWED MONEY.

I, A., grant me to have instantly borrowed and received from B. the sum of , which sum I bind myself, and my heirs, executors, and representatives whomsoever all jointly and severally without the necessity of discussing them in their order, to repay to the said B. or his executors or assignees at the term within the [place], with a fifth part more of liquidate penalty in case of failure, and the interest of the said principal sum at the rate of per centum per annum from the date hereof to the said term of payment, and half-yearly, termly, and proportionally thereafter during the not-payment of the said principal sum, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the term of next for the interest due preceding that date, and the next term's payment thereof at and so forth, half-yearly, termly, and proportionally thereafter during the notpayment of the said principal sum, with a fifth part more of the interest due at each term of liquidate penalty in case of failure in the punctual payment And I consent to registration hereof for preservation and thereof [a]. execution.-In witness whereof.

a. Expenses.—If desired, insert an obligation for these. (See p. 676.)

BOND BY TWO OR MORE GRANTERS.

We, A. and B., grant us to have instantly borrowed and received from C. the sum of \pounds , which sum we bind ourselves jointly and severally and our respective heirs, executors, and representatives whomsoever without the necessity of discussing them in their order, and all jointly and severally, to repay, etc.

Any other clause of obligation will be expressed, "We bind ourselves and our foresaids all jointly and severally as aforesaid," and it may be desired to insert some of the special clauses for the creditor's protection printed on page 679.

BOND OF ANNUITY.

The form of this as a separate deed will easily be adapted from the forms in Sec. XLIII. Add consent to registration for preservation and execution.

BONDS OF CAUTION.

The best advice which one can follow in regard to deeds of this kind, so far as money obligations are concerned, is to avoid them altogether. It is very much better from the creditor's point of view that both obligants should be bound to him as principals and jointly and severally, leaving them to regulate their own relations between themselves. When this course is followed both parties should be made not only principal obligants but also borrowers, that is to say, they ought both to acknowledge to have borrowed and received the money. It is strongly advised that the rule should be rigidly enforced against admitting

any variation such as explanatory expressions. Warning may be taken from a case where A. borrowed, and he and also B "by way of corroborative guarantee" bound themselves to repay; held that the septennial limitation applied. But of course in all these cases the creditor in point of fact knows quite well the true relations of his debtors, and while therefore the septennial limitation will not apply to bonds framed as now suggested, all equitable pleas are available to the de facto, though not express, cautioners, e.g. if the creditor part with securities or give time by positive engagement. As regards this last matter it is very important to note that it has been held in England that the accepting payment of interest in advance, this not being in terms of the deed, and done without the surety's consent, is a positive giving of time, and may free the surety. Notwithstanding the general advice now given, there are two cases in which the true character of the cautioner's obligation must be in terms or practically disclosed on the face of the deed. These cases are—

Caution for Interest.—It has been well pointed out that this is a far more serious obligation than the granter of it often realises at the time.4 He can get out of it only by paying the principal. But it does not follow that he is not much better off under an obligation for interest only than for principal, for the latter might mean bankruptcy and the former not. For though there is apparently an old case in which decree for principal was given against obligants for interest,4 that would not be followed now, though still it is practically important to note that that is just what happens in the bankruptcy of the obligant for interest; for then the creditor ranks as for a perpetual annuity, and the value of that is just the principal sum necessary to produce it at (it is assumed) the rate of interest expressed in the obligation. septennial limitation does not apply to an obligant for interest only.5 When the borrower gives security it seems proper for the creditor to make a condition that he shall be entitled to apply all the proceeds of the security, both corpus and income, to the principal of his debt primo loco, reserving his claim in full for the interest against the cautioner.

Partial Caution.—The case supposed is a loan of £1000 by A. to B., guaranteed by C. to the extent of £500. Misunderstandings and mistakes are very apt to arise under these circumstances. The point sharply is—is it the first or the last half which C. guarantees? Is he liable at all if A. has recovered £500 from the special security, if any, or from B.'s general estate? It is suggested that the fair thing, and what is in all probability intended, is that the cautioner shall be liable, within his limit, until the creditor has recovered up to that limit from some source other than the special security, and that this is best carried out by

Stocks v. M'Lagan, 1890, 17 R. 1122.
 Paterson v. Bonar, 1844, 6 D. 987.
 Blake v. White, 1885, 1 You., and Coll.
 Molleson v. Hutchison, 1892, 19 R.
 581.

making the cautionary obligation extend to the whole debt, but with a limit of liability.

Caution to or for a Firm.—A continuing cautionary obligation to or for a firm (i.e. whether the firm be the creditor or the principal debtor) "is in the absence of agreement to the contrary revoked as to future transactions by any change in the constitution of the firm." Obviously unless this were negatived no one could continue to give credit to a firm in reliance on any cautionary obligation.

Caution to or for a Company.—This was formerly in exactly the same position as in the case of firms, for the section of the Mercantile Law Amendment Act applied to both. But that is repealed by the Partnership Act, and it applies only to firms, and it is expressly provided that companies incorporated by Act or Charter or by registration under the Companies Acts are not within the Partnership Act. Now therefore a continuing obligation to or for a company will not be impliedly revoked by a change in the membership.

Caution by a Firm, Company, etc.—Great care must be observed in accepting cautionary obligations from legal persons, or natural persons under any disability. Thus no member or members of a partnership have implied power to bind the firm or other partners in this way. Nor may a company, unless specially empowered in its constitution, even when it may be supposed that it has an interest of its own to serve.² Nor may married women or trustees.

Mercantile Guarantees.—In these cases, assuming that legal liability has been incurred at all,³ the point which usually arises is in applying a limit of liability if any, that is to say, whether the guarantor is liable only for, say, the first £100 of goods supplied, and is entitled to have the first sums recovered placed to the credit of that sum, or whether he has given a guarantee which is both continuing and covering, that is, continuing to cover all dealings, and covering any deficiency (not exceeding the specified limit) remaining unpaid after applying all sums which the creditor can recover from all other sources.⁴

Caution for Officials.—The leading point is whether the obligation is merely one for honesty and fidelity, or is also for solvency, and even, it may be, for losses arising from errors of judgment. Even between fidelity and solvency the distinction is obvious, for the most faithful servant might be overtaken by innocent misfortune, and then unless it could be held to be a breach of fidelity to immix official funds with private and other funds, a guarantee of fidelity would not cover the loss. There are many other very important points, all of which are intended to be provided for in favour of the employer in the form printed on p. 20. In point of fact these guarantees are now most commonly given by companies whose business it is.

⁴ Ibid., 288 et seq.



¹ Partnership Act 1890, s. 18.

⁸ See p. 585.

³ Bell, *Pr.*, 280.

BOND WITH A CAUTIONER

I, A., grant me to have instantly borrowed and received from C. the sum of £, which sum I, the said A., as principal, and I, B., as cautioner, bind ourselves jointly and severally, and our respective heirs, executors, and representatives whomsoever without the necessity of discussing them in their order, and all jointly and severally, to repay, etc.

If the creditor is content to take a bond in this form, there is no reason why he should object to a clause of relief, thus saving, it may be, the debtor the expense of a separate deed. When agreed to, the clause of relief may run:—

And I, the said A., bind myself and my foresaids to free and relieve the said B. and his foresaids of the obligations herein contained at the said term of payment or at any time thereafter on demand by him or them at his or their pleasure [and, if desired, the relief may be amplified as in the second form on p. 484, inserting a sum say £100 in excess of the debt].

BOND WITH CAUTION FOR INTEREST

I, A., grant me to have instantly borrowed and received from C. the sum of £, which sum I bind myself, and my heirs, executors, and representatives whomsoever all jointly and severally without the necessity of discussing them in their order, to repay to the said C. or his executors or assignees at the term of within the [place], with a fifth part more of liquidate penalty in case of failure. And I, the said A., and I, B., bind ourselves jointly and severally, and our respective heirs, executors, and representatives whomsoever without the necessity of discussing them in their order, all jointly and severally, to pay to the said C. and his foresaids the interest of the said principal sum, etc.

Some of the clauses on p. 679 may be inserted, and at any rate a clause in something like the following terms:—

And I, the said B., agree that the obligation hereinbefore undertaken by me is and shall be an independent obligation, and shall continue in full force so long as there remains unpaid any part of the said principal debt, or any sum of interest, and that notwithstanding any defect or nullity in, or any failure or extinction of, the obligation for principal; and further that the said C. and his foresaids shall be entitled to apply all sums which they may recover from the said A. or his foresaids [or from the security hereby created] or from any source other than me or my foresaids primo loco to principal and to any sum due or to become due under these presents other than interest.

BOND WITH PARTIAL CAUTION

[Proceed as in form above, adding.] But it is hereby specially provided and declared with reference to the obligation hereinbefore undertaken by me

¹ This is, it seems, implied (Bell, Pr., 245), but should be made express whether there be one or more cautioners.

the said B. [cautioner], that the same is granted and accepted with and under the following declarations only, and not otherwise—viz., that I, the said B., my estate and representatives shall not, under that obligation or anything which may follow thereon, be liable to pay more than the sum of £, and interest thereon at the said rate from the date of demand therefor, or default in punctual payment of interest under these presents, whichever shall first happen, till paid, but that on the other hand, subject only to the said limitation of liability, the said obligation is a covering obligation and enforceable to the full extent of said limited liability without deduction of any sums which the said C. [creditor] or his foresaids may or shall have recovered on account from the said A. [principal debtor] or his foresaids, or from any source other than me the said B. or my foresaids.

Although this section deals with unsecured bonds, it is convenient to show here the variations of this clause of limitation of liability in the case of a

BOND WITH PARTIAL CAUTION AND WITH SECURITY CONSTITUTED BY THE PRINCIPAL DEBTOR

And here the clause will be different according to the true intention of parties. The question is, is the cautioner for say £500 of a £1000 debt to be free if and when the creditor shall have received £500 and interest thereon from some source other than the special security, e.g. the debtor's general estate? or is the cautioner to be liable for £500 and interest so long as so much remains unpaid, i.e. "ultimate loss"? In the latter case the clause may run as in the preceding form, altering the final words thus:

without deduction of any sums which the said C. or his foresaids may have recovered on account from the said A. or his foresaids, or from the rents or other income or the proceeds of the security hereby created, or from any source other than me the said B. or my foresaids.

In the other case the clause may run after "viz.": that I, the said B., my estate and representatives shall not, under that obligation or anything that may follow thereon, be liable to pay more than the sum of £, and interest thereon at the said rate from the date of demand therefor, or default in punctual payment of interest under these presents, or entering into possession, or commencement of proceedings for realization of the said security by the said C. or his foresaids, whichever shall first happen, till paid, but that on the other hand, subject only to the said limitation of liability, the said obligation is a covering obligation and enforceable to the full extent of said limited liability without deduction of any sums which the said C. or his foresaids may or shall have recovered on account from the rents or other income or from the price or proceeds of the security hereby created, but under deduction of any sums which may or shall have been recovered from the said A. or his foresaids

without encroaching on the said security or the rents or other income thereof.

MERCANTILE GUARANTEES

1. SINGLE TRANSACTION

[Place and date.] In consideration of your supplying to B. or to his order a cargo of coals of tons or thereabouts within days from this date, I guarantee the price thereof up to \pounds . [Signed] A. To C.

2. THE LIKE WITH FURTHER CLAUSES

[Add as follows.] I shall be entitled to delay payment until , free of interest, and thereafter for an additional period of at 5 per cent. interest for the additional period. Further, you may take B.'s bill or other obligation or security at such period as you think fit up to . . . and may give time up to that date without prejudice to my guarantee.

To C.

3. FOR COURSE OF DEALING WITH LIMIT OF AMOUNT

[Place and date.] In consideration of your agreeing to supply B. with goods and otherwise give him credit, but only so long and to such extent and on such terms as you may from time to time think fit, I guarantee his account with you to the amount of \pounds . This guarantee is both continuing and covering. You may take B.'s bill or other obligation or security and may give time, all if and as and for such period as you think fit and without prejudice to this guarantee.

To C.

4. THE LIKE, INCLUDING PRESENT BALANCE

[Place and date.] In consideration of your agreeing to continue to supply B. with goods [as in preceding form to 'guarantee'], the sum at present due on his account with you amounting to \pounds or thereabouts, and also his account for future dealings. My total liability under this guarantee is not to exceed \pounds . This guarantee is both continuing [as in preceding form].

To C.

5. Continuing Guarantee (a) by a Firm, (b) to a Firm, and (c) for a Firm

We, A. B. & C., and A., B., and C., the partners thereof as such and also personally and individually and all jointly and severally, in consideration of D. E. & F. agreeing to supply G. H. & I. with goods and otherwise give them credit, but only so long and to such extent and on such terms as D. E. & F. may from time to time think fit, hereby guarantee to the said D. E. & F. payment of their account with the said G. H. & I. to the amount of £

. This guarantee is both continuing and covering, and is to apply to all dealings between the said two firms or their successors in business

notwithstanding any change in the membership, name, or business of either or both of them, and is not to be terminated by any change in the membership, name, or business of our firm. [Clause as to giving time, etc.]—In witness whereof.

6. CLAUSE AS TO TERMINATION

This guarantee may be terminated at any time on [one week's] written notice being given by me [or us] to the said [creditor], but that only as regards the future [or the period after the expiry of the notice].

BONDS OF CAUTION FOR EMPLOYEES, ETC.

For different reasons it appears unnecessary to give any form of bond of caution for such officers as judicial factors on the one hand and bank agents on the other. For other purposes the form may be adapted from the following

BOND OF CAUTION FOR A HOUSE FACTOR

We, A. and B., considering that C. has requested D. to employ him as a house and property agent and factor, and that we, being desirous that he should be so employed during the pleasure of the said D., have offered to grant these presents in manner underwritten, on which condition only the said D. will employ the said C. during pleasure as aforesaid. Therefore we hereby bind ourselves jointly and severally, and our respective heirs, executors, and representatives whomsoever, all jointly and severally without the necessity of discussing them in their order, to pay to the said D. on demand every and all sum and sums which may at any time and from time to time become due to the said D. by the said C. in respect or on account of his employment by the said D. as house and property agent and factor, and all loss, damage, and expense which the said D. may incur through such employment in any manner of way, with a fifth part more of liquidate penalty in case of failure in punctual payment, and the interest of any such sum and of all such loss, damage, and expense at the rate of five per centum per annum from the date when the same becomes due by the said C. or is incurred till paid, declaring always and it is hereby agreed as follows:-

First. The total principal sum to be recovered under the obligation hereinbefore written is limited to \pounds , with, in addition, penalty and interest as aforesaid.

Second. These presents shall constitute a continuing and covering obligation, and that whether the employment of the said C. by the said D. should be continuous or not.

Third. The acceptance of these presents implies no undertaking by the said D. to employ the said C., nor as to the duration, continuity, extent, or nature of such employment; and these presents are not dependent on any of these matters.

Fourth. We have ourselves made such inquiries on all points as we think proper, and we are satisfied with the results thereof, and are willing accordingly to grant these presents; and in doing so we do not rely on any representation express or implied by or on behalf of the said D.

Fifth. There shall be no obligation on the said D. to have periodical settlements with the said C., nor to insist against him for payment of any sums which may from time to time become due or in arrear; nor to use checks of any kind; nor to give us or our foresaids notice of any sums payable or in arrear, or of any failure, default, or irregularity, or of anything which may happen in connection with the employment of the said C.; nor to do diligence; and that all without prejudice to the obligation hereinbefore undertaken by us, the duty being on us and our foresaids to make such inquiries from time to time as we may think right.

Sixth. These presents are not to be terminated by us or either of us or our foresaids except only at the expiry of three months after receipt by the said D. of a notice of intention to terminate the same; and until the expiry of such period these presents shall be and continue in full force and effect; and further, even after the expiry of such notice, they shall continue in force to the effect of enabling the said D. to recover from us and our foresaids all sums which have become payable up to the expiry of the said period of three months, under limitation of liability as aforesaid, with penalty and interest as aforesaid, and expenses as aftermentioned.

And we bind ourselves and our foresaids, all jointly and severally as aforesaid, for payment of all expenses which may be incurred by the said D. in enforcing these presents or otherwise in consequence hereof or in relation hereto.—In witness whereof.

It may be desired to insert some modification of the clauses on p. 679 providing against all the obligations being bad because one may turn out to be so.

As to creditor's duty to cautioner on default, etc., of employees, see Snaddon v. London, etc., Ass. Co., 1902, 5 F. 182.

Assignations of Personal Bonds

In connection with assignations the following matters may be referred to:—

Equities between Debtor and Cedent.—The assignee of a personal bond is exposed to all exceptions pleadable against the assigner. Thus the debt may have been wholly or partly repaid or there may be compensating claims. The new lender is not in safety to take an assignation without first making inquiry of the debtor whether the whole debt still remains due and unaffected in any way.

Preferences in Competition.—In purchasing a bond or other debt due by a deceased debtor it cannot be assumed that the estate will be divided rateably among all the creditors, for any creditor may acquire a preference by diligence after the expiry of six months after the death, say by arrestment in the hands of a debtor of the estate. The case quoted shews how this might be prevented by personal bar.¹

Non-Assignable Rights.—It is convenient to note here the main

¹ Globs Ins. Co. v. Mackenzie, 1850, 7 Bell's Ap., 296.

classes of rights which may not be assigned, or at least the assignation of which is fettered by various restrictions.

- 1. Alimentary Provisions; but note (1) in order to give valid alimentary protection it appears to be necessary to constitute a continuing trust.1 (2) No one is entitled to tie up his or her estate in this way for his or her own benefit with the single exception of a wife during the marriage,2 the settlement being made by antenuptial deed, to which apparently the intended husband must be a party.8 But as to both of these rules personal bar may operate: thus an obligant for an annuity expressed to be alimentary, and those representing him, may be barred from questioning the alimentary nature of the provision.4 (3) Rule No. 2 strikes at a postnuptial provision by a husband to a wife so far as intended to take effect during marriage,5 for that would or might have the effect of really providing for himself through the name of his wife. (4) Capital cannot be made alimentary.⁶ (5) When the protection exists it is limited to what is reasonable in amount under all the circumstances; quoad excessum the provision is assignable. The undernoted cases 7 shew what was, under certain circumstances, held to be a sufficient aliment, but any one proposing to rely upon an assignment of the hypothetical excess, or even after a judgment of the court fixing the limit for the time, must keep two things in view, viz. (a) the amount fixed as aliment is a preferential first charge, and (b) the amount may at any time and from time to time be increased according to circumstances, e.g., marriage, birth of children, ill-health; and a subsisting assignation of the supposed excess would be no bar to a claim for increase of the aliment. (6) Each periodical payment is free as it falls due, and may be assigned, as may also arrears.
- 2. Delectus Personæ.—Whenever this principle operates, e.g. ordinary agricultural leases; as to leases, see more fully p. 611.
- 3. Contracts involving mutual rights and obligations.⁸ This is a class of great importance, and is even more important as the risk is apt to be overlooked. Thus if A. contracts with B. for a supply by A. to B. extending over a course of time, of, e.g. coals, paper, or machinery, and if A. sells his business to C., B. is not bound to go on taking the supply from C. This rule operates with great and disturbing force in (a) sales of businesses under sequestration, liquidation, or otherwise; (b) changes in partnership resulting in the constitution of a new legal persona, and (c) reconstruction of incorporated companies, the new com-

¹ Murray v. Macfarlane's Trs., 1895, 22 R 997

² Reliance, etc., Ass. Soc. v. Halkett's Factor, 1891, 18 R. 615, at p. 622.

³ Watt v. Watson, 1897, 24 R. 380.

⁴ Thomson v. T. & Co., 1902, 4 F. 980.

⁵ Dunlop v. Johnston, 1867, 5 M. (H. L.) 22.

Rothwell v. Stuart's Trs., 1898, 1 F. 81.
 Fenton Livingstone v. F. L., 1886, 14 R.
 Haydon v. Forrest's Trs., 1895, 3 S. L. T.
 286.

⁸ Grierson, Oldham & Co. Ltd. v. Forbes, Maxwell & Co. Ltd., 1895, 22 R. 812. International Fibre Co. Ltd. v. Dawson, 1900, 2 F. 686.

pany, even though consisting of the same members and under the same name as the old, being still in law a totally distinct and new company, thereby enabling the customers to throw up their contracts if it be to their interest to do so.

- 4. The salaries of public employments, to the extent to which these are reasonably necessary to enable the receiver to discharge, in a proper manner, the duties of his office, which is the condition of his tenure.
- 5. It has been held that an assignation of an expectant legacy is ineffectual, i.e. an assignation granted during the testator's life.1 But queere, though no doubt there would be difficulty and risk in regard to intimation, for no title would be completed by intimating to the testator or to the expectant executors before the testator's death. Of course it is obvious that in an ordinary case there is a totally different and fatal objection to an assignation of this kind, viz., that any attempted intimation would almost certainly lead to the legacy being revoked. But then the case in which it sometimes arises as a practical question is where the testator has become insane after the execution of the will. Or it may be not a legacy, but an expectant chance of intestate succession to an insane person, the assignment of which would probably require to be held as ultra vires if Bedwells is to be regarded as fatal to an assignation of a legacy from a living person. These rights are commonly assigned in England, where the want of complete notice is a certain objection, but not to the same extent as with us; and in this connection it may be noted that the English courts will not allow stop-orders to be used with reference to the estates of insane persons.2
- 6. An assignation of a share in a partnership does not make the assignee a partner, delectus personæ preventing that result. But an assignation of the share is competent to the effect of entitling the assignee to receive the assigner's share of profits and (at the proper time) of the assets, and the assignee must accept the account of profits agreed to by the partners.³
 - 7. Liferents, in a sense, as to which see p. 238.

Forms of Assignation.—The Transmission of Moveable Property (Scotland) Act, 1862, gives two forms. The one is intended to be written apart from, and the other to be annexed to, the bond. It is directed that the forms shall specify—(1) the nature of the deed assigned (unless the assignation is annexed); (2) any connecting title; and (3) any circumstances requiring to be stated in regard to the nature and extent of the right assigned.

(1) Nature of Bond.—It is not uncommon to introduce a full narrative of the bond, but this is quite unnecessary. A very brief

¹ Bedwells v. Tod, 2nd December 1819, F. C. ² In re Wilkinson, 1874, L. R. 10 Ch. 78. ³ Partnership Act, 1890, s. 31 (1) and (2).

statement of the obligation is all that is required though the deed is separate.

- (2) Connecting Title.—This is where the granter of the assignation is himself an assignee or has otherwise derived right by transmission the title will be briefly deduced.
- (3) Nature and Extent of Right Assigned.—This means the nature of the assignation, not of the bond. It is not easy to say what "nature" really points to. As to "extent," if the assignation is partial (which in the case of a personal bond is uncommon), this will be specified; and in any case it must be stated from what date interest is assigned.

Warrandice.—The statutory forms contain no warrandice, but of course it will be implied according to the circumstances, and it may be better that what is intended should be expressed.

Registration Clause.—The statutory forms contain no registration clause, and none should be inserted. A consent for execution is ineffectual, and a consent for preservation is unnecessary. The only matter in connection with registration which requires attention as regards assignations is that—

Where the bond has been registered for execution before the date of the assignation, the assignation should expressly assign, not only the bond, but also the decree and warrant. The assignee will then be entitled to obtain a fiat for summary diligence against the original debtor under the Personal Diligence Act, whereas if the bond only is assigned, the assignee must use letters of horning.

Intimation.—This is dealt with at p. 681.

ASSIGNATIONS OF PERSONAL BONDS

By Original Creditor-Separate Deed

- I, A., in consideration of the sum of \pounds , now paid to me by B., do hereby assign to the said B. and his executors 1 or assignees the bond granted by C. dated , by which he bound himself to pay to me the sum of \pounds at the term of with interest at the rate of per centum per annum, which interest is hereby assigned for the period after the term of .—In witness whereof.
 - ¹ Executors.—The statutory forms say "heirs," but executors is better.

By Original Creditor-Annexed Deed

I, A., in consideration of the sum of £, now paid to me by B., do hereby assign to the said B. and his executors or assignees the foregoing [or within written] bond granted in my favour, with interest from the term of .—In witness whereof.

By Original Creditor-Separate Deed-Part only

I, A., in consideration of the sum of £500, now paid to me by B., do hereby assign to the said B., and his executors or assignees, but only to the

extent after specified, the bond granted by C. dated , by which he bound himself to pay to me the sum of £1000 at the term of , with interest at the rate of per centum per annum. But these presents do and shall assign the said bond only to the extent of the said sum of £500, with interest thereof from the term of and penalties corresponding thereto if incurred. And I bind myself to make the said bond or an extract thereof furthcoming to the said B. and his foresaids on all necessary occasions on the usual terms.—In witness whereof.

Note.—A partial assignation of a personal bond is rare. If taken at all, the bond should certainly be first recorded, and in that case the decree also will be assigned to the same extent.

By DERIVATIVE CREDITOR—SEPARATE DEED

I, A., in consideration of the sum of \pounds , now paid to me by B., do hereby assign to the said B. and his executors or assignees the bond granted by C. dated , by which he bound himself to pay to D. the sum of \pounds at the term of with interest at the rate of per centum per annum, which interest is hereby assigned for the period after the term of , to which bond I acquired right conform to assignation by the said D. in my favour dated .—In witness whereof.

By Original Creditor—Separate Deed—Decree of Registration also Assigned

I, A., in consideration of the sum of £ , now paid to me by B., do hereby assign to the said B. and his executors or assignees (first) the bond and registered in the Books of granted by C. in my favour dated , by which he bound himself to pay to me the Council and Session on at the term of with interest at the rate of per centum per annum, which interest is hereby assigned for the period after the term of ; and (second) the decree by the Lords of Council and Session at my instance against the said C. for the sum contained in the said bond, which decree was obtained by registration as aforesaid, and is dated the said [date of registration], with the extract thereof and warrant of the said Lords therein contained, with all that has followed or is competent to follow thereon.—In witness whereof.

THE SAME, WITH DILIGENCE

[Add at end.] And particularly without prejudice to the said generality—
(first) the charge given at my instance to the said C. on for payment of
[as in charge]; (second) the arrestment used at my instance in the hands of D. on
, with all goods, debts, sums of money, and everything else thereby
attached; (third) the poinding executed at my instance of the property of the
said C., on in or about his premises at or elsewhere, and all goods
and property thereby attached; and (fourth) the inhibition used at my instance
against the said C. on , together with the executions of charge,
arrestment, poinding, and inhibition, under the hands of respectively,
and dated respectively the said [dates] or of whatever other dates the said

diligences and executions thereof may be, and the whole tenor, contents, effect, and benefit thereof, and right to follow forth the same [but not in name or at the instance of me or my representatives].

DISCHARGES

Personal Bonds.—There may be a formal deed of discharge, and if so, it will take the following form:—

(1) By Original Creditor

I, A., in consideration of the sum of \pounds , instantly paid to me by B., do hereby discharge a bond dated , granted by the said B. in my favour for \pounds and all interest due thereon.—In witness whereof.

(2) By Assignee

I, A., in consideration of the sum of £, instantly paid to me by B., do hereby discharge a bond dated, granted by the said B. in favour of C. for £ and all interest due thereon, to which bond I acquired right by assignation granted by the said C. in my favour, dated .—In witness whereof.

But a simple receipt on the bond, without any words of discharge, is of course sufficient, and will save expense.

¹ Niven v. Ayr Burgh, 1899, 1 F. 400.

SECTION III

BILLS AND PROMISSORY NOTES

THE law (except as to summary diligence) is codified in the Bills of Exchange Act, 1882; when not otherwise stated the references in this section are to that Act. All that is attempted here is to give the forms (which the Act does not do), and to group in convenient shape for reference some of the leading rules which require to be appealed to most frequently. As matters of this kind frequently require much dispatch, a little repetition has been purposely introduced, so that if possible what is wanted may be readily found.

Definitions.—1. Bill.—A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.¹

2. Promissory Note.—A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.²

The provisions of the Act with reference to bills apply also to notes, subject to the special rules laid down in Part IV. of the Act.³ Except so far as the differences are obvious (e.g. that presentment of a note for acceptance is unnecessary), they are pointed out in the following pages.

Joint or Several Liability.—In the case of a bill two or more parties thereon, whether drawers or acceptors or indorsers, are jointly and severally liable.⁴ In the case of promissory notes the rule is statutory so far as the makers are concerned:—

A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor. Where a note runs, "I promise to pay," and is signed by two or more persons, it is deemed to be their joint and several note.⁵

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¹ a. 8. ⁴ Bell, Pr. 61.

² s. 83. ⁵ s. 85. ³ s. 89.

This in Scotland apparently means joint and several liability when the contrary is not expressed,1 and the same will apply to indorsers.

Security.-1. Bills.-There must be no order to pay out of a particular fund, for that would destroy the instrument as a bill.2 But note that the bill may contain an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount.2 and further

in Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder from the time when the bill is presented to the drawee.8

And an acceptance payable at a certain bank has the same effect on presentment.4

2. Notes.—Security may be given expressly in gremio of the note.

A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.5

Usually it will be better to have a more formal document when security is to be taken. However, there may be occasions when it is necessary to take a document of this kind; and when that is so, it is recommended that a promissory note be taken and not a bill. For if a bill be taken, observe that (1) the bill must be drawn upon the holder of the security, e.g. trustees in the case of a legacy, which is very undesirable, or the insurance company in the case of a policy, or the customer in the case of a book debt-which are still worse; (2) what the trustee or debtor holds must be 'funds' which may exclude many cases, e.g. trustees holding heritable property; and (3) the funds must be available for the payment of the bill, which can hardly be predicated of funds held for the drawer in fee, but subject to say a subsisting liferent. All these objections disappear in the case of a note. as to both bills and notes in this connection great care must be taken to avoid destroying the instrument as such by introducing any indefinite obligation. Suppose, for instance, in an emergency, security over a life policy were taken in this form, it would be fatal to introduce an obligation to pay the premiums in general terms, and even if a stated sum per annum were inserted that would still be fatal as being unlimited as to time, and it will probably be found that it could not be done at all. Security when introduced would appear to increase the stamp duty.

Instalments.—Both bills and notes are to relate to "a sum." Therefore the total ought always to be stated in one sum, but it may be payable "by stated instalments" (i.e., number, dates, amount or amounts,

⁶ s. 9.



¹ Henderson, Sons & Co. v. Wallace & 4 B. L. C. v. Rainey's Trs., 1885, 12 R. 825. Pennell, 1902, 5 F. 166. ² s. 3 (3).

⁸ s. 58 (2).

⁵ s. 83 (3).

for of course the instalments need not be of equal amount), with or without "a provision that upon default in payment of any instalment the whole shall become due." 1

Interest may be expressly bargained for. The objects of doing so are (1) to fix the rate (an indefinite rate would be fatal to the bill as such),² and (2) to give interest for the period between the date of the bill on the one hand and maturity or (in the case of a bill payable on demand) presentment for payment on the other.

Interest Clause.—Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.³

No Interest Clause.—On dishonour the holder recovers inter alia the principal and interest thereon from the time of presentment for payment if the bill is payable on demand and from the maturity of the bill in any other case.

Fatal Contents.—A bill or note must not contain any of the following:—

- 1. Generally, any qualification of the order or promise; but polite expressions, e.g. "please," in a bill, may not be fatal.
 - 2. Any uncertainty in the amount, or alternative amounts.
 - 3. Any uncertainty as to time of payment. But-
 - (1) Instalments are allowable (supra, p. 28).
 - (2) Time of payment may be on demand, or at sight or on presentation.
 - All deemed payable on demand.⁵
 - (3) Or it may be unexpressed.
 - (4) A bill accepted, and a bill or note endorsed, when it is overdue is, as regards such acceptor or endorser, payable on demand.⁵
 - (5) A bill [or note] is payable at a determinable future time which is expressed to be payable—
 - (a) At a fixed period after date or sight.
 - (b) On, or at a fixed period after, the occurrence of a specified event which is certain to happen though the time of happening may be uncertain.⁶

Ex. "On my death" or "one year after my death" are both good, and so of any other person's death; on or after attainment of certain age or marriage, both bad; "death or marriage," bad. Note that the introduction of a contingency being fatal, "the happening of the event does not cure the defect."

4. An order in a bill to two drawees in the alternative or to two or more drawees in succession.

¹ s. 9.

² Tennant v. Crawford, 1878, 5 R. 433.

⁸ s. 10.

⁶ s. 11.

⁷ s. 6 (2).

⁴ s. 57 (1) (b).

5. Any order or obligation of or for any act in addition to the payment of money, e.g. to insure or to give security.

This latter would certainly invalidate a bill, but as to notes it may possibly admit of question in view of s. 83 (3) above referred to.

6. An order in the case of a bill to pay out of a particular fund.² It appears clear that the same holds as regards a promise in a note to pay out of a particular fund—which is not an unconditional promise to pay, differing entirely from an absolute promise with security over a particular fund.

Non-fatal Elements.—

1. The omission of the date of the instrument.3

Where a bill [or note] expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance.⁴

- 2. Ante-dating or post-dating.5
- 3. The omission of date of payment: it is then payable on demand.
- 4. The omission of any special statement, or any statement at all, of value, *i.e.* the words "value received" are not necessary.
 - 5. The omission of the place of drawing and payment.8
- 6. Joint, or alternative, or ex officio payees, "or one or some of several payees." 9
- 7. Discrepancy between words and figures in sum: the words prevail.¹⁰
 - 8. Instalments,
 - 9. Interest,

See *supra*, pp. 28–29.

10. Security in notes,

Parties.—1. Corporations are not empowered by the Act to become liable on bills or notes; their capacity or want of it falls to be determined apart from the Act.¹¹

- 2. Minors may be liable if the obligation be in course of trade or for necessaries.
- 3. Married women are commonly incompetent to incur liability on bills or notes, but they may be liable under exceptional circumstances.¹²
- 4. Per procuration.—This operates as notice of limited authority, and the principal is liable only if the power authorised the obligation.¹⁸
- 5. Representative Capacity. The distinction here is somewhat fine as to whether the agent or representative incurs personal

¹ s. 3 (2).	⁹ s. 7 (2).
² 3 (3).	¹⁰ s. 9 (2).
³ 3 (4) (a).	¹¹ 8. 22.
4 s. 12.	¹² Davis v. Murray, 1898, 6 S. L. T. No.
⁵ s. 13 (2).	132; Gibson v. Irvine, 1900, 7 S. L. T. No.
⁶ 10 (1) (b).	385; Galbraith v. Provident Bank, 1900, 2
⁷ 3 (4) (b).	F. 1148.
8 3 (4) (c).	¹³ s. 25.

liability.¹ The proper course is to make the expression clearly taxative and exclusive of personal liability. Thus, after the signature and statement of representative capacity, add "and only as such [official] and not personally or individually." ²

Payee.—Negotiation.—The payees may be joint, or alternative, or ex officio payees, or one or some of several payees. If drawn or endorsed not to A., but to his order, "it is nevertheless payable to him or his order at his option." The words "or order" are always unnecessary in the absence of any "words prohibiting transfer or indicating an intention that it should not be transferable" *e.g. "to A. only" or "not negotiable." Contrast "not negotiable" cheques.

Presentment for Acceptance.6—Obviously this applies only to bills. It is essential in the following cases only:—

- 1. Bills payable after sight, in order to fix the date of maturity. In this case, if the bill be negotiated before acceptance, the holder must either present it or again negotiate within a reasonable time, otherwise the drawer and prior indorsers are free.
- 2. Bills containing an express stipulation that they shall be presented for acceptance.
- 3. Bills drawn payable elsewhere than at the residence or place of business of the drawee.

The precise rules for presentment for acceptance are set out in sec. 41 et seq. Though the holder have reason to believe that the bill will be dishonoured, he must present. If not accepted within the customary time, the bill must be treated as dishonoured, otherwise the drawer and indorsers are free.⁸ If not accepted, presentment for payment is unnecessary, and an immediate claim arises at the instance of the holder against drawer and indorsers.⁹ The holder is not bound to take a qualified acceptance.¹⁰ If he do, the drawer and indorsers are free, except so far as they have authorised it or subsequently assent.¹⁰ This does not apply to partial acceptance of which the holder gives notice.¹⁰ These last rules come to this—

- (1) If only partial or otherwise qualified acceptance be offered, the holder is not bound to take it, but may treat the bill as dishonoured and give notice at once.
- (2) If a partial acceptance be offered, it may be safely taken if otherwise satisfactory, and if notice be given at once, *i.e.* the *consent* of drawers or indorsers is not required.
- (3) If any other kind of qualified acceptance be offered, the holder, if disposed to take it, must give notice at once to drawer and indorsers, and if they do not within a reasonable time express dissent, the holder

1 s. 26.	⁶ s. 39.
² Cf. s. 31 (5) as to endorsements.	⁷ s. 40.
³ s. 8 (5).	⁸ s. 42.
4 s. 8 (4).	⁹ s. 43.
⁵ s. 81.	¹⁰ s. 44.

may take the acceptance without releasing them; otherwise not. But observe that "an acceptance to pay at a particular place" (which is very common) is a general acceptance, unless payable there only.

Indorsements.2—The leading rules are :--

- 1. The indorsement must be on the bill. The signature alone is enough.
 - 2. It must be of the whole bill.
- 3. And wholly to one person, or to one set of persons jointly and not severally. That is, a £100 bill may be endorsed to A. and B., but not £50 to A. and £50 to B.
- 4. From which rule it follows that a bill payable to two or more must be indorsed by both or all, unless they are partners.
- 5. Conditions may be added to endorsements (1) prohibiting further negotiation,³ (2) negativing personal liability in the case of representative indorsers,⁴ (3) negativing recourse in all cases. Other conditions ought not to be introduced. If they are, the payer may safely disregard them.⁵

Presentment for Payment is not necessary in the following cases:—

- 1. In order to render the acceptor of a bill liable if the acceptance be general.⁶
- 2. In order to render the maker of a note liable unless the note is, in the body of it, made payable at a particular place.⁷

Observe here a curious distinction between bills and notes. A bill accepted payable at a particular bank without the word "only" or similar words need not be presented in order to make the acceptor liable. But a note payable at a particular bank, although without any taxative word, must be presented in order to render even the maker liable. As regards both bills and notes there must be presentment and protest as a warrant for summary diligence even against the acceptor or maker; and not only so, but the presentment must be at the proper place in terms of the Act, and it would seem also on the exact due date.

Rules for Presentment for Payment.—These are fully set out in ss. 45 and 46. The following may be specially noted:—

- 1. If not payable on demand, 10 the bill or note must be presented, on its due date, i.e. on its last day of grace.
- 2. If payable on demand, the presentment must be within a reasonable time after issue in order to render the drawer liable, and within a reasonable time after indorsement in order to make the indorser liable.
- 3. The place is (1) that specified, (2) failing which, the address given, (3) failing which, the acceptor's place of business if known, (4) and if not,

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<sup>1</sup> s. 19.
<sup>2</sup> s. 32.
<sup>3</sup> s. 35.
<sup>4</sup> s. 31 (5).
<sup>5</sup> s. 33.
<sup>6</sup> s. 52 (1), s. 19.
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his residence—observe the residence will not do if his place of business be known; (5) in any *other* case, personally or at last place of business or residence—observe personal presentment will not do unless the methods previously stated fail.

Notice of Dishonour, whether by non-acceptance or non-payment, is necessary in order to preserve the liability of the drawer and indorsers, that is, notice must be given to each. The notice may be given by the holder or by an indorser liable on the bill. Any notice given by the holder enures for the benefit of all subsequent holders and all indorsers entitled to claim against the party to whom it is given. Notice given by an indorser enures to the holder and all indorsers subsequent to the party to whom it is given.

The simple practical rule is that when dishonour occurs the holder must at once give notice to all parties whom he desires to hold liable on the bill, and in like manner each of these, when he receives his notice, must at once give notice to each party whom he in turn claims to hold liable to him in relief. The notice need not be in writing, but of course it ought to be. If the giver and receiver of the notice reside in the same place, the notice must arrive on the day after dishonour; if in different places, it must be sent off on the day after the dishonour, or if no convenient post on that day, then by the next post.

Noting and Protest.—As to inland bills and notes "it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorsers" and multo magis as to the acceptor and maker. But noting and protest are necessary (1) to warrant summary diligence, and (2) in the case of foreign bills.

- Rules.—1. Time.—The noting must be on the day of dishonour.⁵ The protest may be extended later, and as of the date of noting.⁶
- 2. Place.—The protest must be at the place of dishonour, subject to certain exceptions.
- 3. Contents of Protest.8—(1) A copy of the bill, (2) at whose request the bill is protested, (3) place of protest, (4) date of protest, (5) cause or reason for protesting, e.g. non-acceptance or non-payment, (6) the demand made, (7) answer given if any, (8) or the fact that the drawee or acceptor could not be found. (9) The protest must be signed by the notary.8 It is not necessary for the witnesses to sign except when the protest is by householder instead of a notary (sch. 1), but in view of this it may be preferred that the witnesses should always sign.
- 4. Failing Notary.—"Where the services of a notary cannot be obtained at the place where the bill is dishonoured,9 any householder or substantial

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1 sa. 48, 49.
2 a. 51 (1).
3 a. 52 (3).
4 51 (2).
5 a. 51 (4), subject to certain exceptions in a 51. (9).
6 Ibid., and see also s. 93.
7 51 (6).
8 s. 51 (7).
9 Somerville v. Aaronson, 1898, 25 R.
524.
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resident of the place may in the presence of two witnesses give a certificate signed by them" in lieu of notarial protest.

Quære whether this warrants summary diligence.2

Summary Diligence.—This is unaffected by the Act.³ The rules are:—

- 1. Jurisdiction.—This procedure is available only against parties liable on bills and notes who are subject to the jurisdiction of the Scottish Courts. If that condition be not fulfilled, the mere fact that the place of payment is in Scotland will not make summary diligence competent.
- 2. Completeness of Bill.—The bill or note must be complete and regular ex facie, e.g. a bill signed by mark, though it may be good otherwise, will not warrant summary diligence. The bill must be dated. The omission of the word "pounds" is not fatal. An unnamed ex officio holder cannot use summary diligence.
 - 3. Protest is essential; as to protest by householder, see supra.
- 4. Time Limit.—The protest must be registered within six months of the date of the bill if for non-acceptance, and within six months after maturity if for non-payment, or after demand if the bill be payable on demand.

Bill to Drawer

£100.

[Place, date.]

Three months after date pay to me or my order [within [place]] the sum of one hundred pounds, value received.

A.

To B.

Joint and Several Bill to Drawer

£100.

[Place, date.]

On [date] jointly and severally pay to me or my order [place] the sum of one hundred pounds, value received.

A.

To B. and C.

Bill Drawn by Company

£100.

[Place, date.]

On [date] pay to the X. Company Ltd., or order, within its registered office at the sum of one hundred pounds, value received.

A., Director,
B., Director,
C., Secretary,

Of the said Company, but all only as such and to bind the Company, and not personally or individually.

To D.

¹ a. 94.

² Somerville v. Aaronson, 1898, 25 R. 524.

³ s. 98.

⁴ Gordon v. Sloss, 1848, 10 D. 1129.

⁵ Fraser v. Bannerman, 1853, 15 D. 756.

⁶ M'Rostie v. Halley, 1849, 12 D. 124.

Bill with Interest

£100.

[Place, date.]

On [date] pay to me or order [place] the sum of one hundred pounds [value received], with interest at the rate of five per centum per annum from this date till paid [payable half-yearly at the terms of Whitsunday and Martinmas, beginning at the term of

A.

To B.

Bill to Third Party

£100.

[Place, date.]

On demand pay to C. or order [place] the sum of one hundred pounds, value received.

A.

To B.

Instalment Bill

£100.

[Place, date.]

Pay to me or order [place] the sum of one hundred pounds, value received, in instalments of ten pounds each on 1st [month and year] and the first day of each of the nine months immediately following [but on default in payment of any instalment the whole sum of £100 or the balance thereof for the time being shall become due].

A.

To B.

Promissory Note

£100.

[Place, date.]

On demand I promise to pay to B. or order within [place] the sum of one hundred pounds, value received.

A.

Joint and Several Note

£100.

[Place, date.]

On [date] we jointly and severally promise to pay to C. or order within [place] the sum of one hundred pounds, value received.

A.

В.

Note by Firm and Partners

£100.

[Place, date.]

Three months after date we, A., B. & C., and A., B. and C., the individual partners of said firm as such partners and as individuals, jointly and severally promise to pay to D. or order within [place] the sum of one hundred pounds, value received.

A. B. & C.

A.

B.

C.

Indorsations

Ordinary Form-"Blank"

This is simply the signature on the back of the bill.

Ordinary Form-"Special"

Pay to D. or order.—(Signed) A.

Without Recourse

Pay to D. or order without recourse.

In Representative Capacity

Pay to D. or order.

A., Director,
B., Director,
C., Secretary,
All of the X. Company Ltd., but only as such and on behalf of the Company, but not personally or individually [and also without recourse against the Company].

Negativing Joint and Several Liability

Pay to D. or order.

A., With joint, but not several, nor B., joint and several, liability.

Prohibiting further Negotiation

Pay D. only.—A.

Protest.—1. Acceptor or Maker found.—Prefix a full copy of the bill, including acceptance, indorsements, and anything else written on it.

Know all men that I, A., notary public of , in the county of , in the United Kingdom, at the request of B., did on the day of at [place] present the bill of exchange above written to C. and demand payment thereof, to which demand he made answer [state it if any, or say made no answer] whereupon I date and place foresaid protested and now do protest the said bill of exchange against the said C. [and indorsers] and all others concerned for non-payment of the contents and for interest, damages, and expenses, in the presence of D. and E.

[Motto], A., N. P.

Witnesses do not sign. Stamp 1s.; may be adhesive.

2. Acceptor or Maker not found

Know all men that I, A., notary public of , in the county of , in the United Kingdom, at the request of B., did on the day of proceed to [place] for the purpose of presenting the bill of exchange above written and demanding payment thereof, but after reasonable diligence neither

C. nor any person authorised to pay or refuse payment could be found, whereupon I [as above].

3. At Bank

Know all men that I, A., notary public of , in the county of , in the United Kingdom, at the request of B., did on the day of proceed to [state precise office of Bank], and C. not being found nor any one otherwise specially authorised to pay or refuse payment of the bill of exchange above written, I presented the said bill of exchange to the cashier of the said Bank there and demanded payment thereof, to which demand he made answer that the Bank had no instructions [or "no funds"], whereupon [as above].

4. By householder

Know all men that I, A., householder, of , in the county of , in the United Kingdom, at the request of B., there being no notary public available, did on the day of , at [place], demand payment [or acceptance] of the bill of exchange hereunder written from C., to which demand he made answer [state answer if any, or say made no answer], wherefore I now in the presence of D. and E. do protest the said bill of exchange.

A.,
D., Witnesses. Note the witnesses must sign in this case.

Annex a full copy of the bill and all that is written thereon.

SECTION IV

REGISTRATION—EXECUTION

THE three purposes of registration are (1) preservation, (2) execution, and (3) publication. The second is never found except in combination with the first; and the first, or the first and second, may be combined with the third.

Publication is limited to land-rights. The others also are applicable to land-rights.

Execution requires an express consent by the debtor; the others do not, though it is very common to find a clause of consent—indeed, it is given in statutory forms—in cases where there can be no execution, but it is of no use at all, and may be omitted.

Publication requires a warrant of registration; the others do not, unless they are combined with publication, when they do.

REGISTRATION FOR EXECUTION

The essentials required to authorise summary diligence are:-

1. Definite obligation, i.e. an obligation distinct as to (a) amount, (b) time of payment, (c) creditor, and (d) debtor. As to amount, an indefinite obligation as in a bond of cash credit may be made definite by a certificate by an official in terms of an agreement in the obligation, and the obligation and certificate being registered together will warrant summary diligence, but an agreement that the charge following on a certificate of that kind shall not be suspended except on consignation is not binding. As to time of payment, an obligation to pay on the death of A. would not authorise summary diligence, but if it is merely a future determinate date, a warrant may be obtained, but it will be qualified by the words "the terms of payment being always first come and bygone." There are special rules regarding summary diligence on partnership obligations. A charge is competent against the firm of A. & Co., but not, it seems, against an unincorporated company with a descriptive name, as the "X Coal Company." A decree against either

¹ Smith v. Drummond, 1829, 7 S. 792.
³ M'Lean v. Rose, 1836, 15 S. 286.

^{2 1 &}amp; 2 Vict. c. 114, Sched. 1.

class of company is a warrant for diligence against the individual partners.1

2. Express consent in gremio to registration for execution, except in the case of bills and notes.

But even if these conditions do exist, it does not follow that summary diligence is competent *de plano*. It is necessary to distinguish the following cases:—

- 1. New Debtor.—When it is sought to do diligence against the representatives of a deceased debtor, it is necessary (except as to cases within sec. 47 of the 1874 Act as aftermentioned) to obtain a decree of constitution, and to proceed on it. This, of course, may be obtained by a derivative, as well as by the original, creditor.
- 2. New Creditor.—If the original creditor has obtained decree (which includes a decree of registration), anyone (e.g. assignee or executor) deriving right from him to the debt and decree may obtain a warrant in the Bill Chamber or Sheriff Court, as the case may be, authorising arrestment, charge, and poinding against the original debtor. This is under the Personal Diligence Act.2 The point is that the Act applies to those acquiring right not merely to the debt but to the decree (s. 7). It is necessary that the person applying for the warrant should have right not only to the debt but also to the decree, and therefore it is important that the confirmation or assignation should expressly give a title to the decree as well as to the bond and debt. If the bond has not been recorded, the strictly proper procedure, before taking an assignation, would be to require the original creditor to record it, and thus make it possible to assign the decree. If the original creditor has recorded the bond before the date of the assignation, but the decree is omitted from the assignation, it is competent to go back to him and obtain a separate assignation of the decree. The alternative is to proceed by letters of horning; and that is the only course where the original creditor has not obtained decree at all.

As regards the matter of jurisdiction in the granting of warrants under the Personal Diligence Act, it stands thus: If the decree has been obtained from the Court of Session or Books of Council and Session, the minute must be obtained in the Bill Chamber, and in no other case can an original warrant be obtained in the Bill Chamber; for if the decree has issued from a Sheriff Court or Sheriff Court books, the warrant must be obtained from the same Sheriff Court. In this latter case, if it is desired to execute the warrant beyond the sheriffdom, separate application for a warrant of concurrence must be made either in the Bill Chamber or in the Sheriff Court within whose jurisdiction it is desired to execute the warrant: form Sch. 10 of the Act.

3. Heritable Securities.—The procedure under the Personal Diligence Act just referred to is as applicable to heritable securities as to personal

¹ Drew v. Lumsden, 1865, 8 M. 384.

² 1 & 2 Viot. c. 114.

bonds or other obligations. But that procedure, as has been seen, is not available in either of the following cases—(a) if the original creditor has not recorded the bond for execution; (b) if it is sought to enforce the obligation against anyone other than the original debtor. But by sec. 47 of the 1874 Act 1 a more general remedy is introduced in the case of heritable securities which is not displaced by either of these conditions. This procedure is available (a) without any registration for execution at all, either previously or at the time of applying for the warrant; (b) though the applicant is not the original creditor (his title being produced), and though he is only a partial creditor. On the other hand, the procedure is confined to the case where it is sought to enforce the obligation against someone who (a) is not the original debtor, and (b) is the proprietor of the security subjects. Accordingly it has no application to the cases of diligence (1) against the personal representatives of a deceased debtor, or (2) by a derivative creditor against the original debtor. The warrant which is obtained is in terms a warrant to charge only, but by the Act it is provided that "all diligence may thereafter proceed against the party in common form." It is not expressly provided that the bond must contain a consent to registration for execution in order to authorise this procedure, but the Act says the personal obligation may be enforced against such person by summary diligence or otherwise in the same manner as against the original debtor, which, it is thought, clearly requires the clause of consent as the foundation of summary diligence.

Horning.—Except as to cases within s. 47 of the 1874 Act as just dealt with, letters of horning are still necessary whenever the procedure is at the instance of a derivative creditor who does not hold an express title not only to the debt but also to a decree (which may be a decree of registration) obtained by the original creditor; and even this is competent only against the original debtor, otherwise a decree of constitution is required.

¹ Fully discussed in Section XXXIII; form of agreement in gremio on p. 327.

MINUTE FOR DERIVATIVE CREDITOR UNDER PERSONAL DILIGENCE ACT

(1) In BILL CHAMBER

[Place and date.] Warrant is craved to charge, arrest, and poind the property and effects of B. [debtor] 1 at the instance of A. as assignee [or executor] of C. [original creditor at whose instance the extract was issued]. Produced herewith assignation 2 by the said C. in favour of the said A., dated [or confirmation 3 by the sheriff of in favour of the said

- ¹ This can be the original debtor only.
- ² It must be an assignation of the decree. Note that every step in the title must be produced and referred to.
- 8 The confirmation must expressly give a title to the extract.

A. as executor of the said C., dated at on]. Dated the day of .

The clerk of bills subjoins—(1) fiat ut petitur, (2) date, (3) signature, and (4) on each document produced he puts the date and his initials.

The minute is endorsed on the extract.

It must be signed by a Writer to the Signet.

(2) In Sheriff Court

The form and procedure are the same, except that the minute is signed by the party or a procurator of Court and it is the sheriff-clerk who endorses the warrant.

MINUTE FOR SUMMARY DILIGENCE UNDER SEC. 47 OF THE 1874 ACT (SCHED. K)

ORIGINAL CREDITOR-WHOLE DEBT

Warrant is craved in virtue of the Conveyancing (Scotland) Act, 1874, at the instance of A., the creditor under a bond and disposition in security over the lands of X., in the county of Y. [or the house 1 King Street, in the city and county of Edinburgh, for the principal sum of £1000 with corresponding interest and penalties granted by B., then proprietor of the said lands [or subjects], in favour of the said A., and dated recorded in the division of the general register of sasines for the county of : To charge C., the present proprietor of the said lands [or subjects], and as such the present debtor in the said bond and disposition in security, to make payment to the said A. of the said principal sum of £1000 contained in and due by the said bond and disposition in , being the amount of the security, and also of the further sum of £ interest now due thereon.2 Produced herewith the said bond and disposition in security. Dated the day of

D., W.S., Edinburgh.
S.S.C., Edinburgh.
Law Agent, Glasgow.
(Or as the case may be.)

- ¹ Description should be kept very brief: the schedule says "specify shortly."
- ² Interest will be included not only to the last term, but to the date of the minute. The creditor is entitled to call up his loan on a six days charge, and of course he is entitled to require interest to the date of payment.

The clerk of the bills or the sheriff-clerk appends—(1) fiat ut petitur, (2) the date, and (3) his signature.

Part only.—If the whole debt is not due to A., in respect either of partial repayment or partial assignation, after "creditor" in line 2, insert "to the extent aftermentioned," and after "A." in line 10, insert "of the principal

sum of \mathcal{L} , being the extent to which the said A. is in right of the said bond and disposition in security."

MINUTE FOR ASSIGNEE

Warrant is craved in virtue of the Conveyancing (Scotland) Act, 1874, at the instance of A., the creditor in virtue of the assignation in his favour. aftermentioned under a bond and disposition in security over the principal sum of £1000 with corresponding interest and penalties granted by B., then proprietor of the said lands [or subjects], in favour of C., and , and recorded in the division of the general register of dated sasines for the county of \mathbf{on} : To charge D., the present proprietor of the said lands, and as such the present debtor in the said bond and disposition in security, to make payment to the said A. of the said principal sum of £1000 contained in and due by the said bond and disposition in security, and also of the further sum of £ , being the amount of the interest now due thereon. Produced b herewith—(1) the said bond and disposition in security, and (2) assignation by the said C. in favour of the said A., dated , and recorded in the said division of the general register of sasines on the Dated [as on previous page].

See notes 1 and 2 previous page.

- * The immediate title in favour of the new creditor is, it is thought, all that need be referred to here. Thus, if there have been two assignations—one by the original creditor to X., and the other by X. to A., the latter alone need be referred to. But if there is a general disposition in favour of A., followed by a notarial instrument in his favour, both must be referred to. If the notarial instrument is in favour of an executor, the confirmation also had better be referred to, and indeed it is recommended that the full title should be specified and produced, at least if conveniently possible.
- ^b Production.—The bond must be produced in this case as well as when the original creditor applies, but an extract from the Books of Council and Session or register of sasines is sufficient; and there must also be produced and specified the title in the creditor's person, as explained in the preceding note.

Part only.—If the whole debt is not due to B., after "creditor" in line 2, insert "to the extent and in virtue of," and after A. in line 9, insert "of the principal sum of \pounds , being the extent to which the said A. is in right of the said bond and disposition in security"; and after A. in line 14, insert "to the extent of the sum of \pounds with corresponding interest and penalties." But if less is now due to A. than was originally assigned to him, the first of these alterations will require to run—"A., the creditor in virtue of the assignation in his favour and to the extent aftermentioned."

PUBLICATION COMBINED WITH PRESERVATION, OR PRESERVATION AND EXECUTION

This rests upon two statutes—one passed in 1868 and the other in 1877.2

1 31 & 82 Vict. c. 64, s. 12.

² 40 & 41 Vict. c. 40, s. 6.



It is limited to registration in the general register of sasines (not in burgh registers) and in the Books of Council and Session (not any Sheriff Court Books).

The ordinary rule, of course, applies, that there must be a consent to execution before there can be registration for that purpose.

The warrant of registration must state the purposes for which it is desired to register, thus—"for preservation as well as for publication," or "for preservation and execution as well as for publication."

The principal writ is retained, and an extract is issued.

The writs are recorded at full length in the register of sasines, but they are not engrossed, but merely indexed, in the Books of Council and Session. The object of the whole procedure is the saving of expense.

It may (but ought not to) happen that a deed containing a consent to registration for preservation and execution is recorded on a warrant directing registration "for preservation as well as for publication," but saying nothing about execution. It may thereafter be desired to register for execution. It was to meet this case that the 1877 Act was passed. The objects are—(1) to make the extract issued on the first registration sufficient for the second registration instead of the principal, which is already retained in the register of sasines, and (2) to give the benefit of saving in expense. The procedure is—(1) the extract obtained on the first registration is presented in the register of sasines with a warrant thereon directing registration "for preservation and execution," saying nothing about publication; (2) a memorandum is inserted in the appropriate division or divisions of the register of sasines referring to the previous registration, and that is deemed full registration; (3) accordingly the writ is indexed in the Books of Council and Session; (4) the extract as presented is retained, and an extract thereof is issued.

This procedure is not available when the first registration has been for publication only in the usual way. In that case, if it is afterwards desired to register for execution, the writ must be presented in the Books of Council and Session, when it is recorded at full length. This is the ordinary case of obtaining a warrant to charge on a bond and disposition in security already recorded in the register of sasines.

The combined warrants are most used in the case of feu-contracts, contracts of ground-annual, and deeds of assumption containing special conveyances of heritable property or securities.

SECTION V

INDENTURES OF APPRENTICESHIP

Writing.—Rei Interventus.—Even apart from the rules of different societies, writing is essential assuming that the period is over a year. If the writing be defective in form as distinguished from substance, rei interventus will validate it. But the facts showing rei interventus must be inconsistent with a contract for one year only.¹

Capacity.—The apprentice will usually, though not always, be a minor. If his father is in life, or if he has any other curator, the father or curator will concur. But it is not settled that, even when a guardian exists, an indenture entered into by the minor alone is null.² If the apprentice is a pupil, it would appear clear that he cannot bind himself, and further, that neither can his tutor, if any, bind him. Apart, however, from age limits in particular professions and occupations, it does not appear that this matter of the apprentice's capacity is one of any practical importance. If he chooses to serve, the indenture will also serve its purpose; and if he chooses not to serve, the case of Stevenson is no encouragement to the other party to take action.

Minimum Ages.—(1) W. S., 18; or if a graduate in Arts, 19 with a three years' apprenticeship.

- (2) Law agent, none; but the apprenticeship is five years, and the minimum age for qualifying is 21.3
 - (3) Chimney-sweepers, 16.4
 - (4) Sea-service, 12.5

Cautioner.—See Stevenson, supra. From that case it is clear that the cautioner will be held to his obligation, though the principal, the apprentice, may be free. But the practical result there was that it was held that there was no substantial damage by the apprentice deserting his service, and while the master was successful against the cautioner, he recovered only £5 damages, and did not obtain even full judicial expenses.

Gow v. D. M'Ewan & Son, 1901, 8
 S. L. T. No. 386. Grant v. Ramage & Ferguson, 1897, 25 R. 35.

^{3 36 &}amp; 37 Vict. c. 63, 5 (1).

^{4 27 &}amp; 28 Vict. c. 87.

⁵ 57 & 58 Vict. c. 60, s. 106.

² Stevenson v. Adair, 1872, 10 M. 919.

Assignation.—The doctrine of delectus personæ applies, and therefore the master cannot assign his apprentice to a new master without the apprentice's consent; and if there is a cautioner, he will give a new obligation to the new master. Under the Law Agents Act (s. 5 (5)), a master may permit his apprentice to serve any part of his time, not exceeding two years, with another qualified master. This is not an assignation, and the only discharge will be by the original master.

Discharge.—It is usual to have a discharge at the expiry of the apprenticeship. This is not essential as proof of the service, but it is the best and easiest proof, and besides, there ought clearly to be a discharge to the cautioner. Indeed, there ought to be a mutual discharge, but in practice it is usually just a unilateral discharge by the master in favour of the apprentice and his cautioner.

Stamp Duty.—The stamps on indentures are: W.S., £60; any other case, 2s. 6d. Assignations, permissions, and discharges, no money being paid, and the documents containing no consent to registration, appear not to be liable to stamp duty.

Registration.—Every indenture of a law apprentice must be recorded in the register of probative writs (Sheriff Court Books) "of the county in which the same is entered into," which presumably means the place where the apprenticeship is intended to be served. It must also be intimated to the Registrar of Law Agents "within six months from the date fixed for the commencement of the apprenticeship." Any assignation must be intimated to him within six months of its date. In addition, in the case of a W.S. indenture, it and any assignation and the discharge must be registered in the Signet Office within three months of its date.

INDENTURE BETWEEN A WRITER TO THE SIGNET AND APPRENTICE WITH HIS FATHER'S CONSENT

It is contracted between A., Writer to the Signet, residing in Edinburgh, on the one part, and B., son of C., with consent of the said C., and the said C. as cautioner and surety, and taking burden on him for the said B., on the other part; That is to say, the said B., with consent foresaid, hereby becomes bound apprentice to the said A. in his profession of a Writer to His Majesty's Signet, and that for the space of five years from , which is hereby declared to be the commencement of the said apprenticeship, during which time the said B., and the said C. as cautioner for him, hereby bind themselves jointly and severally that the said B. shall serve the said A. in his said profession honestly, faithfully, and diligently, and shall at no time absent himself from his master's service without permission, under pain of two days' service for each day's absence, and that he, the said B., shall conceal

¹ Edin. Glasshouse Co. v. Shaw, 1789, Mor. 597. ² 36 & 37 Vict. c. 63, 5 (2).

the secrets of his master's business and the business of his clients, and that he shall behave himself decently, civilly, and discreetly towards his master, and shall abstain from bad company and vicious practices. For which causes [and in consideration of an apprentice fee of £100 instantly paid by the said C., the receipt of which the said A. hereby acknowledges], and on the other part, the said A. binds himself to teach the said B. in his profession as a Writer to the Signet so far as he knows himself, and so far as his said apprentice shall be capable to learn. And the said B. hereby binds himself to relieve the said C. of his foregoing cautionary engagement for him, and of all damages and expenses which he may sustain or incur through the same.—In witness whereof.

INDENTURE BETWEEN A FIRM OF LAW AGENTS AND THEIR APPRENTICE WITH CONSENT OF HIS CURATORS

It is contracted between A., B., and C., all law agents and conveyancers in , on the one part, and D., residing at son of the late E., with consent of F., G., and H., his curators appointed by his father in his trust disposition and settlement, dated and registered in the Books of Council and Session on , and the said F. personally and individually as cautioner and surety, and taking burden on him for the said D., on the other part; That is to say, the said D., with consent foresaid, hereby becomes bound apprentice to the said A., B., and C., and the survivors and survivor of them, in their profession of law agents and conveyancers in , and that for the space of five years from , which is hereby declared to be the commencement of the said apprenticeship, during which time the said D., and the said F. as cautioner for him, hereby bind themselves jointly and severally that the said D. shall serve the said A., B., and C., and the survivors and survivor of them. in their said profession honestly, faithfully, and diligently, and shall at no time absent himself from his masters' service without permission, under pain of two days' service for each day's absence, and that he, the said D., shall conceal the secrets of his masters' business and the business of their clients, and that he shall behave himself decently, civilly, and discreetly towards his masters, and shall abstain from bad company and vicious practices. which causes, and on the other part, the said A., B., and C. bind themselves to teach the said D. in their profession as law agents and conveyancers so far as they know themselves, and so far as their said apprentice shall be capable to learn. And the said D. hereby binds himself to relieve the said F. of his foregoing cautionary engagement for him, and of all damages and expenses which he may sustain or incur through the same.—In witness whereof.

INDENTURES IN OTHER PROFESSIONS AND TRADES

These will be readily adapted from the foregoing. In many businesses it is the intention that the apprentice shall be for so many years in one department, and for the remainder of the time in another, e.g., in the case of the

nursery and seed business, for three years in the nursery, and for two years in the seed warehouse. In each case it will be proper to state this briefly thus:

After the word "diligently" in the foregoing form, say—

and that for the first three years in the nursery, or one or other or some of their nurseries, and for the remaining two years in the seed warehouse.

DISCHARGES OF INDENTURE

1. SIMPLEST FORM

I, A., designed in the foregoing indenture [or the indenture of which the foregoing is an extract], considering that the also therein designed B. has served me as my apprentice during the full period therein stipulated, do hereby discharge him, and the also therein designed C., of their whole obligations thereunder.—In witness whereof.

To be engrossed on the original indenture, or extract of it.

2. Where (Legal) Apprenticeship has been Divided

I, A., designed [as above], considering that the also therein designed B. has served the full period therein stipulated, whereof three years were served with me and the remaining period of two years was by my permission served with D., do hereby discharge the said B., and the also therein designed C., of their whole obligations thereunder.—In witness whereof.

3. MUTUAL DISCHARGE

We, A., B., and C., the parties to the foregoing indenture [or the indenture of which the foregoing is an extract], considering that the period of apprenticeship therein stipulated has expired and was duly served, as I, the said A., hereby admit, do hereby mutually discharge each other of all obligations under or in respect of the said indenture and apprenticeship.—In witness whereof.

SECTION VI

FACTORIES AND COMMISSIONS, AND POWERS OF ATTORNEY

Speaking generally, these deeds are prepared either (1) because the granter is, or is going, abroad and the powers have to be exercised here, or (2) vice versa, because the granter is remaining at home and the powers have to be exercised abroad. In the former case—home use—it is common to call the deed a factory and commission. In the latter case—use abroad—it is usual to call it a power of attorney. But indeed, if the deed is to be, or may have to be, used out of Scotland at all, the latter name is preferable. For the office, "attorney" is much the best name; it is better known in Scotland than the terms "factor" and "commissioner" are known elsewhere in that sense. Besides, "factor" has rather too limited a suggestion, and "commissioner" rather errs in the opposite extreme, unless what is in view is the management of a landed estate in Scotland.

Two or more Attorneys.—It must be made clear whether they are both or all to hold office at one time, or whether they are intended to take office only by succession the one to the other.

Joint Attorneys.—If they are to be attorneys together, it must further be made clear (1) whether the power of attorney is to fall altogether if any of them should die or otherwise cease to hold office; (2) whether both or all the acting attorneys must concur in every act: (3) or whether there is to be a quorum; or (4) a sine quo non; or (5) whether each and any or either of the attorneys may act by himself alone. Of course there may be special cases requiring to be specially provided for, but, as a general rule, it is recommended that the attorneys should be appointed jointly and severally, the power of attorney (apart from recal or other circumstances operating recal) remaining in force so long as any one survives and retains office, and each having full power to act independently of the other or others. Of course objections may be stated to this, but a power of attorney implies a large degree of trust between granter and grantee, and also between joint-grantees if they agree to act. Nor does it follow that, because these powers exist, they are always to be acted on to the uttermost extreme. Rather they are intended to smooth operations when it might be difficult to obtain the signatures of both or all the attorneys.

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Attorneys in succession.—In this case the attorneys are appointed so that the second has no office until the first has ceased to be attorney, though of course that need not be by death. In an appointment to A., whom failing to B., that is the result. From which, of course, it follows that, after A. has accepted office, it is no reason for B. acting simply because A. is out of reach or it is otherwise inconvenient to obtain A.'s signature. Until A. has ceased to be attorney, B. has no standing at all.

Two or more Granters.—When this is the case there is no reason at all why one deed should not serve; on the contrary it will be a distinct saving of expense. But while contained in one deed, it should be framed so as to have the same effect as though the powers were separate. Thus resignation or recal or other termination in one case should not terminate the other or others; there may require to be separate and distinct, instead of joint and several, accountings; and it will be kept in view that the attorney may require to prosecute claims and deal with matters arising between or among the granters inter se, though that could not be till after he had ceased to represent one or some of the constituents.

Powers.—It is not correct to speak of special powers in this connection. The only safe footing on which to proceed is, that the attorney has no powers except such as are expressly conferred. General expressions are not to be relied on. For instance, it might be said that a power "to manage the granter's affairs and act for him therein as he could do himself" is comprehensive enough to cover a great deal, but it has been questioned whether it would cover even such an act of ordinary management as the uplifting of rents and interests. The rule to follow is, to ascertain as well and as nearly as may be what are the powers which will certainly or probably require to be exercised, and to confer these expressly and in such terms as will best cover the actual circumstances of the particular case. The following may be specially referred to:—

- 1. To uplift Estate, Capital and Income.—The uplifting of capital is realisation of a kind, but what is here pointed at is realisation otherwise than by sale. If any assets are particularly known which will require to be realised,—e.g. a share of a trust estate in which the granter is interested,—it will be specially mentioned, but of course without limitation. It is suggested that in the case of investments with public companies, separate mandates on the companies' own special forms should be given with reference to interest and dividends.
- 2. To Sell.—It is proper, if not necessary, to give express power to sell by public roup or private bargain. The provision of sec. 4 of the Trusts Act, 1867, by which a power of sale given to a trustee is by implication of that nature, does not extend to an attorney. Either in the same clause, or in a general clause, power will be given to grant all

deeds necessary to carry out the sale, and to bind the constituent in absolute warrandice. It is well also to say expressly that the attorney is to receive the price.

- 3. To Feu and to dispose of land by way of ground-annual.
- 4. To grant a servitude.1
- 5. To Borrow.—If this power is to be conferred, it will authorise the attorney (a) to bind the constituent personally, and if there is to be power to bind him jointly and severally with others, that must be specially stated; (b) to grant security over his estates, heritable and moveable; (c) conferring power of sale on the creditor; (d) the rate of interest may require attention, and if compound interest is to be authorised, it will be expressed; and (e) the same as regards securities in the form of ex facie absolute conveyances with or without back-letters. A power "in connection with my said business to make, draw, sign, accept or endorse" bills and notes does not authorise borrowing.²
- 6. To re-arrange Debts and Securities.—This refers to debts due by the constituent and securities over his estate. It may be necessary (a) to agree to a higher rate of interest; (b) to get the interest down; (c) to grant bonds of corroboration; (d) to arrange assignations of securities; (e) to take discharges and reborrow the money on new security deeds. According to circumstances, these, or some of them, will be referred to.
- 7. To deal with Securities held by the Constituent.—It may be necessary (a) to lower the interest; (b) to call them up; (c) to grant discharges; (d) assignations; (e) deeds of restriction; (f) or postponement; (g) to exercise the power of sale; (h) or the other powers belonging to a creditor, e.g. poinding the ground, entering into possession; (i) to accept substituted security. Powers on these points will of course be made to apply to future as well as existing securities.
- 8. To serve Heir.—See Consolidation Act, 1868, sec. 29. It would appear necessary to mention the person or persons to whom the service may be expede; at least that should certainly be done, and in the case of special service there should also be a general reference to the property. Looking to the liability which even yet is undertaken by accepting a succession, the attorney should be very careful to see that everything that he does in this respect is not only within the phraseology of the deed, but is actually authorised by the constituent.
- 9. To obtain Confirmation as Executor.—In practice this also requires special authority. It should cover the obtaining of decerniture as executor as well as confirmation. As regards caution, authority may be required to pay a premium to a guarantee company. It may further be convenient to have the confirmation in name of the attorney. (See 19 infra.)
- 10. To settle Government Duties.—This is a power which is not wholly for the attorney's protection, for it may be necessary for him to enforce

¹ Macgregor v. Balfour, 1899, 2 F. 345.
² Jacobs v. Morris, 1902, 1 Ch. 816.

any relief to which the constituent may be entitled, or to charge the amount upon an entailed estate.

- 11. To grant Leases; also to accept renunciations of leases; to grant abatements of rent; and to remove tenants.
 - 12. To bring and defend Actions.
 - 13. To Compromise.
 - 14. To submit to Arbitration.
- 15. To Invest.—The only matter to which it appears necessary to direct special attention is as regards investments to which liabilities attach, e.g. partly-paid shares in companies. It may be desired in some cases to take the investments in name of the attorney.
 - 16. To attend Meetings of Heritors and to act and vote.
- 17. To appoint Sub-Factors, for whom, of course, the attorney should not be responsible.
- 18. To grant Deeds.—A general clause should be added giving power to grant all deeds which may be required in the execution of any of the It will be as well to mention the classes of deeds which will most probably be required, of course without limitation. Regard should specially be had to the matter of obligations in these deeds, especially But further, e.g. in the case of discharges in favour of warrandice. trustees, there will probably be required a clause of indemnity in favour of the trustees against debts and claims. In the same class of deeds there is this element, namely, that they are more than discharges for money paid; they are also discharges of intromissions and omissions: these matters had better be mentioned, otherwise it may be found that the trustees' agents raise difficulties as to the attorney's powers. as regards current trusts in which the constituent is interested, it may be necessary to give consents to certain courses of action which might not otherwise be open to the trustees, indemnities with reference to investments, and other matters of a like nature, which the attorney could not possibly grant without express authority, and which he will be very careful of granting even with it. Some of these matters will be better dealt with in a substantive enabling clause.
- 19. Generally it should be made plain that the attorney's powers are to extend to all estate of the constituent, present and future, including all investments which may be made by the attorney, and e.g. in cases where the attorney is to obtain confirmation and realise an executry estate, that the powers do not end there, but apply to the estate after it is realised. This is on the assumption that a general factory is intended.

Termination of Attorney's Office.—The termination of the office may come from the side of the constituent or the attorney.

Constituent-

- 1. Recal.
- 2. Superseding, as by a later appointment of attorney, or by

 1 Dempster v. Potts, 1836, 14 Sh. 521.

dealing with the matter himself; but of course the effect of this may be partial only.

- 3. Bankruptcy.
- 4. Incapacity. Quære whether the appointment of a curator bonis is enough or whether there must be cognition.¹
- 5. Death.

Attorney-

- 1. Resignation.
- 2. Incapacity.
- 3. Death.

When there are more than one attorney it will depend on the terms of the appointment whether the resignation, incapacity, or death of one will terminate the office.

But the practical point is, how far are (a) the attorney and (b) third parties entitled to rely on the attorney's powers being in force? It is obvious that many of the above occasions of termination may have arisen without the attorney knowing anything about it, and still more so in the case of third parties. There are some grounds for maintaining that, in certain cases at least, the parties are safe 2; but there is no case which goes the length of protecting third parties where the attorney knows that his office has fallen. Of course, in that case, if the attorney's subsequent transaction is to stand good, the constituent may suffer loss, but better that he should do so than third parties, seeing that it is he who has given the attorney the means of doing the mischief. The operation of the law at present is not at all satisfactory. To keep matters right, it is suggested that the deed should contain clauses to the effect that, as regards both attorney and third parties, the criterion shall be their respective knowledge. (See p. 58.) This must go the length of sustaining transactions even after the constituent is dead, if the other party did not know. This is the law in England.³ But the English law (Conveyancing Act, 1882) goes much further, for it provides machinery by which, up to a certain time limit, the attorney may act though the constituent is dead, or has executed a revocation, or himself purported to act, and though both the attorney and the third party are aware of it. The machinery is to declare the deed irrevocable for a specified period not exceeding one year. This is in the case of powers granted without consideration; in the case of powers granted for a valuable consideration and declared irrevocable, the same applies, but without any limit of time.4

Constituent's Return.—Among the causes of the termination of office above mentioned, reference is not made to the case of a power of

Dick, Petr., 1901, 9 S. L. T. No. 146.
 Pollock v. Paterson, 10 Dec. 1811, F.C.

³ Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 47.

² Pollock v. Paterson, 10 Dec. 1811, F.C. (incapacity); Campbell v. Anderson, 1826, 5 Sh. 86; affd. 1829, 3 Wil. & Sh. Ap. 384 (death).

^{4 45 &}amp; 46 Vict. c. 39, ss. 8 and 9.

attorney granted on account of the constituent leaving this country, and the effect thereon of his subsequently returning. It would appear to be clear that, under these circumstances, the attorney cannot act. But what if the constituent again goes abroad? Does the factory revive? This is by no means clear. Express clauses should be inserted (p. 58); whether the powers should be even suspended during the parenthesis in which the constituent is in this country, or should hold throughout, is for consideration in each case.

Lapse of Time.—Another matter in the same connection is, after what lapse of time may the power be acted and relied on? In cases which involve a continuous course of management on the attorney's part, this point has no special significance, though even then the longer the time the more probable the constituent's death. But it is otherwise when the power of attorney is granted for one special purpose, e.g. to sell an estate or a house. Would it be safe to act and rely on that after the lapse of ten years? Something will depend on the people with whom one is dealing; but as a general rule it would not be expedient to proceed without some confirmation. A new deed is not required; what is required is anything to shew that the old deed is living, e.g. a letter from the constituent.

Attorney's Remuneration.—If remuneration be intended, it appears that it must be made express.¹ The usual way will be by a reference to a stated official (e.g. the Auditor of the Court of Session), failing agreement. When the attorney is a solicitor, it should further be provided that he is to be entitled to act as such, and to charge the usual professional fees.

Rules for Attorney's Actings.—Of course, it is possible only to mention briefly one or two of the most outstanding and obvious rules:—

- 1. Scope of Powers.—It is not to be assumed that the attorney, though entitled under the phraseology of the deed to commit the constituent to certain things as in any question with third parties, is therefore safe in doing so as in a question between himself and the constituent. He must act with ordinary prudence, and the mere fact that some act is in terms covered by the powers, is of itself no more justification for doing it, than is the general power to lend on heritable security a warrant for a trustee accepting any heritable security.
- 2. Communications with Constituent.—As far as possible, in all important matters the formal deed should be regarded as the machinery for executing detailed instructions to be given by the constituent by letters or other communications.
- 3. Liabilities.—The attorney and his advisers will have in view the circumstances which will entail personal liability on his part to third parties. Thus all contracts, bonds,² bills,³ etc., may require to be made



¹ Orbiston v. Hamilton, 1736, Mor. 4063. ³ Bills of Exchange Act, 1882, s. 26.

² M. Laren, Wills, 1334.

expressly in name of the principal, and with a clear negativing of personal liability on the part of the attorney. Of course, in litigating, this may be impossible as regards liability to the other side for expenses. Before the attorney hands over the funds to the constituent, he should not only receive his remuneration, but also he should be relieved of all liabilities which he may have undertaken. If, e.g. in bonds, the attorney has bound himself, even as such only and expressly negativing personal liability, he might be liable for handing over estate before seeing the debt paid. As to warrandice in bonds over heritable or other property, see p. 423.

4. Cash Balances.—The rule enforced by the Accountant of Court in the case of judicial factories, namely, that not more than £50 must be kept in the factor's hands for ten days, may be kept in view; but, in point of fact, the balance should usually be much less. The money in bank will, of course, be ear-marked.

FACTORY AND COMMISSION FOR USE AT HOME CONFERRING A VARIETY OF POWERS

I, A., whereas I intend to go abroad, and it is expedient that I should appoint an attorney factor and commissioner to act for me, and having full trust and confidence in the integrity and ability of B., have resolved to appoint him accordingly; and whereas I have various properties in the United Kingdom, including, inter alia [specify very briefly]; and whereas I am interested in various trust and other estates, including, inter alia (first) the trust and executry estate of my father, the late C.; (second) the trust and executry estate of D. [and so on, specifying them articulately, distinctly, and briefly]; and whereas these presents are to apply to the said properties, and to my interests in the said estates and the produce thereof, but it is not intended that they should be limited thereto, but, on the contrary, it is intended that they should, as it is hereby declared that they do and shall, extend and apply to my whole property, means, and estate, heritable and moveable, real and personal, of whatever nature and wheresoever situated, and that both capital and income, and whether now belonging, or which may hereafter belong, to me, all which and each and every part thereof are hereinafter referred to and included under the expression "my estate": Therefore I hereby appoint the said B. my attorney factor and commissioner (hereinafter called "my attorney"), with full power for me and in my name, or in his own name as my attorney, to do everything regarding my estate which I could have done if personally present, and that without limitation by reason of anything herein contained or otherwise; and particularly, but without prejudice to the said generality, I confer upon my attorney the following powers, all to be exercised or not, and if exercised, then at such times and in such way and manner, and for such consideration or without any consideration, and generally on such terms and conditions, all as he in his sole discretion may think fit, namely:



1. To UPLIFT

(First) To require, sue for, and receive transference and payment of my estate.

2. To Adjust Accounts

(Second) To examine, approve, and allow, or to disapprove and disallow, and to adjust all accounts of, or relating to, or against, my estate.

3. To Give Indemnity to Trustees, etc.

(Third) To give and undertake to and in favour of the trustees and executors of my father, the trustees and executors of the said D. [and so on], and all others, all such consents, authorities, instructions, obligations, and indemnities as my attorney may think fit.

4. To DISCHARGE TRUSTEES, ETC.

(Fourth) To grant receipts, releases, and discharges, interim and final, not only for property and sums transferred and paid, but also of actings, transactions, intromissions, management, and omissions, and including obligations of warrandice, indemnity, and relief, and generally with such other clauses as may be desired.

5. To Accept Transfers

(Fifth) To execute transfers as accepting transferee of all stocks and shares of any company or companies which may be transferred to me, and to register the same and complete title to the stocks and shares (whether fully paid or not) in my name, or in his name as my attorney.

6. To LET

(Sixth) To grant leases and accept renunciations of leases, and to grant abatements of rent.

7. To SELL

(Seventh) To sell, feu, grant long leases, dispone by way of ground-annual, or to exchange or otherwise realise my estate, and all by public auction or private bargain, with power to give credit and time, with or without security, and to grant all such dispositions, feu-charters, feu-contracts, long leases, contracts of ground-annual, contracts of excambion, assignations, transfers, and other deeds, and containing such obligations and other clauses as may be required or desired, for carrying out such sales, exchanges, and realisations.

8. To Alter Feu Holdings, etc.

(Eighth) To arrange and carry through resignations and renunciations of feu, blench, and other holdings of property, superiority, and midsuperiority, and also long leasehold rights, allocations, conversions to money, commutations, redemptions, and discharges of feu-duties, ground-annuals, tack duties, casualties, additional payments, carriages and services, and all others, and that all in whole or in part, and on such terms and conditions as my attorney may think



fit, and whether the said estates, interests, payments, and others be held by or of me or payable or enforceable by me.

9. To Borrow

(Ninth) To borrow [and concur in borrowing] money, binding me and my heirs, executors, administrators, and representatives without the benefit of discussion in payment thereof [either alone or jointly and severally with any other person or persons (the proceeds of the loan being apportioned or applied as my attorney may think fit, but with which the lender shall have no concern)], with interest [compound interest] and penalties [and in obligations for premiums and extra premiums of life, survivorship, contingency, fire, and other insurance with interest [compound interest] and penalties, and in other obligations for the maintenance, renewal, and re-effecting of such insurances, whether such life and survivorship policies be on my life or on that of any other person], and in all relative and other obligations which may be desired by the lenders, and to give security over my estate [including, or otherwise also over, such insurances as aforesaid whether existing or to be effected by my attorney], and for these purposes to grant bills, notes, bonds, mortgages, bonds and dispositions in security, bonds and assignations in security, ex facie absolute conveyances, and all other documents of obligation, mortgage, and conveyance.

10. To LITIGATE

(Tenth) To pursue all actions or processes of law of what kind soever in any court, and to use all manner of diligence and execution to vindicate my rights, and to defend all actions or processes, and to resist all diligence and execution which may be brought or used or threatened against me or my estate.

11. To Compromise and Refer

(Eleventh) To settle all questions, matters, and disputes by compromise, or arbitration, or advice of counsel, and to give time to debtors, with or without security, and to accept part for the whole, or otherwise to settle questions arising with debtors, creditors, purchasers, and others, according as my attorney shall determine.

12. Investments

(Twelfth) To leave my estate in the position in which it may be at the date of these presents, or to invest it in the purchase of heritable, real, moveable, or personal property in the United Kingdom or abroad, or to lend out or invest the same on such terms and for such period, either as temporary or as permanent investments, or indefinitely, on heritable, real, moveable, or personal security, by way of first, or postponed, or pari passu charge, or on credit or obligation, or on such other obligations, securities, or investments, or in such other way as my attorney may think fit, and that without any limitation whatever by reason of anything herein contained or otherwise, including, without prejudice to the said generality, purchases of and loans on (1) any property or security which trustees are or may be by the law of Scotland or England (the one without prejudice to the other) entitled to purchase or to

lend upon; (2) the Government funds of any of the colonies of Great Britain or of her Indian Empire; (3) bonds, mortgages, annuities, funded debt, or any other obligations or acknowledgments of debt issued by public bodies or corporations, commissioners, or trusts, including municipal, county, district, parochial, and other local authorities, and all other bodies and trusts constituted by authority of any Act, general or special, of the Parliament of the United Kingdom or of colonial legislatures, or by Provisional Order; (4) the interests of heirs of entail or liferenters or annuities combined with life assurance; (5) debentures or deposit receipts of companies incorporated by any Act of Parliament or colonial legislature, general or special, or registered under the Companies Acts of Parliament or of any colonial legislature, and carrying on business or having an office or agency in the United Kingdom; and (6) debenture, guaranteed, lien, or preference stock, or fully-paid guaranteed or preference shares of such incorporated or registered companies, where such stock or shares bear to have a cumulative preference as regards both revenue and capital, and from time to time to continue, renew, call up, sell, or alter the obligations, securities, and investments as my attorney shall determine: Declaring that all the powers hereby conferred shall apply to the investments and securities which may be made or taken by my attorney, as well as to all my other estate.

13. To EMPLOY SOLICITORS, ETC.

(Thirteenth) To appoint or employ factors, law agents, counsel, brokers, accountants, and others, and to pay them the usual remuneration for their services.

GENERAL CLAUSES

And with reference to all the powers generally and particularly hereinbefore conferred, I provide that the same may be exercised by my attorney alone, and with reference to my estate alone, or they may be exercised by him in conjunction with any other person or persons, including himself if personally interested, and any other estate or estates by way of joint or pro indiviso ownership or joint management or otherwise, as my attorney may think fit: And I provide that my attorney shall incur no responsibility whatever on account or in respect of his actings, intromissions, management, or omissions, save only to account to me for the estate which he may actually and personally receive; nor shall he be responsible for any factor, agent, counsel, broker, accountant, or others, or to take proceedings or do diligence otherwise than as he in his sole discretion may think fit: And my attorney shall be entitled to remuneration for his services as the same may be determined by the Auditor of the Court of Session for the time being: And I declare that all receipts, releases, discharges. conveyances, dispositions, assignations, transfers, bills, notes, bonds, mortgages, bonds and dispositions in security, bonds and assignations in security, ex facie absolute conveyances, and all other deeds and documents whatever which may be granted by my attorney to whatever person or persons or company or others. shall be equally valid and binding as if granted by myself, and, without prejudice thereto, I bind myself and my foresaids if and when called upon so to do to ratify and adopt all such deeds and documents; and, further and

generally, I bind myself and my foresaids if and when called upon so to do, to ratify, adopt, and confirm all the actings, transactions, intromissions, and management of my attorney and the said factors, agents, and others to be appointed by him in any manner of way, and that both in his favour and in favour of third parties interested: And with regard to the endurance and termination of the powers hereby conferred, I declare as follows: (first) that though I should from time to time return to and be in the United Kingdom, the said powers shall not thereby be terminated or even suspended, but shall continue in full force and effect; (second) that as regards my attorney, the said powers shall be operative and may be executed, even although recalled in writing, or otherwise in law terminated, owing to my death or otherwise. unless and until my attorney shall have received notice of such recal or termination; and (third) that as regards third parties, the said powers shall be operative, and may be acted and relied on, upon production of these presents, or an extract thereof from the Books of Council and Session, unless and until they shall have had notice of such recal or termination, and that even although my death should have taken place: Providing always that my attorney shall be bound, as by acceptance hereof he binds himself, his heirs, executors, and representatives, to hold just count and reckoning with me and my foresaids for his intromissions in virtue of these presents, and to make payment to me or them of whatever balance shall be due by him after deduction of expenses and his own remuneration and upon being relieved of all obligations and liabilities undertaken or incurred on my account, of and against all which obligations and liabilities I bind myself and my foresaids to relieve and indemnify my attorney: And I revoke all former powers of attorney and factories and commissions (if any) by me at any time heretofore made, so far as inconsistent with these presents.-In witness whereof.

POWER OF ATTORNEY BY PERSON ABROAD, WITH SPECIAL REFERENCE TO AN INTESTATE SUCCESSION TO HERITABLE AND MOVEABLE ESTATE IN SCOTLAND

I, A., considering that my sister B. died intestate on , possessed of heritable and moveable, real and personal property in the United Kingdom, that I am entitled to succeed and require to make up titles thereto, that I have or may acquire other property and interests in the United Kingdom, and that in respect of my residence in it is convenient that I should grant the present power of attorney: Therefore I hereby appoint C. and D., and each of them by himself alone, and the survivor, to be my attorneys factors and commissioners, and attorney factor and commissioner, to the effect and with the powers aftermentioned, they and each of them separately and the survivor being hereinafter referred to under the expression "my attorneys," and declaring that all powers hereby conferred on my attorneys may be exercised by either of them by himself alone or by the survivor of them: And I hereby confer on my attorneys—

COMPLETION OF TITLE TO HERITAGE

Full power for me and in my name to complete titles to the estates heritable and moveable, real and personal, of my said sister, and to procure me served

and decerned nearest and lawful heir in special or general at law or of provision or otherwise to her or to such of her ancestors or predecessors as may be requisite, in all lands and heritages and real estate which she or they died last vest and seised in or possessed of or entitled to, and to sign, present, and carry through all necessary petitions for service and other petitions, and to obtain extracts from Chancery, and to record the extract decree or decrees in the register of sasines, as also to obtain and record writs of clare constat or others to complete my title to said heritable and real estate, and to take all other proceedings which may be necessary for that purpose or in connection therewith.

COMPLETION OF TITLE TO PERSONALTY

As also to present and carry through all necessary petitions for the appointment of me or my attorneys or such other person as may be expedient as executor-dative or executors-dative of my said sister in Scotland, to give up all necessary inventories, to obtain confirmation, and to obtain the same sealed in England 1 and elsewhere: As also to obtain me or my attorneys or such other person as may be expedient appointed administrator or administrators of my said sister in England, and to obtain the letters of administration or other grant sealed in Scotland 1 and elsewhere; and having obtained such confirmation or appointment as administrator or administrators, or both, to complete the title to the moveable and personal estate of my said sister.

OTHER POWERS

As also with the following further powers to my attorneys for me personally and also for me as heir, executor, or administrator foresaid, or all or any of them, and also themselves or himself as such executors and administrators, or executor and administrator, or any of them, in the event of them or either of them being so appointed; all which powers shall apply to the heritable and moveable real and personal estate of my said sister, and the heritable and moveable real and personal estate now belonging, or which may hereafter belong, to me in the United Kingdom, all hereinafter referred to as "the said estates," and all which powers shall be exercised or not, and if exercised, then at such times, and in such way and manner, and for such consideration, or without any consideration, and generally on such terms and conditions, all as my attorneys in their or his own discretion shall think fit, viz.:—

1. To SETTLE DEBTS, DUTIES, ETC.

(First) To adjust and pay all debts, accounts, wages, funeral expenses, Government duties, and others, which were due by my said sister, or which are or may be or become due by her estate, or by me or them as executors or administrators foresaid, or otherwise, as well as those which are or may be or become due by me personally.

2. To Realise Personal Estate

(Second) To receive, sue for, and discharge, or assign and convey all debts,

¹ Mention Ireland, if probably necessary.



sums of money, securities therefor, deposit receipts, and all others whatsoever due and addebted to or forming part of the said estates, and to grant receipts and discharges therefor.

3. To LET

(Third) To grant leases of the said heritable and real estates, or any part thereof, to accept renunciations or surrenders of the same, and of any lease of the same or any part thereof now current, or which may hereafter be granted, and to allow reductions or abatements of rent, temporary or permanent, and to output and input tenants.

4. To LITIGATE

(Fourth) To apply for, obtain, and carry out warrants of sequestration and sale of the tenants' furniture and effects, to pursue declarators and generally all actions of law and legal proceedings which may be required to vindicate my rights of every description in relation to said estates, or otherwise, and also to defend me in any action, suit, or process which may be brought against me, and for these purposes to employ advocates and law agents.

5. To REPAIR AND IMPROVE

(Fifth) To keep the said heritable or real estates in repair, and make alterations or improvements on the same, or any part thereof, and for that purpose to employ tradesmen and others, and pay their accounts.

6. To Compromise and Refer

(Sixth) To compromise any debts or claims which may be or be alleged to be due or owing to my said sister, or to her estate, or to me, or which may lie against her or her estate, or me, and to enter into submissions to one or more arbiters, with power to such arbiters to name an oversman.

7. To SELL

(Seventh) To realise and sell the said estates by public roup or private bargain, and thereupon to grant in favour of the purchaser or purchasers all necessary dispositions, assignations, or other conveyances with all usual and necessary clauses, and binding me in absolute warrandice, and to receive payment of and discharge the price or prices.

GENERAL CLAUSES

(Lastly) Generally to do everything anent the premises which I could do myself if personally present, or which to the office of attorney factor and commissioner is known to belong, all which I bind myself and my heirs, executors, and representatives to ratify, homologate, and hold firm: Declaring hereby that all receipts, discharges, conveyances, and other deeds and writings granted by my attorneys, or either of them, or the survivor, to whatever person or persons, and all acts done by them or him in execution of the premises, shall be equally valid and binding as if granted and done by my-

¹ Mention specifically any other classes of investments.

self: Declaring that the purchasers, assignees, and debtors shall have no concern with the application of the prices or amounts owing, due, or payable: And declaring also that this power of attorney shall subsist till the same is recalled, in whole or in part, by a writing under my hand: Bnt providing always that the said C. and D. shall be bound, as they by acceptance hereof bind themselves, their heirs, executors, and successors, to hold just count and reckoning with me, my heirs, executors, or assignees, for their intromissions in virtue of this power of attorney, and to make payment to me or them of whatever balance shall be due after deduction of all necessary expenses and the usual professional charges for their trouble, and declaring that the said C. and D., and the survivor, or their firm, shall be entitled to perform the duties of law agents, factors, and cashiers in the premises, and shall be entitled to the same professional fees and commissions to which they or he would be entitled if they or he were not attorneys.—In witness whereof.

Note.—The most prominent omission in this form is the power to bornow. If desired, see p. 56 for form.

FACTORY AND COMMISSION FOR MANAGEMENT AND SALE OF HERITABLE PROPERTY

I, A., considering that I am proprietor of certain property in King Street, Edinburgh, forming the tenement No. 1 of said street, with pertinents (hereinafter called "the said subjects"), and that it is convenient that I should grant a power of attorney for the management and realisation thereof, and for the other purposes aftermentioned: Therefore I hereby appoint B. my attorney factor and commissioner (hereinafter called "my attorney"), with full power for me, and in my name, or in his own name as my attorney, to do everything regarding the management and realisation of the said subjects which I could have done if personally present, and that without limitation by reason of anything herein contained or otherwise: And particularly but without prejudice to the said generality, I confer upon my attorney the following powers, all to be exercised or not, and if exercised, then at such times, and in such way and manner, and for such consideration, and generally on such terms and conditions, all as he in his sole discretion may think fit, namely (first) to let the said subjects from year to year or for longer periods, to uplift the rents past current and future, to accept renunciations of leases and tenancies, and to grant abatements of rent; (second) to sell the said subjects in whole or in lots, and by public roup or private bargain, and to receive the price or prices; (third) to make arrangements regarding the existing securities affecting the said subjects, to give notice for repayment thereof, and to repay the same; (fourth) to borrow money either on assignations of the existing or any future securities, or on new security deeds, binding me and my heirs, executors, and representatives, without the benefit of discussion, in payment thereof, with interest and penalties, and in all relative and other obligations which may be desired by the lenders, and constituting security over the said subjects, or any part thereof, with power of sale in favour of the lenders; (fifth) to

1 For more detailed clause, see p. 58.

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pursue all actions or processes of law of what kind soever in any court, and to use all manner of diligence and execution to vindicate my title to the said subjects, and generally with reference thereto in any manner of way, and to defend all actions or processes, and to resist all diligence and execution which may be brought, or used, or threatened against me or the said subjects; (sixth) to settle all questions, matters, and disputes by compromise, or arbitration, or advice of counsel; (seventh) to [act as or] employ factors, law agents, and others, and to [charge or] pay them the usual remuneration for their services; and (eighth) to execute all writings and deeds which may be necessary or desired for the carrying out of any of the powers hereinbefore generally or particularly conferred, including leases, missives of let, contracts and missives of sale, articles of roup, receipts, dispositions, bonds and dispositions in security, and submissions, and these all in such terms and containing such obligations of warrandice and other obligations on me, my estate, and representatives, as my attorney may find expedient, all which writings and deeds, as well not named as named, shall be equally valid and binding as if granted by myself, and without prejudice thereto I bind myself and my foresaids, if and when called upon, to ratify and adopt all such writings and deeds, and further and generally I bind myself and my foresaids, if and when called upon so to do, to ratify, adopt, and confirm all the actings, transactions, intromissions, and management of my attorney, and that both in his favour and in favour of third parties interested: And I provide that my attorney shall incur no responsibility whatever on account or in respect of his actings, intromissions, management, or omissions, save only to account to me for the funds which he may actually and personally receive; nor shall he be responsible for any factor, agent, or others, or to take proceedings, or to do diligence, otherwise than as he in his sole discretion may think fit: And with regard to the endurance [as on p. 58 to end].

POWER OF ATTORNEY TO CARRY OUT A SALE

I, A., considering that I am proprietor of the shop 10 Lennox Street, Glasgow, and pertinents, that the same has been sold to B. at the price of £, and that it is convenient that I should grant a power of attorney for the easier carrying through of the transaction: Therefore I appoint C. my attorney, with full power to grant a disposition of the said subjects in ordinary form or in such form as he may think fit in favour of the said B., or his representatives or nominees, and to receive the price; and with power also to take all action, and generally to do whatever in his discretion my attorney may think expedient for enforcing and carrying out the transaction.\frac{1}{2}—In witness whereof.

POWER OF ATTORNEY BY PRO INDIVISO OWNER TO EFFECT A SALE

I, A., considering that I am proprietor to the extent of a one-third pro indiviso share of the shop 10 Lennox Street, Glasgow, and pertinents, that it is

¹ If remuneration qua attorney is intended, insert special clause, as on pp. 57-61.

intended to sell the same, and that it is convenient that I should grant a power of attorney for the easier effecting and carrying out of a sale: Therefore I appoint B. my attorney, with full power to sell my said share to the other pro indiviso proprietors, or either of them, or to any others; also to concur with the other pro indiviso proprietors in selling the said subjects; and in either case by public roup or private bargain, and for such price as my attorney may think proper; as also to grant or concur in granting a disposition to the purchaser or his representatives or nominees; as also to receive the price or my share thereof; as also to adjust accounts with the other pro indiviso proprietors; and also to take all action and generally to do whatever in his discretion my attorney may think expedient for enforcing and carrying out any sale which he may enter into, and for vindicating my rights in a question not only with the purchaser but also with the other pro indiviso proprietors and all others.\(^1\)—In witness whereof.

POWER OF ATTORNEY TO BORROW MONEY AND GRANT SECURITY IN SPECIAL TERMS REFERRING TO PRIOR DEED

I, A., considering that I am heir of entail in possession of the entailed estate of X. [or am entitled to a liferent of the estate held under [specify will or other instrument] or otherwise as the case may be, mentioning the asset briefly but so as fairly to identify it]: That I have already borrowed the sum of on the security thereof [coupled with life assurance], conform to bond and disposition and assignation in security in favour of B., dated

[if recorded at all]: That I , and recorded in am desirous of borrowing further on the same security [coupled with additional life assurance or with or without additional life assurance as my attorney may in his discretion arrange], and that it is convenient that I should grant a power of attorney for that purpose: Therefore I hereby appoint C. my attorney with power to borrow any sum or sums not exceeding £ the same security as that held by B. as aforesaid [with the addition of further life assurance on my life], and to grant deeds of obligation and security containing all the clauses contained in the said security deed in favour of the said B. [with the necessary alterations and additions in respect of the additional life assurance], and with all other alterations and additions which my attorney in his sole discretion may think proper [and the additional life assurance may be to such amount], and the rate[s] of interest [and premium] may be such as my attorney may find expedient under the circumstances. And I declare that all deeds granted by my attorney shall be equally valid and binding as if granted by myself.1—In witness whereof.

POWER OF ATTORNEY TO BE SENT ABROAD WITH A VIEW TO SALE

To all to whom these presents shall come, I., A., send greeting.—Whereas I am owner or tenant of or otherwise interested in real estate and personal

¹ Remuneration. See note, previous page.

, and have other concerns and affairs there, and particularly but without prejudice to the said generality [state the special property or affairs, to which these presents are to extend and apply without being limited thereto: Now know ye that I do by these presents appoint B. my true and lawful attorney to the effect underwritten, giving, granting, and committing to my attorney the following powers, namely, To manage, sell, and absolutely dispose of all and sundry my whole property, rights, interests, means, estate, and effects, real and personal or of what other nature the same ; To receive all sums, capital and income, payable in respect thereof; To enter into any contract or contracts for sale of the said whole property and others, or any part or parts thereof, either by public auction or private bargain; And for me and in my name, and as my act and deed, to make, sign, seal, execute, and deliver all contracts, deeds, conveyances, transfers, assignments, and assurances in the law for conveying, transferring, assigning, and assuring the property sold unto the purchaser or respective purchasers, or his, her, or their nominees, and his, her, or their heirs, executors, administrators, and assigns, or otherwise as he, she, or they may respectively direct: And for me and in my name to receive the purchase moneys, and to give receipts and discharges therefor: And I declare that the receipt of my attorney shall be a sufficient discharge to any and all purchaser and purchasers, and other persons whatever, for the sums therein acknowledged to be received; and that such purchaser or purchasers, or other persons, shall not be bound or entitled to see to the application of such money, and shall not be responsible for the non-application or misapplication thereof: And generally with power to my attorney, for me and in my name, to do, execute, perform, and transact all and everything concerning and about the said property and affairs and others hereinbefore generally and particularly described or referred to, and every part thereof, and the disposal of the same, which I could or might do myself if personally present: And I hereby ratify and confirm all and whatever matters and things my attorney shall lawfully do, execute, or perform, or cause to be done, executed, or performed, under or by virtue or authority or in pursuance of these presents: And my attorney by acting hereunder binds himself to make just count, reckoning, and payment to me, or those empowered by me, of and for his intromissions in virtue hereof, and the balance arising thereon, when required, after deduction of all necessary charges and expenses [including his own remuneration].—In witness whereof.

Signed, sealed, and delivered by the said A. in the presence of

Other clauses as desired will be readily adapted from the previous forms.

POWER OF ATTORNEY BY TWO GRANTERS

The above forms may be readily adapted, the chief alterations on, for example, the form on p. 54, being



1. Appointment.—This may run—

Therefore we severally and respectively appoint the said B. the attorney factor and commissioner of each of us (hereinafter called "our attorney") to do anything regarding our respective estates which we respectively could have done if personally present, and that without limitation by reason of anything herein contained or otherwise, and particularly but without prejudice to the said generality, we severally and respectively confer upon our attorney the following powers, etc.

2. Special Clause.—Before the reserved obligation for an accounting, say—

And further to remove all doubt it is hereby specially declared that these presents shall be construed and acted on in all respects as if we had granted two separate powers of attorney in favour of the said B., in the same terms as these presents *mutatis mutandis*, and particularly without prejudice to the said generality, that our attorney shall have no power to bind either of us in obligations or liability with reference to the estate of the other, and that we undertake no obligation or liability to our attorney or otherwise except each with reference to our own respective estates only, and that these presents though recalled, terminated, or suspended as regards one of us, shall not thereby be recalled, terminated, or suspended as regards the other.

Separate Accountings: Apportionment.—Providing always that our attorney shall be bound as by acceptance hereof he binds himself, his heirs, executors, and representatives to hold just count and reckoning with each of us separately and our respective foresaids for his intromissions in virtue hereof, and to make payment to each of us separately and our respective foresaids of whatever balance shall be due by him as attorney for each of us respectively after deduction of expenses and his own remuneration, declaring that all questions which may arise as to apportionment between our respective estates of any items, whether of receipts or expenditure, capital or income, and including expenses, are hereby referred to the final decision of the auditor of the Court of Session for the time being as sole arbiter, and it shall not be necessary that we should be specially or separately represented before him unless he shall himself so order, in which case we elect to be represented by such solicitor or counsel or otherwise as our attorney shall instruct on our behalf repectively.

In the case of powers of attorney which are to be sent abroad, it is usual to append certificates of attestation by a witness and a magistrate in the following form:—

DECLARATION BY WITNESS.

I, C. [one of the witnesses], do solemnly and sincerely declare that I was present and did see the power of attorney hereunto annexed, dated , duly signed, sealed, and delivered by the therein named A. [granter] who so signed, sealed, and delivered the same in the presence of D. [the other witness]

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and of me the declarant, and I declare that the name "A." subscribed and set to the said power of attorney is in the proper handwriting of the said A., and that the names "D." and "C." subscribed to the attestation written at the foot of the said power of attorney, as the signatures of the witnesses to the execution thereof, are of the respective proper handwriting of the said D. and of me the declarant; and I make this solemn declaration conscientiously believing the same to be true and in virtue of the provisions of the Statutory Declarations Act, 1835.

Declared at the day of before me , chief magistrate of .

CERTIFICATE OF MAGISTRATE

To all to whom these presents shall come, I, X., chief magistrate of , do hereby certify that on the day of the date hereof personally came and appeared before me C., named and designed in the foregoing declaration, being a person well known and worthy of good credit, and did solemnly and sincerely declare to be true the several matters and things mentioned and contained in the said declaration, pursuant to the Statutory Declarations Act, 1835.

In faith and testimony whereof, I, the said X., have caused the seal of the corporation of to be hereunto put and affixed, and the power of attorney mentioned and referred to in the said declaration to be hereunto also annexed.

Dated at the day of in the year of our Lord one thousand nine hundred and .

[Lord] Provost.

DENUDING AND SETTLEMENT

When the attorney comes to denude and settle, the following matters require consideration:—

- 1. Actual relief of all obligations incurred, that is to say, not merely an obligation of relief by the constituent, but actual relief by the act of the creditors in the obligations.
- 2. Even when the attorney has bound himself only as attorney, he may, as already pointed out, incur liability if he parts with funds without providing for the debt, and therefore if it is not to be paid he ought to have the creditor's consent.
- 3. Regard must be had to statutory liability, e.g. for Government duties, taxes, and rates. For instance, if he have paid interests under deduction of income tax, he is probably personally liable to the exchequer for the tax so deducted.
- 4. Payment of his own remuneration and all expenses and reimbursement of all outlays.
- 5. Complete approval, exoneration, and indemnity, which may take the form of the following:—

DISCHARGE BY CONSTITUENT TO ATTORNEY

I, A., considering that I granted in favour of B. a factory commission, and power of attorney dated (hereinafter called "the Power"), which is here specially referred to and held as repeated brevitatis causa: Further considering that the said B. accepted and acted as my attorney, and has had various intromissions, and particularly [specify any special matter as to which a question might possibly be raised, e.g. a compromise of a debt or claim, but this special mention of these matters is not in any way to limit or prejudice the absolute terms and effect of these presents: Further considering that the said B. has submitted to me full accounts of his intromissions, which I have carefully perused, and of which, as well as of his whole actings and management, I approve, and from the abstract thereof annexed and signed as relative hereto it is seen that the balance due to me after giving credit for previous payments to me as shown in said abstract is £ , and now seeing that the said B. has instantly paid to me the said sum of £ , and has delivered to me all my documents and papers, of all which I hereby acknowledge the receipt, therefore I hereby absolutely, finally, and for ever discharge the said B. of his whole actings, transactions, intromissions and management, and of all omissions if any which I might lay to his charge, and I bind myself to relieve and indemnify the said B. [and the factors and law agents employed by him] of and against all claims, demands, and liabilities of whatever nature which may be brought against him [or them] in connection with me or my estate or the Power or his actings, transactions, intromissions, management, and omissions. And I warrant these presents absolutely.—In witness whereof.

Annex abstract of accounts.

SECTION VII

ARBITRATION

CAPACITY OF PARTIES

- 1. Trustees have implied power "to submit and refer all claims connected with the trust estate" when this is not at variance with the terms or purposes of the trust. All the trustees should sign. But see 7 and 8.
- 2. Tutors,² Factors loco tutoris,³ and Curators bonis had at common law power so far as concerns moveable estate; and now by the Trusts Act, 1884 (s. 2), the powers contained in the Trusts Act, 1867, are extended to all these officers and also to factors *loco absentis*, so that in all these cases it appears that the power to refer now exists, and is not limited to personal estate.
- 3. Minors.—If the minor has no curator, no one will enter into a submission with him. If he has a curator, he, with the curator's consent, has the necessary power, subject to challenge within the quadriennium utile.
- 4. Judicial Factors had at common law no power to submit as one of the ordinary powers of their office.⁵ But this disability also is removed by the Trusts Act, 1884.
- 5. Firm.—No partner has implied power to bind the co-partnery to a reference, and therefore all the partners must be parties.⁶
- 6. Married Women.—There is nothing in the Married Women's Property (Scotland) Act, 1881, which enables a married woman to make a valid contract of submission without her husband's consent, unless perhaps it be with reference to the rents of her heritable estate due or to become due during her own lifetime. But if both the jus mariti and right of administration are fully and validly excluded, there is no reason why the wife's submission without her

 ^{30 &}amp; 31 Vict. c. 97, s. 2 (5).
 Maitland v. Mitchell, 1796, Mor. 641;
 Ersk. i. 7. 18; iii. 3. 39.
 Falconer v. Thomson, 1792, Mor.

³ Falconer v. Thomson, 1792, Mor. 16880; Baillis, etc. v. Pollock, 1829, 7 Sh. 619.

⁴ Corson, Petr., 1885, 18 Sh. 1093; Ersk. i. 7. 52.

⁵ M'Dowal's Crs. v. M'D., 1778, Mor. 4058.

⁶ Lumsden v. Gordon, 1728, Mor. 14567.

husband's consent should not be valid. But in point of fact few people will be found willing to be the other party to the contract in such cases.

- 7. Trustees in Sequestration have power, with consent of the commissioners, to refer to arbitration any questions which may arise in the course of the sequestration regarding the estate, or any demand or claim made thereon.¹ If the matter is one of great importance, it may be proper to have the consent of the creditors at a meeting called for the purpose. Quære, whether the trustee should refer any question which it is his right and duty to decide, e.g. a creditor's ranking.
- 8. Trustees under Trust Deeds for Creditors could not, prior to 1884, be assumed to have the necessary power, unless, as is usually the case, it was expressly conferred on them. But the Trusts Act, 1884, has apparently removed this disability.² If, however, the power be not express in the deed, the trustee should obtain at least the consent of the debtor and of the creditors at a special meeting.
- 9. Liquidators.—Official liquidators may refer with the sanction of the Court.³ And on the construction of secs. 133 (7), 151, and 171 of the Act, it would appear to be the better opinion that voluntary liquidators have the same power without consent, even though there has been a supervision order, of course "subject to any restrictions imposed by the Court."
- 10. Counsel have implied authority to refer a litigation to arbitration,4 but of course this power will not be exercised without the client's consent.
- 11. Law Agents, on the other hand, have not this power, and if the agent purport to bind the client and he repudiate, the agent may be found personally liable.⁵

SUBJECT-MATTER

It goes without saying that this should be distinctly stated, and it will usually be found that the shorter the statement is, the clearer it will be. The distinction is sometimes taken between general and special submissions, the former being intended to settle all disputes between the parties. It is not likely that the practitioner will come across many of this kind. It may be assumed that in almost every general submission questions will be raised as to the extent of the reference. It has been suggested that matters relating to heritage would not be included in a general submission unless heritage were mentioned,6 but Erskine gives an opinion against this restriction,7 and it is submitted that nowadays his opinion would certainly be adopted

¹ Bankruptcy Act, 1856, s. 176.

² Royal Bank, Petrs., 1893, 20 R. 741.

³ Companies Act, 1862, s. 171.

⁴ Gilfillan v. Monkhouse, 1833, 11 S. 548; Mackenzie v. Girvan, 1843, 2 Bell's App. 43, per Ld. Campbell.

⁵ Livingston v. Johnson, 1880, 8 S. 594; Woodside v. Cuthbertson, 1848, 10 D. 604.

⁶ Paterson v. Forret, 1612, Mor. 5064.

⁷ Ersk. iv. 3. 32.

unless the deed bore indications of being limited to small affairs. But, of course, no room should be left for doubt on the point. On the other hand, a general submission may be found to cover what was never truly intended. It will cover questions of fraud, and so will a particular submission as regards the special matters referred. Where there is a special clause followed by a general one, the latter will, according to the usual rule, be restricted to matters ejusdem generis with those specially mentioned.

Damages.—If it is contemplated that the subject-matter of the reference may resolve itself into damages, it is necessery to give express power to award and assess damages, for that power is not implied.²

As to procedure in an action which concludes both for payment of sums due under a contract, and for damages for breach of contract, the alternatives are (1) to allow a proof, "under reservation however of any questions which may arise during the course of the inquiry falling within the scope of the reference contained in the contract," or (2) to sist process 4 until the arbiter has dealt with the matters at issue so far as falling within the reference.

ANCILLARY ARBITRATION

This is the very common case of a reference clause in another contract, e.g. a contract for the construction of works. The only point which need be mentioned here is—the sphere of its operation. The most common question is—whether the clause is limited to questions which arise during, e.g. the execution of the works, or whether, on the other hand, it extends to all questions under or arising out of the contract, irrespective of when they arise. In a case 5 where the wording of the reference clause required the narrower construction, Inglis, Ld. Pres., said, "I really hope that there will be an end to cases of this class. A very little care in the choice of language would prevent all ambiguity. Let parties only distinctly express themselves so as to mean that the reference is to cover every kind of claim arising out of the contract, and the Court cannot interfere. On the other hand, if they will use language like that in the clause here, let them clearly understand that it is now settled law that such a clause covers only questions which arise during the execution of the contract." The clause which received this restricted interpretation was-

Should any difference arise between the proprietor and any of the contractors in regard to the true meaning of the plans, drawings, or specifications,

¹ E. Kintors v. Union Bank, 1861, 1 M. (H. L.) 11.

² Mackay v. Leven Police Commissioners, 1893, 20 R. 1093.

³ Barr v. Queensferry Commissioners, 1899, 1 F. 630.

Wilson, etc. v. Stewart, 1898, 25 R. 655.
 Beattie v. Macgregor, 1883, 10 R. 1094.

or the manner in which the work is to be executed, or any matter arising thereout or connected therewith, the same is hereby submitted, etc.

With this may be contrasted a case 1 decided by the other Division at the same time, and referred to in *Beattie's* case with approval, in which the larger meaning was allowed. There the clause was—

Should any dispute arise as to the true nature, sufficiency, times, or extent of the work intended to be performed under the specifications and drawings, or as to the works having been duly and properly completed, or as to the construction of these presents, or as to any matter, claim, or obligation whatever arising out of or in connection with the works, the same shall be submitted, etc.

On this question it is obviously for consideration whether in these cases it is proper that the clause should be of the larger nature if, as is commonly the case, the reference is to the engineer or other employee of one of the parties to the contract. But the point is to leave no doubt whichever way of it is intended.

THE ARBITER OR ARBITERS

The great rule until recently was, that the arbiter must be named in the contract, and that it was not sufficient to refer to the holder of an office for the time, or to a person to be named by, say, the sheriff of a certain county. The exceptions to this rule were (1) certain statutory exceptions; and (2) what were called ancillary submissions, e.g. an agreement in a lease that the landlord should, at its expiry, take over the stock at a valuation; then, though no arbiters were named in the lease, it was held that there was a valid reference, and that the parties must at the expiry of the lease proceed to name arbiters. And now the rule itself has been wholly abrogated, and with what is now practically retrospective effect. So that now there may be a valid contract of submission though no arbiters are named, it being no objection to the validity of the reference that it is "to a person not named, or to a person to be named by another person, or to a person merely described as the holder for the time being of any office or appointment." 2

The submission ought to make it clear whether it is to a sole arbiter or to two arbiters and an oversman. Though that be not express, there may be enough to guide the court, e.g. a reference according to the custom of a particular trade.³ If not, the Court cannot appoint an arbiter under the statute, but the contract to refer may be enforceable by another method.⁴

The reference may be to one of the parties as sole arbiter, and this

¹ Mackay v. Par. Bd. of Barry, 1883, 10 R. 1046. See also Barr, supra.

² Arbitration Act, 1894, 57 & 58 Viet. c. 13.

³ Douglas & Co. v. Stiven, 1900, 2 F.

⁴ M'Millan & Son, Ltd., Petrs., 1902, 10 S. L. T. No. 235,

not only as to a definite matter but also of all disputes under an executorial contract.¹ If a reference of this peculiar kind

is abused, the party who is injured is not without redress, because if a party acts manifestly against the law or the facts in favour of himself, his award would be liable to reduction on the same grounds as the award of a third party would be who had identified himself with one of the interests in the subject of dispute.¹

Disqualification.—Anything which proves that the arbiter or oversman is committed to one side of the question will disqualify him. But that does not prevent a valid reference to say the engineer of one of the parties, or even, as has been seen, to one of the parties themselves. But, for example, the engineers of the employers will be disqualified in consequence of their having given evidence for the employers, or taken up some other position which showed that they had made up their minds.²

THE OVERSMAN

The oversman or umpire may be appointed (1) by the parties in the submission; (2) by the arbiters if there is no appointment in the deed, and if it does not debar the arbiters from appointing; (3) in the same case, if the arbiters do not appoint, the Court will do so; and (4) failing everything else, the parties may at any time make an appointment, which, however, is practically a new submission. Clearly the oversman should be appointed before the business of the reference is entered upon, which is indeed the compulsory rule under the Lands Clauses Acts. Not only is it obvious that once the parties or the arbiters have quarrelled on the merits, they will be less likely to agree upon a joint nomination of an oversman; but, further, unless he is appointed at once, he cannot be present at any proof which may be held and any debate which may take place before the arbiters.

The abovementioned implied power to the arbiters to name an oversman is a statutory reversal ³ of the common law rule that arbiters had no such power unless it was expressly conferred. Various questions may arise as to the existence and subsistence of the power, and the following cases may be distinguished:—

- 1. If the submission contains an appointment of an oversman, who fails, it appears that the arbiters have no power.
- 2. If the arbiters appoint an oversman who declines to accept (a case which should not be allowed to happen), the power is not exhausted.
- 3. If the oversman accepts but dies, whether before or after devolution, it would appear that the power of appointment is exhausted.

These considerations suggest that there should still be an express

³ See Note 2, p. 71.



¹ Buchan v. Melville, 1902, 4 F. 620.

Hamilton's Trs., 1908, 10 S. L. T. No. 341, 2 Buchan, supra, Halliday v. D. of and cases cited.

clause as to the arbiters' power to appoint an oversman in all submissions to two arbiters, whether the parties themselves name an oversman in the deed or do not; and the terms of the clause should be carefully considered. (See pp. 78, 79.)

PROCEDURE

"All the incidental questions which arise in the course of procedure are as much referred to the arbiter's sole judgment as the final decision"; 1 e.g. as to allowing the parties to be represented by lawyers, "each arbiter must settle it according to the subject matter which he has in hand, and the resulting considerations of convenience and justice. In some references, to exclude lawyers would be unjust; in others, to admit them would be absurd. Their presence at one stage of an arbitration might be useful, and at another stage of the same arbitration might be confusing." 2

It is impossible, and would be out of place, to go into the matter of procedure here at any length, but the following points may be noted:—

- 1. First Orders.—Acceptance of office; appointment of clerk and legal assessor; appointment of oversman if not contained in the submission; and order for claim or counter claims, if suitable and necessary, within a short stated period; and answer or respective answers, within a short further stated period. But if the submission is of the nature of, e.g. a stock valuation, there will be no order for claims.
 - 2. Acceptance of Office by Oversman.
- 3. Inspection.—If the case is suitable for a meeting on the ground, this will be formally intimated to both sides.
- 4. Proof.—Questions have been raised both whether in certain cases arbiters were entitled to proceed without proof, and on the other hand, whether they were entitled to order proof. It is hardly necessary to say that, if proof be heard on one side, it must be heard on both; nor will it be prudent to refuse to receive proof when offered by either of the parties, though there are several cases in which decrees-arbitral have been upheld in the face of such a refusal. But the object is not to defeat, but to prevent, a challenge and the consequent expense. The parties may be asked to renounce probation, or otherwise an order may be issued requiring them and each of them to state within a short interval whether they desire to lead proof. It is customary for the oversman to be present at the proof, and it will be prudent and expedient to obtain a joint minute of the parties consenting to this and to the oversman deciding any questions which may arise between the arbiters at the proof, e.g. as to the admission or rejection of any particular line

1890, 17 R. 624; affd. 1891, 18 R. (H. L.) 52. Paterson v. Corpn. of Glasgow, 1901, 8 F. (H. L.) 34.



¹ Per Lord Rutherfurd Clark in *Holmes*, at p. 656.

² Per Lord Robertson in Paterson.

³ Holmes Oil Co. v. Pumpherston Oil Co.,

of evidence. Or, perhaps better, the deed of submission may itself contain a clause to this effect. But so far as regards the mere fact of the oversman sitting with the arbiters no special consent is necessary.¹

- 5. **Hearing.**—The same remarks apply here, but in a stronger degree. Less expense is involved, and it is difficult to figure a case where a hearing should be refused. But see the case noted below.²
- 6. Devolution.—If the arbiters fail to agree, they will devolve on the oversman. The minute of devolution will expressly state that the arbiters have differed. In certain cases the devolution may be partial, the remainder of the questions being disposed of by decree-arbitral by the arbiters, but in that case they must take care that the two things—the decree and the devolution—are mutually exclusive and are exhaustive, and that the decree is issued within the time of the submission, for any prorogation by the oversman will apply only to what is devolved upon him, and devolution does not imply prorogation ³ Unless otherwise specially provided, devolution requires an express act in addition to the mere appointment of the oversman, ⁴ and the power to devolve arises only after the arbiters have differed, so that the death of an arbiter without devolution brings the whole submission to an end.
- 7. Notes of proposed Findings and allowance of Representations.—Notes of proposed findings are not essential, but it is the practice to issue them, and this should not be departed from. At the same time the parties will be allowed to lodge representations against the proposed findings, if so advised, within a short stated period.

DECREE-ARBITRAL

The view is suggested that, as a rule, decrees-arbitral are allowed to run to most unnecessary length. (Forms are given on pp. 84, 89.) The decree will be conveniently endorsed on the submission or a copy of it.

- 1. Narrative.—The decree ought to recite very briefly (a) the acceptance of office; (b) proof, if any; (c) hearing of parties; (d) prorogations, if any; and (e) if the decree is by the oversman, his appointment and acceptance, arbiters' difference, and devolution. It is said that it is essential that the decree shall contain the words "having God and a good conscience before our eyes." It is difficult to take this seriously in view of the modern statutory provisions for declarations in lieu of oaths adapted expressly to meet the case of people holding no religious belief. But the words should not be omitted.
- 2. Substantive Operative Clauses.—Care will be taken to make these square exactly with the terms of the submission, neither more nor less. Usually there is no reason why details should be given,

Crawford v. Paterson, 1858, 20 D. 488.
 M'Nair's Trs. v. Roxburgh, 1855, 17 D.
 Gf. M'Ghee v. Moneur, 1899, 1 F. 594.
 Brysson v. Mitchell, 1823, 2 S. 340.



which may simply be furnishing matter for objections to the decree. On the other hand, if separate matters are articulately referred to the arbiters, it is proper that in the award they too should follow the same rule.

3. Expenses.—The decree will deal with expenses (a) as between the parties; and (b) the expense of the clerk and legal assessor; but not the arbiters' own remuneration. This, however, does not necessarily mean that the arbiters and oversman are not entitled to remuneration. No doubt that is the common law rule; or was, for see opinions that the law might now be found to be modified. But the rule does not extend to arbitrations under the Lands Clauses Consolidation Act, 1845, which (s. 32) provides that the Company shall in all cases pay the expenses of the arbiters and oversman; held in Murray's case that this is not limited to out-of-pocket costs, but includes reasonable remuneration.

The award of expenses may be in name of the agent-disburser.2

- 4. Penalty.—There must be no penalty unless or otherwise than authorised by the submission. But it is suggested that there should be no penalty clause in the submission; and further, that even if there is, it should not be repeated in the award.
- 5. Registration.—Any consent to registration for execution appears unnecessary. If the submission does not contain a clause consenting to registration, for this purpose, of both the submission itself and any decree or decrees arbitral, such a clause in the decree will not be effectual; and if the submission does contain such a clause, any similar clause in the decree is superfluous. But it is suggested that the arbiter should appoint the clerk to register the submission, decree, etc., on payment of his (the clerk's) remuneration.

INTERIM DECREES

It is usual to give express power to issue interim decrees. If that be omitted, it is not clear that it can be implied even when matters are separable. When the power exists, an interim decree is binding though no final decree should be issued.³ It is suggested that the propriety of giving power to issue interim decrees is worthy of more consideration than it usually receives. If the question is merely how much A. owes to B., the liability being admitted, there is not much objection to a power to issue an interim decree, though even then it would be very awkward if, after an interim award was issued for £1000 on account, the submission fell without a final decree, and on a new submission it was held that £900 was the full original sum. It may be said that practically under these circumstances no interim decree would be issued

¹ Murray v. N. B. Ry. Co., 1900, 2 F. ² Hood v. Baillie, 1832, 11 S. 207. ³ Mackessock v. Drew, 1822, 2 S. 11.

without A.'s consent; but if so, that could be given as well without a clause in the submission. The case is obviously worse if the liability also be denied, for then, after an interim decree was pronounced in one submission, it might be established in a second submission that there was no liability at all. On the other hand, where the arbiters will require to lay down principles of judgment which it will be necessary or convenient to have worked out under their orders, it is clearly a case for an interim award. (See p. 87.)

ENDURANCE OF SUBMISSION

Apart from the terms of the deed of submission, the chief practical matter to be kept in view is, that in the ordinary case the submission will fall by the death of either of the parties. This is clearly law,1 though why it should be so it is difficult to understand. The rule does not apply to the case of trustees who have all died after entering into a submission if the trust is carried on in the persons of assumed trustees,2 and in the same case opinions were expressed that the rule does not apply to a mere reference to expiscate matters, e.g., accounts, there being no pending dispute. The submission will of course contain a clause to exclude the operation of the rule. Necessarily the submission falls by the death of one of the arbiters, or of a sole arbiter 3 or of the oversman, after matters have been devolved upon him, unless a clause has been inserted to meet the latter case. It does not fall by the bankruptcy of the parties. In that event intimation should be made to the trustee. He may decline to appear on account of the risk of personal liability for costs. His non-appearance after intimation does not prevent the submission being proceeded with or affect the award.4

In the clauses as to endurance usually found in submissions—

- 1. "Betwixt and the day of next to come," probably means year and day; 5 and the period runs from the last signature to the deed of submission.6
- 2. "Betwixt and the day of "has the same effect—i.e. it gives no longer period."
- 3. "Betwixt and the 1st day of June 1904" includes the specified day.8
- 4. When no endurance is specified, it is a question whether the contract lasts for forty years or is limited to year and day.9
 - ¹ Ersk. iv. 3. 29.
- ² Alexander's Trs. v. Dymock's Trs., 1883, 10 R. 1189.
 - 3 Moir v. Duff & Co., 1900, 2 F. 1265.
- ⁴ Barbour v. Wight, F. C., 21 Nov. 1811. Grant v. Girdwood, F. C., 23 June 1820.
- ⁵ E. Dunmore v. M'Inturner, 1829, 7 S. 595.
- ⁶ Taylor v. Grieve, 1800, Mor. Ap. Arbitration, No. 8.
- ⁷ Stark v. Thom, 1820, F. C. App. p. 3.
- 8 Cockburn v. Edward, 1724, Mor. 640.
- ⁹ Floming v. Wilson, etc., 1827, 5 S. 906; Ersk. iv. 3. 29.

PROROGATIONS

The above is on the assumption that there is no prorogation. The parties may always prorogate. But as to the arbiters and oversman, if it is intended that they should have the power, it ought to be expressly given. If given to the arbiters, the oversman may exercise it after devolution, unless a contrary intention appear in the deed.¹

GENERAL SUBMISSION TO A SOLE ARBITER

We, A. and B., do hereby submit all claims, disputes, questions, and differences, as well those relating to heritable as to moveable estate, and all others at present existing between us, to the amicable and final decision of C.. as sole arbiter mutually chosen, declaring that this submission, while not limited thereto, embraces the following matters, namely [specify briefly and articulately]: And we agree that the arbiter, while entitled to hear proof personally or by commission, make inquiries, obtain skilled assistance, and hear the parties, shall not be bound to do all or any of those things unless or further or otherwise than as he in his uncontrolled discretion shall think fit, but he shall be entitled to decide the matters hereby referred in whole or in part by his personal skill and knowledge, if and so far as he shall think fit so to do; and he shall be entitled to order the execution and performance of such deeds, works, and things as he may think fit; to order consignation; and to award and assess damages. With power to the arbiter to decern against either party in whole or in part for payment of the expenses which may be incurred by the other party, including the expense of these presents, and of the decree or decrees-arbitral, and registration of the same, and also for the expense of all skilled assistance, and for the remuneration of the clerk to the submission: And whatever the arbiter shall determine by decree or decreesarbitral, interim or final, to be pronounced before the expiry of year and day from the last date of these presents, or before the expiry of any other day to which he may prorogate this submission, which he is hereby empowered to do at pleasure, we bind ourselves and our respective heirs, executors, and representatives to implement to each other. And it is hereby declared that although either or both of us shall die during the dependence of this submission, the same shall continue in operation, and with all that shall then have followed or may thereafter follow thereon be binding against us both and our respective estates and foresaids: And we agree that in case no final decree-

Alternatively the following clauses may be introduced in lieu of this last: And we bind ourselves and our respective heirs, executors, and representatives to implement to each other whatever the arbiter shall determine by decree or decrees-arbitral interim or final; and we agree that notwithstanding the lapse of year and day, this submission shall endure until all matters hereby referred are finally determined, and that without the necessity of any prorogation, and particularly it is hereby declared that although either or both of us shall die, etc.

¹ Glover v. G.'s Trs., 1805, 4 Paton, 655.

arbitral shall follow hereon, all probation which may be taken hereunder shall be received as legal probation quantum et quale in any subsequent submission or process of law between us or our respective foresaids: And we consent to registration hereof and of the prorogations and decree or decrees-arbitral to follow hereon for preservation and execution.—In witness whereof.

GENERAL SUBMISSION TO ARBITERS AND OVERSMAN ALL THEREIN NAMED

We, A. and B., do hereby submit all claims, disputes, questions, and differences, as well those relating to heritable as to moveable estate, and all others at present existing between us, to the amicable and final decision of C. and D., arbiters mutually chosen, and in case of difference in opinion between them [or failing either of them by non-acceptance, death, or otherwise] then of E. as oversman [or sole arbiter as the case may be], and failing him [as oversman], before delivery of a final decree-arbitral, whether by nonacceptance, death, or otherwise, and whether before or after devolution, then of any other oversman to be chosen by the arbiters, declaring that this submission, while not limited thereto, embraces the following matters, namely [specify briefly and articulately]: And we agree that the arbiters and oversman [and sole arbiter as the case may be] while entitled to hear proof, personally or by commission, make inquiries, obtain skilled assistance, and hear the parties, shall not be bound to do all or any of those things unless or further or otherwise than as they or he, in their or his uncontrolled discretion respectively, shall think fit, but they and he respectively shall be entitled to decide the matters hereby referred in whole or in part by their or his personal skill and knowledge, if and so far as they and he respectively shall think fit so to do, and they and he shall be entitled to order the execution and performance of such deeds, works, and things as they and he may think fit, to order consignation, and to award and assess damages: And we consent to the oversman being present and consulting and advising and taking part with the arbiters in all or any of their deliberations, examinations, proof, and hearing (if any), and at all other stages; and if there should be a devolution, then to his deciding after or without hearing the opinions of the arbiters and without further enquiry and hearing, all as he in his uncontrolled discretion may think fit: With power to the arbiters and oversman [and sole arbiter as the case may be] respectively to decern against either party, in whole or in part, for payment of the expenses which may be incurred by the other party, including the expense of these presents, and of the decree or decrees-arbitral, and registration of the same, and also for the expense of all skilled assistance, and for the remuneration of the clerk to the submission: And whatever the arbiters or oversman [or sole arbiter as the case may be] respectively shall determine, by decree or decrees-arbitral, interim or final, to be pronounced before the expiry of year and day from the last date of these presents, or before the expiry of any other day to which they or he respectively may prorogate this submission, which they and he are respectively authorised to do at pleasure, we bind our-



selves [as on p. 77 to clause of registration]: And we consent to registration hereof and of the prorogations and devolution and decree or decrees-arbitral to follow hereon for preservation and execution.—In witness whereof.

SUBMISSION TO ARBITERS AND OVERSMAN TO BE NAMED BY THEM

To the amicable and final decision of C. and D., arbiters mutually chosen, and in case of their differing in opinion [or failing either of them, whether by death or otherwise then] of an oversman [as such or as sole arbiter as the case may be] to be chosen by them before they enter on the business of the submission, and in the event of the failure of any oversman so appointed before delivery of a final decree-arbitral, whether by non-acceptance, death, or otherwise, and whether before or after devolution, then of any other oversman [as such or as sole arbiter, as the case may be] to be chosen by the said arbiters, before or after they enter on the business of the submission.

SUBMISSION TO SOLE ARBITER TO SETTLE MARCHES

We, A. and B., considering that we are heritable proprietors of the estates of X. and Y. respectively, in the county of Z.; That the same adjoin one another, and doubts have arisen as to the correct boundary line between the properties, and that we have agreed to settle the same by arbitration: Therefore we do hereby submit to the amicable and final decision of C., as sole arbiter mutually chosen, to determine the boundary line between our said respective properties, wherever the same, in his opinion, adjoin one another, and how such line shall in future be marked out: And we agree that the arbiter, while entitled to hear proof [as on p. 77]: With power to the arbiter to decern against either party in whole or in part for payment of the expenses which may be incurred by the other party, including the expense of these presents, and of the decree-arbitral and registration thereof, and also for the remuneration of the clerk to the submission, but as regards the expense of executing any works which the arbiter shall order for marking out the said boundary line we hereby agree that the same shall be borne by us equally: And whatever the arbiter shall determine by decree-arbitral to be pronounced [as on p. 77 to end, so far as appropriate to the circumstances].

TO SETTLE AND STRAIGHTEN MARCHES

We, A. and B., considering that we are heritable proprietors of the estates of X. and Y. respectively in the county of Z.; That the same adjoin one another, and doubts have arisen as to the correct boundary line between the properties, and that we have agreed to enter into this submission in order to settle the same, and also to straighten or otherwise improve the boundary line, so far as admitted, or as the same may be determined in this submission: Therefore we do hereby submit to the amicable and final decision of C., as sole arbiter mutually chosen, to determine the boundary line between our said respective properties, wherever the same, in his opinion, adjoin one another: And the same having been determined, to straighten or otherwise alter the

whole or any part or parts of the boundary line between the two properties, and to declare what the whole boundary line shall in future be, and how the same shall be in future marked out: As also to decide what dispositions, excambions, or other deeds shall be executed by us respectively, and to adjust the terms thereof; and what sum, if any, shall be paid by either of us to the other in respect of such alterations: And we agree that the arbiter, while entitled to hear proof [as on p. 77]: With power to the arbiter to decern against either party in whole or in part for payment of the expenses which may be incurred by the other party, including the expense of these presents, and of the decree or decrees arbitral and registration thereof, and of the dispositions, excambions, and other deeds, and also for the remuneration [as above to end].

SUBMISSION TO SOLE ARBITER TO CLEAR UP PARTNERSHIP ACCOUNTS BETWEEN PARTNERS

We, A. and B., considering that since the we have carried on business as in co-partnery under the firm of A. and B.: That there was no contract of co-partnery, but the arrangement was, as we hereby admit, that we should contribute equally to capital, and should be equally interested in profits, and equally liable for losses: That we have now dissolved partnership as at the day of order to determine our respective rights, duties, and obligations, and to adjust accounts between us, we have resolved to enter into this present contract of submission: Therefore we do hereby submit to the amicable and final decision of C., C.A., Edinburgh, as sole arbiter mutually chosen, to investigate the whole partnership affairs and accounts so far as in his opinion the same is necessary, to make or obtain all valuations which in his opinion are necessary or advisable, and further and otherwise, without limitation by reason of what is hereinbefore written, to do everything which in his opinion is required in order to ascertain and determine all matters, claims, and accounts between us relating to the said business and partnership, and to determine the same accordingly, and to decern for whatever sum or sums he may find due by either of us to the other, and to determine what discharges or other deeds fall to be granted by us respectively, and to adjust the same: And we agree that the arbiter while entitled to hear proof [as on p. 77 to end, so far as appropriate to the circumstances.

SUBMISSION TO SOLE ARBITER TO FIX SHARE OF DECEASED PARTNER IN CO-PARTNERY

We, the parties following, namely (first) A., B., and C., the trustees and executors of the deceased D., acting under his trust disposition and settlement dated , and registered in the Books of Council and Session on , and duly confirmed as executors foresaid conform to confirmation by the sheriff of in our favour dated at on , and (second) E. and F. [surviving partners], Considering that the said D. and we the said E. and F. carried on business as under the firm name

of D., E., & F., in terms of the contract of co-partnery between him and us, , which is here specially referred to and held as repeated brevitatis causa; That by the said contract of co-partnery it is provided that on the death of any of the partners the surviving partners shall have the option of acquiring the share of the deceased on the basis of a balance-sheet to be made up as at the date of his death, which balance-sheet, failing agreement, should be adjusted by G., C.A., Edinburgh, as sole arbiter; That the said D. died on the day of , and that in terms of the said contract of co-partnery we have agreed to refer to the said G. to the effect after-written: Therefore we hereby submit to the amicable and final decision of said G., as sole arbiter, to make up a balance-sheet of the said business and co-partnery as at the said day of , in order to fix the share and interest of the said D. therein, and to fix and determine the same accordingly: And we agree [as on p. 77 to end, so far as appropriate to the circumstances].

TO SETTLE QUESTIONS REGARDING THE BUILDING OF A HOUSE, ETC.

We, A. and B., considering that I, the said B., was employed by me, the said A., to erect a dwelling house at , with offices and enclosing walls and railings, and the house erected by me the said B. is now known as ; Further considering that questions have arisen between us regarding the said employment and the execution of the work; That I, the said A., have already paid to the said B. the following sums on account of the said contract, , £ on , and \pounds is still claimed, and under these circumstances we have agreed to enter into this contract of submission: Therefore we hereby submit to the amicable and final decision of C., as sole arbiter, to determine what sum if any is still due by me the said A. to me the said B. and with what interest, if any, thereon, in respect of the said employment and works; and in order to the decision of this question, the said arbiter shall (without prejudice to his general powers as arbiter, and without limitation by reason of the narrative of these presents or otherwise) be entitled, and he is hereby appointed arbiter, to determine, inter alia, the nature, extent, terms, and conditions of the employment, and the sufficiency or insufficiency of the materials and workmanship, and to award and assess damages: And we agree [as on p. 77 to end, so far as appropriate to the circumstances].

SUBMISSION OF DEPENDING CROSS ACTIONS TO A SOLE ARBITER

We, A. and B., considering that we instituted counter actions, the one against the other, in the Court of Session, and that the same are now depending before Lord , Ordinary, the summons at the instance of me, the said A., being signeted on , and the summons at the instance of me, the said B., being signeted on , and the records in both actions having been closed on , which records are here specially referred to and held as repeated brevitatis causa; And now seeing

that we have decided to settle by arbitration instead of in Court all the claims and matters in dispute between us in the said actions: Therefore we do hereby submit the same to the amicable and final decision of C. as sole arbiter mutually chosen: And we agree [as on p. 77 to end, so far as appropriate, but in the expenses clause include the expenses of the said actions].

If there is a cautioner in either process, he should be a consenting party.

TO SETTLE DIVISION OF INTESTATE SUCCESSION

We, A., B., and C., considering that D., who died on , was the husband of me the said A., the father of me the said B., and the grandfather of me the said C.; That he died intestate, possessed of both heritable and moveable estate; That various questions have arisen regarding our respective claims, rights, and interests against and in his estates, to settle which we have resolved to enter into this contract of submission: Therefore we hereby submit to the amicable and final decision of E., as sole arbiter, to determine all questions regarding our respective claims, rights, and interests against and in the heritable and moveable real and personal estates of the said D., and to determine to what extent respectively we are entitled to the same, whether as creditors, or by right of succession, or otherwise in any character, or on any title, or in any manner of way, and under what burdens and conditions respectively: As also to decide what deeds and documents fall to be granted by us respectively, and to adjust the same: And we agree [as on p. 77 to end, so far as appropriate, but the expenses clause should refer to the expenses which may be incurred by any other or others of us, including the expense of these presents, and of the said deeds and documents, and of the decree or decreesarbitral, and registration thereof, and also for, etc.].

ORDERS BY ARBITERS, ETC.

1. ACCEPTANCE

[Place and date.] I accept office as arbiter; or, We accept office as arbiters, and appoint X. as oversman.—In witness whereof.

This will be endorsed on the submission.

2. FIRST ORDER

[Same date.] The arbiter appoints D. to be clerk and legal assessor in the submission: Further he appoints the parties to lodge their respective claims within days, and allows them respectively to see and answer the claim of the other party within days thereafter: Appoints each party to produce with his claim all the written evidence in his possession on which he intends to found.

3. Inspection

[Place and date.] The arbiter fixes otherwise] for a meeting on the ground.

at 12 o'clock noon [or

1 These will be inserted in all the orders.

4. REVISAL

The arbiter appoints parties to revise their claim and answers respectively within days.

5. For Closing Record

The arbiter having considered the revised claim No. of process, and the revised answers No. of process, with the productions and whole process, Appoints parties to attend him at on at o'clock, for the purpose of adjusting and closing the record.

6. CLOSING AND DEBATE

The arbiter closes the record on the revised claim and answers Nos.

and of process, and appoints parties to be heard before him on the whole cause at on at o'clock.

7. CLOSING AND PROOF

The arbiter closes the record on the revised claim and answers Nos. and of process; Allows the parties a proof of their respective averments [and to the claimant a conjunct probation; or, allows the claimant a proof of his averments and the respondent a conjunct probation], [the claimant A. to lead in the proof]; Appoints the same to commence in on

at o'clock: Further, the arbiter respectfully recommends to the Lords of Council and Session [or the Sheriff] to grant warrant for citing witnesses and havers on the application of either party.

8. AVIZANDUM

The arbiter, having heard the proof adduced for both parties, and their procurators thereon and on the whole cause, makes avizandum.

9. WITH NOTES OF PROPOSED FINDINGS

The arbiter having considered the proof, productions, and whole process, issues herewith the subjoined notes of his proposed findings: Allows the parties to lodge representations within the next days.

Notes of proposed findings above referred to.

10. Expenses

The arbiter having considered the representations lodged for the claimant A., adheres to his proposed findings: Appoints the claimant B. to lodge an account of his expenses within the next days, and remits the same when lodged, and also the account of the clerk and legal assessor, to the Auditor of the Court of Session to tax and to report.

11. Propogation

The arbiter prorogates the submission to the day of next.

¹ Inglis, L.-J.-C., in Edin. Mags. v. Warrender, 1862, 1 M. 18.

12. DEVOLUTION

We, A. and B., above designed, having differed in opinion, do hereby devolve the submission and whole matters therein contained upon C., the oversman.—In witness whereof.

This and the oversman's acceptance will be written on the submission.

13. PROBOGATION BY THE PARTIES

(1) Submission not expired, but containing no power of Prorogation

We, A. and B., the parties to the foregoing submission, hereby prorogate the same to the expiry of the day of [specify the exact date intended].—In witness whereof.

(2) Submission expired

We, A. and B., the parties to the foregoing submission, considering that the same has expired without being exhausted, hereby prorogate and renew the same to the expiry of year and day from the date of these presents: And we of new submit the whole matters contained in the said submission to the amicable and final decision of C., therein designed, as sole arbiter, and with the above extension or renewal of endurance we adopt the said submission in all its clauses, all which are here held as repeated brevitatis causa.—In witness whereof.

This latter, being really a new submission, should bear a sixpenny stamp.

14. Consent to Oversman Sitting and Acting at Proof and Hearing along with Arbiters

The parties consent to the oversman sitting along with the arbiters at the proof and hearing, and to his deciding any question which may arise between the arbiters in the course of the proof.

[To be signed by the parties or their agents or counsel.]

DECREES-ARBITRAL

SETTLING MARCHES [SUBMISSION, p. 79]

I, C., sole arbiter appointed under deed of submission between A. and B., dated , whereby they submitted to me to determine the boundary line between their respective estates of X. and Y., in the county of Z., wherever the same, in my opinion, adjoin one another, and how such line should in future be marked out, as the said deed of submission which contains sundry other clauses, and which is here specially referred to and held as repeated, in itself more fully bears, Considering that I accepted office as arbiter, ordered and received claims and answers for the parties, had a meeting with their agents on the ground, and heard parties by their agents; And being now well and ripely advised on the whole matter, and having God and a good conscience before my eyes, I do hereby pronounce my final sentence and decree-arbitral as follows:—I find (first) that the boundary between the said estates of X.

and Y. is the line coloured blue on the plan annexed and signed by me as relative hereto, which is here specially referred to [then, if possible, state the course of the boundary as, e.g., follows, beginning the said line at the junction of the two streams which form the burn at the point marked A on the said plan, thence running down the medium filum of the said burn for 300 yards or thereabouts to the point marked B on the said plan, then turning westwards or north-westwards and running to the hill top named the Ordnance Survey map, and marked C on the said plan, thence keeping to the watershed for 3 miles 100 yards or thereabouts by the points marked D, E, and F on the said plan, and lastly, running from the said last-mentioned point to the road leading to shooting lodge at the point where burn marked G on the said plan; and (second) the road crosses the that march stones shall be erected by the parties at the said points [specify them, and that a stone dyke, similar to that on the adjoining farms of

and , shall be erected by them between the said points and ; and I ordain the said A. and B. to erect said march stones and stone dyke accordingly: And I find the said A. and B. jointly and severally liable in the remuneration of M., my clerk and legal assessor, which I modify at the sum of £, and I decern and ordain the said A. and B. to pay the said sum to the said M., with interest at the rate of five per cent. per annum from the date hereof till paid: And quoad ultra I find no expenses due to or by either party.—In witness whereof.

This will be recorded on two warrants—one for each party—directing registration for preservation as well as for publication, and two extracts will be obtained.

SETTLING AND STRAIGHTENING MARCHES [ANNEXED TO SUBMISSION, p. 79]

I, C., designed in the foregoing deed of submission, Considering that I accepted office as arbiter, ordered and received claims and answers for the parties, had a meeting with their agents on the ground, and heard parties by their agents; And being now well and ripely advised on the whole matter, and having God and a good conscience before my eyes, I do hereby pronounce my final sentence and decree-arbitral as follows:-I find (first) that the boundary line between the estates of X. and Y. as at the date of the said deed of submission is represented by the line coloured blue on the plan annexed and signed as relative hereto, which is here specially referred to; (second) that the same shall be altered in part, so as in future to be represented between the points A and B, and again between the points C and D on the said plan, by the lines coloured red thereon instead of by the line coloured blue; (third) that the whole boundary line between the said properties shall accordingly in future be the line coloured blue on the said plan except between the said points A and B, and again between the said points C and D, between which points the boundary shall be the line coloured red, beginning the said boundary line [specify line in the manner shown in previous style]; (fourth) that there falls to be paid by A., designed in the said deed of submission to B., also therein designed, the sum of \mathcal{L}

respect of the alterations of boundary; (fifth) that the said A. shall, in exchange for the counter disposition aftermentioned, execute in favour of the said B. a disposition in terms of the draft No. of the submission process, which draft is signed by me for the purpose of identification; (sixth) that the said B. shall in exchange for the foresaid disposition, and the said sum of , grant in favour of the said A. a disposition in terms of the draft £ of the submission process, which draft is signed by me for the purpose of identification; and (seventh) [state what fences, etc., are to be erected as in previous style]: And I decern and ordain as follows:—(first) the said A., in exchange for a disposition in his favour, as aforesaid, to grant a disposition in favour of B., as aforesaid, and to pay to the said B. the said sum ; (second) the said B., in exchange for said last-mentioned disposition, and said sum of £ , to grant a disposition in favour of A. as aforesaid; (third) the said A. and B. to erect the said [fence or otherwise]; (fourth) the said A. and B., jointly and severally, to pay the remuneration due to M., my clerk and legal assessor, which I modify at the sum of £ interest at the rate of five per cent. per annum from the date of this decree till paid: And quoad ultra I find no expenses due to or by either party.—In witness whereof.

See note supra.

Adjusting Accounts between Partners [Submission, p. 80]

I, C., designed in the foregoing deed of submission, Considering that I accepted office as arbiter, ordered and received claims and answers for the parties, allowed and heard proof for both parties, and heard them by their agents thereon and on the whole matter; And being now well and ripely advised thereon, and having God and a good conscience before my eyes, I do hereby pronounce my final sentence and decree-arbitral as follows:--I find that A., designed in the said deed of submission, is liable in payment to B., also therein designed, of the sum of £ , with interest at the rate of five per cent. per annum from the till paid, and that in full and day of mutual discharge of all claims and liabilities between the parties in connection with the business and partnership referred to in the said deed of submission, and that on the said sum and interest being paid the parties are bound to execute a deed of mutual discharge in terms of the draft No. submission process, which draft is signed by me for the purpose of identification: Therefore I decern and ordain the said A. to pay to the said B. the said sum , with interest as aforesaid, in exchange for such deed of discharge, of £ and decern and ordain both parties simul ac semel with such payment to exchange such deed of discharge duly executed in duplicate: Further, I find the said A. liable in two-thirds of the expenses incurred by the said B., and the said expenses having been taxed by the Auditor of the Court of Session at £90, decern and ordain the said A. to pay to the said B. the sum of £60 in respect of expenses, with interest thereon at the said rate from the date hereof till paid: Also I find the said A. and B. jointly and severally liable to M., my clerk and legal assessor, for his remuneration, and the same having been taxed by the Auditor of the Court of Session at £30, decern and ordain the said A. and B. jointly and severally to pay the said sum of £30 to the said M., with interest as aforesaid, declaring that *inter se* the said A. shall bear two-thirds thereof and the said B. the remaining one-third thereof: And I direct the said M. to register the said deed of submission and these presents in the Books of Council and Session on payment of his remuneration.—In witness whereof.

FIXING DECEASED PARTNER'S SHARE [SUBMISSION, p. 80]

I, G., designed in the foregoing deed of submission [or of which the foregoing is an extract], Considering that I accepted office as arbiter, and having made the necessary investigation, prepared a balance-sheet of the firm of D., E., , and issued the same in draft to the parties, & F. as at the day of received and considered representations thereon, and heard the parties by their agents; And being now well and ripely advised on the whole matter, and having God and a good conscience before my eyes, do hereby pronounce my final sentence and decree-arbitral as follows: -I find and declare (first) that the balance-sheet signed by me as relative hereto is a full and correct balancesheet of the affairs of the said firm as at the day of , and (second) that, as shown in the said balance-sheet, the amount of the share and interest of the late D. in the said business as at the said day of . [Expenses].—In witness whereof. £

SETTLING QUESTIONS REGARDING ERECTION OF A HOUSE, ETC. [SUBMISSION, p. 81]

I, C., designed in the foregoing deed of submission, Considering that I accepted office as arbiter, ordered B., also therein designed, to lodge a claim, and A., also therein designed, to answer the same; allowed proof and heard the same, and heard parties thereon by their agents; And having fully considered the same and whole process, and being well and ripely advised on the whole matter, and having God and a good conscience before my eyes, do hereby pronounce my final sentence and decree-arbitral as follows:—I find that there is still due by the said A. to the said B., in respect of the matters submitted to me, the sum of £ , with interest thereon at the rate of annum from till paid, and I decern and ordain the said A. to pay the same to the said B. with interest as aforesaid, and that in full settlement between the parties of the matters submitted to me [insert clauses as to (1) expenses, (2) clerk's remuneration, and (3) registration, or such of these as are necessary, from the preceding forms].

INTERIM DECREE-ARBITRAL SETTLING PRINCIPLES OF DIVISION OF INTESTATE SUCCESSION [SUBMISSION, p. 82]

I, E., considering that by deed of submission dated , entered into between A., B., and C., on the narrative therein contained, they submitted to my amicable and final decision, *inter alia*, all questions regarding their respective claims, rights, and interests against and in the heritable and moveable real and personal estates of D., and to determine to what extent respectively they are

entitled to the same, whether as creditors, or by right of succession, or otherwise in any character, or on any title, or in any manner of way, and under what burdens and conditions respectively, all as the said deed of submission, which contains special power to issue interim awards and various other clauses, and which is here specially referred to and held as repeated, in itself more fully bears: Further considering that I accepted office as arbiter, ordered claims and answers, and subsequently revised claims and answers, and heard parties by their agents, and having God and a good conscience before my eyes, I do hereby pronounce my interim sentence and decree-arbitral as follows [state the arbiter's decision on the disputed points, e.g., thus]:—I find and declare (first) that the said A. is a creditor of the estate of her late husband, the said D., for the sum of £ , but with interest only from the date of her husband's death, namely, and that at the rate of cent, per annum, the said claim of debt being in respect of funds and property of the said A. immixed with the funds and property of the said D.; (second) that the claim of debt put forward by the said B., amounting to or thereabouts, in respect of services said to have been rendered by him to the deceased, is not well founded, and the same is hereby repelled; (third) that the said B. is not barred from his right of legitim, as has been maintained to me, and that he is not bound to bring in computo in any form, or to any effect, in respect of legitim or otherwise, the sum paid by the said D. to him, or on his behalf, on or about the ; (fourth) that the said A. is entitled to terce out of the tenement in High Street, Perth, which was sold by the deceased, but had not been disponed by him to the purchaser; (fifth) that the sale of the said tenement converted it to moveable estate, except as regards the widow's rights; (sixth) that the following other items of the moveable estate are not subject to the widow's claim of jus relictæ, namely, (1) deposit , dated receipt of the X. society for £ , and (2) bond and assignation , dated , but that the following item, which it was maintained to me was not subject to the claim of jus relictæ, is so subject, namely, debenture of the Z. company for £ , dated ; and (seventh) that the said B. is entitled to the whole legitim fund without collating the heritage to which he succeeds, but that if he is to claim one-half of the dead's part he can do so only on condition of collating the whole heritage to which he succeeds with the dead's part: And I prorogate the submission to the expiry of year and day from the date hereof.—In witness whereof.

FINAL DECREE FOLLOWING THEREON AND ANNEXED THERETO

I, E., designed in the foregoing interim decree-arbitral [in virtue of the prorogation therein written], do hereby pronounce my final sentence and decree-arbitral under the deed of submission specified in the said interim decree-arbitral, and that as follows:—In respect it is represented to me that the parties have been able to agree on the working out of all matters relating to the succession of the late D. in accordance with the findings pronounced by me in said interim decree, except only the expenses of the submission, I now find it unnecessary to pronounce any further finding on the merits of the

matters submitted, and I confirm the said interim decree-arbitral, and now adopt it as my final decree-arbitral so far as regards the merits [then follow on as regards expenses, etc.].

DECREE-ARBITRAL BY OVERSMAN

(1) Named in Submission; no Proof; separate Hearing

I, A., designed in the foregoing deed of submission, Considering that the arbiters therein named having differed in opinion regarding the subject-matter of the reference, devolved the same upon me as oversman named in the deed of submission, and that I accepted office as oversman, all conform to minutes of devolution and acceptance above written: Further considering that the arbiters had ordered and received claims and answers for the parties which I have considered along with the whole process, and that I have heard the parties by their agents, and being well and ripely advised, etc.

(2) Appointed by Arbiters; Oversman present at Proof and Hearing before Arbiters

I, A., oversman under the foregoing submission, conform to minute of appointment by B. and C., the arbiters thereunder, and minute of acceptance by me, both above written, Considering that the arbiters ordered claims and answers, allowed proof and heard parties, at which proof and hearing I was present as oversman along with the arbiters: Further considering that the arbiters, having differed in opinion regarding the subject matter of the reference, devolved the same upon me conform to minute of devolution before written: And now, having considered the claims and answers and whole process, and heard proof and the parties thereon, as aforesaid, and being well and ripely advised, etc.

STATUTORY ARBITRATIONS

These are too special to allow of the subject receiving adequate treatment in the space at command here. Reference is made to Ferguson's edition of Deas on *Railways*, where the law of the subject, the duties falling upon the agents for the respective parties, and the relative forms, are treated and illustrated exhaustively.

SECTION VIII

PARTNERSHIP

To a large extent the law of partnership has been codified in the Partnership Act, 1890.¹ The references in the footnotes are to that Act.

Partners.—The only matter that need be referred to is a power to any of the partners to introduce another. This is a matter which is beyond the power of any of the partners, unless the power is specially conferred.² It may naturally be conferred to enable one of the partners to introduce a son or other near relative, and be limited accordingly. An arrangement will require to be made as to the effect of the introduction on the division of profits. It may naturally take the form of a curtailment of the introducer's share while both he and the partner whom he introduces remain in the firm.

Endurance.—Speaking generally, the partnership will either be for a term of years, or at will. But even if for a specified term, it is presumed to continue thereafter unless dissolved, and the rights and duties of the partners remain the same as they were before the expiration of the term, so far as they are consistent with the incidents of a partnership at will.³ It is very difficult to determine what is, and what is not, consistent with a partnership at will, and this should be kept in view in framing the contract and afterwards.⁴

Shares of Capital.—The presumption is for equality.⁵ But the fact will, of course, be stated. If, as will often be the case, the contribution of one or all of the partners is not in cash, but in heritable property, stock-in-trade, book debts, goodwill, etc., these assets should be valued, and the contract should adopt the valuation as binding on both or all the partners.

Business.—This should be defined as clearly as circumstances will admit; usually there should be no difficulty whatever. "No change may be made in the nature of the partnership business without the consent of all existing partners." 6

¹ 53 & 54 Vict. c. 39.

² S. 24 (7).

³ S. 27 (1).

⁴ See p. 100.

⁵ S. 24 (1).

⁶ S. 24 (8).

Firm's Name.—This will be specified. Where it is a descriptive name, e.g. the Dalkeith Coal Company, it ought to be stated how letters, cheques, etc., are to be signed, whether the D. C. C. p. John Smith or Thomas Brown; or by any individual partner, as director, manager, secretary, or otherwise.

Shares of Profit and Loss.—Here also the presumption is for equality, and the important point is, that that presumption is not displaced by the fact that the contributions of money and property have been unequal.¹ At first sight this may appear inequitable, but that view rests on a narrow and wrong conception of "capital." Properly considered, the capital of the firm consists not only of the cash and other material resources of that kind, but also of the skill, energy, and business connection brought in by the different members, and of course it is practically impossible to allocate and apportion these if the partners have not done so themselves. Therefore the contract will state in what shares the profits are to be divided.

Guaranteed Minimum Share.—If any of the partners is entitled to a share of profits much below the other share or shares, it may be practically necessary to qualify this by a declaration that his share shall not be less than a certain stated sum. Which suggests the question whether, in an accounting, any deficiency in one year may be set off against an excess in another year. A provision of this nature is not unattended with difficulty, particularly as applied to the first year of a business, in view of the way in which many firms' accounts are made up.

Where Shares of Capital and Profits different.—So long as each partner is entitled to profits in the same proportion as he contributes capital, no difficulty arises though one partner may contribute and participate more largely than another. But it is a different matter when a partner's share of capital is different from his share of profits, the most common instance being when one of two partners puts in all the capital. It is submitted that the rules of sec. 44 are capable of different constructions, but in any view it is clear that in that case the result of that section might not be what was really intended by the parties. It provides, inter alia—

Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.

Suppose A. and B. are partners. A. puts in the whole capital, £1000: they are to share equally in profits. The net result is the loss of the £1000 by the contracting of debts to the amount of £1000. The £1000 of capital would go to pay the £1000 of debts; but in

¹ Ersk. iii. 8. 19; 2 Bell's Com. 503; 5 W. & S. 16; Struthers v. Barr, 1826, 2 Campbell's Trs. v. Thomson, 1829, 7 S. 650, W. & S. 153; Lindley, 676; Clark, 378.

final adjustment between A. and B. must the latter recoup the former to the extent of £500, so that the partners shall bear "losses and deficiencies of capital... in the proportion in which they were entitled to share profits"? Where shares of capital and profits are different, the intentions of the parties on this point should be very carefully ascertained and explicitly expressed.

Drawings on Account of Profits.—This is obviously a matter which should be regulated; and there will be a provision that if, when the year's accounts are made up, it is ascertained that the drawings have been in excess of profits, or of the share of profits agreed to be drawn, then the excess shall forthwith be repaid with interest.

Salaries.—Somewhat similar, but it may be very different in effect, is a provision that the partners shall each be entitled to certain small equal stated salaries, to be charged as expenses of the business, before ascertaining profits. Where the shares of profits are unequal, this provision so far restricts the inequality. They should be charged on profits only, and cumulative.

Capitalising Profits.—Where one partner contributes no capital, or a share much less than the other or others, a provision is sometimes inserted that he shall leave a certain proportion of his profits, or his share of profits beyond a certain figure, in the business towards forming or increasing his share of capital. This may require special consideration in connection with the incidence of losses.

Capital and Revenue.—The apportionment between capital and revenue is a matter which may be of little or of vital importance, according to the other provisions of the contract. It is proper that attention should be directed to the matter, but it will probably be found impossible usefully to introduce any particular agreements on the subject. It will come up, if at all, under the reference clause.

Interest on Capital.—"A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him." Does this mean that interest is not payable, or that interest does not commence to run? Further, when "the ascertainment of profits" is a fact is not clear. There should always be an express clause, unless the partners' proportions of capital are the same as their proportions of profits, in which case it is not precisely material. It appears clear that interest can come out of profits only, for there is no other source from which to pay it; but any special clause should specify (1) the rate, (2) whether the interest is to be contingent on the profits of each year, or is to be a cumulative charge, and (3) the ranking of it as against, e.g. partners' salaries, if any.

Old and New Firms.—"A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner." It will

1 Sec. 24 (4).

2 Sec. 17 (1).

be observed that this subsection says nothing about a new and an old firm; on the contrary, it proceeds on the footing of one existing and continuing firm. This is, no doubt, due to the English doctrine that the firm is not a separate persona at all. In Scotland there is a common popular understanding that a trader (a "merchant") can defeat the rights of his creditors by taking someone into partnership. This is what was referred to by Lord President Inglis when he said: "As a matter of general principle, it appears absurd to hold that a person in trade, by taking his son into partnership, can do anything to injure the rights of his trade creditors." 1 Subsequent cases 2 are noted below, in one of which liability was sustained, and in the others not. Miller, Heddle, and Stephen were all questions whether the new firm was liable. Nelmes was an attempt to make the new partner It will be observed, further, that the section personally liable. does not say that the admission of the new partner is to prejudice the creditors in any way, e.g. that the firm and all its assets shall not remain liable for the debt, nor that the new partner may not also become liable, though the mere fact of his admission is not to infer liability. As to what will rear up liability, it would not require an express agreement with the creditors; an implied agreement rebus ipsis et factis would be sufficient. In England an agreement between the partners is not enough to give the creditors a right of action against the new partner.3 This would be so here also if there were no continuing partner4; but if there is, the result of the cases above quoted would appear to be to the contrary.

The practical advice is to have an express clause on the subject, and, which is even more important, to take care that the actings of the parties square strictly with the written contract, as to which see the observations of Lord Shand in *Stephen*.

Limitations of Mandate.—Secs. 5 to 8 of the Act deal with the matter of the partners' mandate and limitations of it, and the relations constituted with third parties in respect of it. These sections are merely declaratory of the previously existing law. The implied mandate is universal "for carrying on, in the usual way, business of the kind carried on by the firm" (s. 5); and no limitation of the mandate will affect third parties unless they know of it; but, on the other hand, "where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is, in fact, specially authorised by the other partners" (s. 7). It may often be desired to insert a special provision regarding the extent to which, and the manner in

¹ Miller v. Thorburn, 1861, 23 D. 359.

² Liability sustained: Heddle's Ex. v. Marwick & Hourston's Tr., 1888, 15 R. 698.

Contra: Nelmes v. Montgomery, 1888, 10 R.

^{974;} Stephen's Tr. v. M'Dougall & Co's. Tr., 1889, 16 R, 779.

³ Lindley, p. 392.

⁴ Henderson v. Stubbs, 1894, 22 R. 51.

which, each of the partners, or any particular one of them, may bind the firm. This will be effectual even against third parties with notice, and in any case it will give the law *inter se*.

Appointments held by Partners.—If any of the partners draws a salary or profits from a special appointment, it should be made clear whether this income is to go into the firm, or is to be retained by the individual partner separate from, and in addition to, his share of the firm's profits.

Partners' Whole Time.—Somewhat connected with this last matter is the question whether both or all the partners are to give their whole time to the firm's business, or whether any of them is to be privileged in this respect.

Gratuitous Services.—It sometimes happens that when a sole partner in an old-established business is taking in a younger man, it is desired that the former should still be entitled in his discretion to do business for old clients or friends gratuitously if he chooses, and it may be proper that a clause to that effect should go in. The firm would, no doubt, be liable for all claims arising out of business of this nature, and it may be wished to insert a special agreement between the partners as to the incidence inter se of these liabilities.

Provisions regarding Dissolution and Paying Out

When Dissolved.—The Act, following the common law, distinguishes between those things which, apart from agreement, absolutely dissolve the partnership, and those things which give a ground to some or any of the partners to seek dissolution. The sections of the Act are 32 to 35, and it is unnecessary to quote or to attempt to summarise them. It is sufficient to point out the following matters which will require special attention according to circumstances.

- 1. Death.—The common law is preserved to the effect that the death of any partner, in the absence of an agreement to the contrary, operates dissolution (s. 33), so that when there are more than two partners, it should, in the ordinary case, be provided that death shall not operate dissolution.
- 2. Bankruptcy.—The Act provides that the bankruptcy of any partner shall dissolve the firm, in the absence of an agreement to the contrary (s. 33); and by sec. 47 bankruptcy is defined to mean sequestration or cessio. It will usually be wished to negative this by an express provision in the contract, if there are more than two partners. On the other hand, it will be desired that the bankrupt partner should cease to be a partner, either absolutely or in the discretion of the other partner or partners; and in this connection provision should be made not only for the case of (a) sequestration and (b) cessio, but also for (c) trust-deed for behoof of creditors and (d) notour bankruptcy, which are

not referred to in the Act. Of course, if there are but two partners, the exercise of the option by the solvent partner will dissolve the partnership.

3. Assignment of, or Diligence against, Partner's Share.—Both of these matters are, in a sense, dealt with in the Act. By sec. 31 special provision is made for a partner assigning his share in the firm either absolutely or in security. The assignation (which of course does not make the assignee a partner) neither operates dissolution nor is a ground for seeking dissolution. The section applies to Scotland. As regards what we should call diligence, provision is made by sec. 23, but it does not apply to Scotland, and while there is (s. 33) a provision giving the other partners an absolute right in their option to dissolve the firm "if any partner suffers his share of the partnership property to be charged under this Act for his separate debt," the presence of the words "under this Act" will bar this right in Scotland, even though diligence should be used in the hands of the firm for a partner's debt. This is just as the law was before the Act.

Accordingly it is desirable that the contract should contain clauses applicable to the case of a partner (1) granting an assignment of his share, whether total or partial, absolute or in security, or (2) allowing an arrestment or other diligence affecting his share to remain in force for a certain short specified time. If there are only two partners, the clause will be either dissolution, or option to the other to dissolve. If there are more than two, then it will be exclusion, or option to exclude, with the alternative of dissolution in the option of the other partners.

4. Marriage of a Female Partner.—It is not possible to state definitely what the law is, and if one of the partners is a woman, an express clause should be added to meet the case of her marriage.

Administration in Winding-up.—In view of the terms of sec. 39, it should be expressly provided that the winding-up shall be in the hands of the surviving solvent partner or partners, or of the continuing partner or partners, as the case may be.

Realisation: or How?—On dissolution, the right of each partner is to have the whole assets brought to sale. But clauses modifying this are universally inserted. It is necessary to distinguish between (1) the case where a party ceases to be a partner by death or otherwise, but the partnership is not dissolved, and (2) cases of dissolution.

No Dissolution.—The usual provision is that the share shall be the amount standing in the last preceding, or next succeeding, balance-sheet made up in terms of the contract, with interest added to the date of death or other event, in the former case. One great objection to a reference to the next succeeding balance-sheet is that in the case of death it throws a great responsibility on the executors in regard to the adjustment of the figures, which is, or ought to be, excluded when the previous balance-sheet is taken, for then the deceased ought to have signed it himself as approved of.

When Payable.—Sec. 43, dealing with this case, makes the outgoing or deceased partner's share "a debt accruing at the date of dissolution or death." Clauses will be inserted giving the surviving or continuing partners the option of paying by instalments, they giving their bills with or without security.

Interest.—Especially in the case of instalment payments care must be taken to be quite express as to whether interest is to run on the whole from the first, or only on the instalments from the respective dates for payment.1 The former is the natural arrangement. The bills may quite well contain a clause of interest, but it must, of course, be expressly from the date of death or other event.2 But it will be observed that the result may be that, on part of the debt, interest, though running, is not receivable for some years. The proper arrangement is that the interest on the whole outstanding balance should be paid half-yearly, and there is no reason why each bill should not state that it is payable with interest, and that the interest is payable halfyearly on 15th May and 11th November, beginning on 15th May next, or as the case may be. An alternative is to include in each bill interest on the whole sum then outstanding for the period between the death or last payment and the maturity of that bill. Thus, £300 payable in three annual instalments by bills for £115, £110, and £105, at 12, 24, and 36 months' date, without any reference to interest. The objections here are that the interest is payable annually only, and that the matter of income-tax is confused.

As regards the other Partners inter se.—The contract will declare that the share and interest of the outgoing or deceased partner in the capital and profits shall pass to the continuing or surviving partners in proportion to their previous interests. At the same time it will be observed that, while this may mean most unequal shares, both or all will be jointly and severally liable to pay the price, i.e. the share of the outgoing or deceased partner. In that respect, however, it is in no different position from any other firm obligation.

Dissolution.—On actual dissolution there are substantially three ways of arranging, namely:

- 1. Realisation (with power to the partners to bid at public roup), but allowing a certain time for collection in the case of book debts before selling.
 - 2. Private auction amongst the partners.
- 3. Valuation, and options to the partners in the order of their seniority, and within short stated periods respectively, to acquire the whole at the amount of the valuation. The valuation will be made by valuers nominated in the contract, and failing them, then by others to be named by the arbiter.

¹ Evring & Co. v. E., 1882, 10 R. (H. L.) 1
² Bills of Exchange Act, 1882, s. 9.
M'Arthur v. Scott, 1898, 6 S. L. T. No. 208.

In cases 2 and 3, the same remarks as above apply as regards period of payment, security, and interest.

Conveyances of Property.—On any change in the firm all proper conveyances of assets, heritable and moveable, should be executed and completed by recording and otherwise. If this is omitted, there may be much trouble and expense apart from any question of risk. Further, there used often to be an important question regarding stamp duty on deeds granted on the occasion of dissolution or the retirement of a partner. Suppose the gross assets are £1000, liabilities £500; A. retires; B. pays him out with a cash payment of £250, being his (A.'s) half share of the net assets; A. grants a deed acknowledging the £250, and conveying his whole interest in the firm assets to B. The Inland Revenue were formerly in the habit of holding that, under sec. 57 of the Stamp Act. 1891, it was necessary to add to the £250 one-half of the debts, making for stamp-duty purposes a total consideration of £500. The claim for this additional duty was rested on the English doctrine that the firm is not a separate persona; that therefore each partner is owner of a share of each particular firm asset, and that what he sells is his share of each asset subject to a corresponding share of the firm's debts. But in Scotland it is now recognised that, even for stamp duty purposes, the result of the doctrine of separate firm persona is, that the partner has no immediate relation to the firm assets at all; that what he sells is not a share of each asset burdened as just mentioned, but one thing only, namely, his share in the firm itself, i.e. in the net surplus resulting after all firm debts are deducted from firm assets. This is now admitted and acted on by the Inland Revenue. This, however, is limited to cases of going partnerships: it may be otherwise in the case of a dissolved firm. even then it may be noted

- (1) When it is necessary to have a conveyance of part of the assets, e.g. heritable property, but not of the remainder, it is not necessary to pay the sale duty on the whole of the consideration, but only on a fair apportioned part, if the documents are properly worded.
- (2) The case of partition is to be distinguished from sale.¹ In the case noted, two partners dissolved; one retired, the other went on; the former took an assignment of a certain heritable security held by the firm, plus so much cash for equality, as his share; the latter kept everything else. Held it was partition and not sale, and that the agreement was chargeable with deed duty only and not as a sale, not even to the extent of the cash paid, though it contained an express general conveyance. But the separate assignation of the heritable security would have to pay the ordinary 6d. per cent. This case suggests the question, What would be a sufficient proportion of partition to entitle the whole to be classed as such? But if that were to be attempted, it would be important

that the cash part should be instantly paid, and not by instalments, annuity, or otherwise.

Return of Premium.—In view of sec. 40, if any partner pays a premium to another on entering into a partnership for a fixed term, provision may require to be made for the case of the partnership being dissolved before the expiry of the term otherwise than by the death of a partner. And in like manner, if, in the event of dissolution, any partial return of premium is intended, care must be taken to have this intention expressed in any document relating to the dissolution. It is, of course, to be understood that what is here referred to is not a contribution of capital to the firm, but a payment to the other partner personally and outside the firm. It is understood that these arrangements are not common in Scotland.

Notice of Dissolution or Retirement.—The purpose of notice is to prevent liability being incurred for future debts; of course, no notice will have any effect on liabilities already incurred, not even in the case of a dormant partner.

When necessary. Notice is unnecessary in the following cases, namely: (a) death, (b) bankruptcy, i.e. sequestration or cessio of a partner's estate, and (c) retirement of a dormant partner (s. 36).

Who may give? Any partner (s. 37).

What is notice? To non-customers, Gazette notice; to customers, the notice must be brought home, but personal knowledge or a change of name is enough for that purpose.

The outgoing partner or his representatives should see that there is immediate notice by advertisement in the *Gazette* and local newspaper, and circulars to customers. Further, they should require evidence of discharge of old liabilities within a reasonable period. They cannot be compelled to grant deeds conveying the assets until they obtain the consideration therefor, which is (1) the cash payment to them, and (2) real relief from (i.e. payment of) the old liabilities, all of which have been deducted and allowed for in fixing the cash payment.

Share of Profits after Dissolution.—Regard must be had to sec. 42, under which, if the surviving or continuing partner carry on the business with the firm's capital or assets "without any final settlement of accounts as between the firm and the outgoing partner or his estate," then if there is no contrary agreement, the outgoing partner or his representatives are at their option entitled to a share of the profits made after the separation, or to five per cent. interest on their share of assets. But this does not apply if there is an option to purchase duly exercised.

It is not uncommon to introduce into contracts of co-partnery clauses giving a retiring partner, or the trustees or family of a deceased partner, a share of the profits for so many years after retirement or death, or these provisions may be created in a dissolution agreement on the

retirement of a partner. In these connections see section 2 (3) of the Act, and note the following matters:—

- 1. Partnership Risk.—As to all these cases there always remains, or at any rate there may very easily be introduced, an element of risk of partnership liability which will most commonly be by stipulating for control.1 Or again, in the case of trustees receiving a share as in right of a deceased partner, it will be observed that the special statutory protection is limited to "widow or child"; it seems clear that they may take through trustees as well as directly, and with the same safety to themselves, and also with safety to the trustees. If, however, the beneficial purposes are not limited to the testator's widow and children, there is at least not the special statutory protection, but note the general opening words of the subsection, which is declaratory of the common law. The Act speaks of "an annuity," but this need not be for life, and the description is fully answered by a fluctuating annual share of profits for a period, whether fixed or indefinite, and though the absence of profits may reduce the "annuity" to nil. The partnership risk, where it exists at all, turns upon the fact that the payments are to fluctuate with profits; a definite annual sum, not fluctuating with profits, avoids it entirely.
- 2. Net Profits.—It is clear that, under an ordinary clause, what is to be divided is net profits after making allowance for all losses, bad debts, and other items properly falling to be debited to profit and loss, including interest on capital. In particular cases these important matters may be held to be regulated by the custom followed by the firm in the past. Further, is each year to be taken by itself? Suppose the period is ten years; that for nine of these the "annuity" has yielded a substantial sum which has been fully paid, and then in the last year there is a loss; are the recipients of the annuity bound to repay, so that they shall draw only their proper proportion over the ten years? Or suppose it is payable for two years only; that on the first there is a loss of £100 and on the second a profit of £100; is anything payable for the second year? These matters ought to be expressly provided for, but the view is submitted that both parties are entitled to have the full period treated as one undivided whole. But of course the beneficiaries are never to be liable to pay if they draw nothing, nor more than they draw; the contrary would be an admission of partnership liability.
- 3. Obligation to carry on.—The payments will by implication cease on the death of the partner who is intended to carry on and make them, and it is thought to be equally clear that they will cease on his retirement from ill-health or other genuine inability to carry on. Indeed, in the absence of an express obligation to carry on, it would appear that they would cease on genuine retirement, though without any adequate reason except pleasure, but a difficult question might be raised if in that case he sold the goodwill.

- 4. Partnership at will.—A practical question of great importance is, is a clause of this kind "consistent with the incidents of a partnership at will?" Eminent counsel have advised both ways; and see the cases noted.¹ The point arises when the stipulated term of partnership has been exceeded without a new arrangement, as is so common. With much deference in view of the conflict of authority, it is submitted that this provision is not applicable to a partnership at will.
- 5. Questions between the beneficiaries.—When payable to executors for the benefit of widow and children, the money does not form part of the executry estate, but goes to the beneficiaries at once in their own right.² When payable to testamentary trustees, the moneys are capital and not income.³
- 6. Other points are: (a) the assumption of a partner and how his share of profits is to affect the annuity; (b) power to commute the payments on a reasonable occasion and on reasonable terms.

Goodwill.—This is a matter not dealt with by the Act. In the absence of any agreement to the contrary, goodwill must be valued in all settlements with outgoing partners or their representatives. The matter is mixed up with that of the use of the firm name after dissolution or other change; and that again will be viewed by each partner differently according as it does or does not include his own name. In the case of death there will often be no objection to the continued use of the name, whatever it is (see s. 14). But it is otherwise in case of a surviving person ceasing to be a partner, especially if his name is part of the firm name, or if he has made the business under the firm name, whatever it is. The following are suggested as suitable provisions on these subjects:—

- 1. That no allowance shall in any case be made for goodwill, and that neither party after dissolution shall be entitled to use the firm's name. This is suitable in the case of A. and B. starting under the firm name of A. and B. If the survivor should find it to his interest to continue under the firm name, he can purchase the right from the predeceaser's representatives. But in a local business that is not probable.
- 2. That in the event of death the deceased's right and interest in the goodwill and firm name shall pass to the survivors; that on the occasion of a partner going out otherwise, or on dissolution, the firm name shall be included in the assets to be taken over or disposed of, but that the goodwill shall otherwise be held as personal to the partners respectively, and not disposed of; and that the goodwill and name in the case of death, and the name in all other cases, shall for the purpose of ascertaining the share of the outgoing partner be

Neilson v. Mossend Iron Co., 1884, 13 R
 (H. L.) 50; Cox v. Willoughby, 1880, 13
 Ch. D. 863. In Dyke's Trs., 1903, 11
 S. L. T. No. 258, the point had been conceded.

^{. &}lt;sup>2</sup> Adamson's Trs. v. Adamson's Execrs., 1891, 18 R. 1133.

³ Freer's Trs. v. Freer, 1897, 24 R. 437. Dyke's Trs. supra.

taken to be worth a certain sum, which may be specified or left to be fixed by the previous year's profits, or the number of years for which the partnership has endured. This is suitable to the case where the partners' names are not in the firm.

3. That in the event of death the deceased's right and interest in the goodwill and firm name shall pass to the survivors, the value to be ascertained as in the last case; but that in all other cases of change nothing shall be allowed for goodwill, and none of the parties shall be entitled to use the name of the other, or any firm name in which it occurs. This is suitable to the case of a firm name made up of the names of the individual partners.

"An assignment of a business and its goodwill, without more, as against the assignor confers on the assignee the exclusive right to carry on the business assigned, and as incidental to this it also confers on him the exclusive right to represent himself as carrying on that business, and consequently the right not only to sue the assignor for damages if he has infringed these rights, but also to restrain him from infringing them if he manifests an intention to infringe them."

"The rights of a trader, the goodwill of whose business has been sold by his trustee in bankruptcy, are well ascertained. With one exception they are exactly the same as those of a trader who has sold his business by his own voluntary act. Both may set up a new business in the same line and in the same locality. The sole difference in favour of the man whose business has been sold in bankruptcy is, that he cannot be restrained from soliciting his old customers, which the voluntary seller can be. But in neither case may the trader represent himself as carrying on the old business which has been sold. He may start afresh in his own individual name or under a new firm or description, but he must not assume the name of the old business, nor use the trade marks or labels which belonged to it, because these have become the property of another." 2

Restraint of Trade.—Questions as to the legality of conditions in restraint of trade are apt to arise over clauses restricting an outgoing partner from carrying on business within a certain space and time. These clauses may be in the contract of co-partnery, or, more probably, in the agreement for dissolution. The chief points are: (1) that the restriction must be reasonable, (2) that in determining what is reasonable regard will be had to the actual extent of the business which the condition is intended to protect, and (3) that if the restriction be found to be unreasonable, and therefore invalid, the Court will not remodel it so as to make it reasonable and valid, but will quash it entirely.³

¹ Lush and Lindley, L.JJ., in Walker v. Mottram, 1881, 19 Ch. D. 355.

² Lord Stormonth Darling in Melrose, Drover, Ltd. v. Heddle, 1901, 4 F. 1120.

² Macfarlane v. Dumbarton Steamboat Co., 1899, 1 F. 993 (restraint bad); Stewart

v. S., 1899, 1 F. 1158 (restraint good). The law is somewhat different in England (Snell's *Equity*, 484), and even as to Scotland, see *Meikle* v. M., 1895, 3 S. L. T. No. 323.

Under an obligation not to practise a profession or trade there may be a breach by acting as a paid assistant or employee of a third party who carries on the profession or trade in question.¹

Arbitration Clause.—A very full clause to this effect should be added (see p. 103). Great care should be given to the choice of an arbiter, and he should have express powers to employ accountants, men of skill, and valuers.

SHORT FORM OF CONTRACT OF CO-PARTNERY BETWEEN TWO PARTNERS—NEW BUSINESS, EQUAL SHARES

It is agreed between A. and B. that they shall be partners in the business of , at , under the firm name of A. and B., on the following terms and conditions, namely:—

- 1. The partnership shall be for years from
- 2. The capital shall be \pounds , to be contributed equally.
- 3. The partners shall be equally interested in profits and equally liable for losses.
- 4. A balance sheet, and profit and loss account, shall be made up annually, as on , and signed by the partners within one month thereafter, failing which it shall be made up by, or under the direction of, the arbiter, and signed by him, and his signature shall bind the partners and their representatives.
- 5. On the death of either partner the survivor shall in his option be entitled to acquire the deceased's share and interest in the firm, at a price to be fixed as follows, namely—
- (1) If the death takes place before the [end of first year] the price shall be the amount paid in by the deceased, with the addition of interest at the rate of five per cent. per annum from [date of commencement, or] the date when the same was paid in, to the date of death, but under deduction of all sums drawn by the deceased.
- (2) If the death takes place on the day of [annual balance day] in any year, the price shall be the figure at which the deceased's share and interest stand in the balance-sheet made up as on that date.
- (3) In any other case the price shall be the figure at which the same stood in the balance-sheet last preceding the date of death, with the addition of interest at the rate of five per cent. per annum from the date of such balance to the date of death, but under deduction of all sums drawn out by the deceased between those dates.

In any case the price shall be payable in instalments at , and months after the date of death, with interest at five per cent. per annum thereon, and the balances thereof, from the date of death till paid. The survivor shall give his bills therefor without security [or with caution or security to the reasonable satisfaction of the deceased's representatives, as to which the arbiter shall decide]. Within the said months [latest instalment] the survivor shall produce evidence of discharge of all liabilities existing at the date of death.

¹ Williams & Son v. Fairbairn, 1899, 1 F. 944.

- 6. If the partnership should be terminated before its natural expiry by the bankruptcy of either partner, the solvent partner shall have, as regards the other partner's share and interest, the like option of acquisition as is given to a surviving partner under the preceding clause, and on the like terms and conditions.
- 7. In the events stated in the last two preceding articles, if the surviving or solvent partner should not exercise the option thereby conferred, the winding-up shall be in his hands by himself alone.
- 8. In no case shall any allowance be made for goodwill, and after dissolution neither party shall be entitled to use the firm name.
- 9. The parties refer to arbitration by a sole arbiter not only the matters hereinbefore mentioned as referred to arbitration and all other matters, questions, and disputes which may arise between them or between the firm and either of them in any capacity during the subsistence of the partnership, but also all matters, questions, and disputes which may arise between them or their representatives or between the firm and either of them or their representatives in any capacity after its dissolution, and that absolutely and universally without any limitation, with power to the arbiter to employ accountants and valuators, and to take legal and other skilled advice, to award and assess damages, and to order dissolution and settle the terms and conditions thereof [including trade restrictions to be imposed on the , whom failing parties or either of them]; and they name sole arbiter, and failing both of them a sole arbiter shall be appointed by the sheriff of on the application of any person interested. And they consent to registration of these presents, and of all decrees-arbitral, interim and final, to be pronounced under the foregoing reference, for preservation and execution.—In witness whereof.

SHORT FORM-TWO PARTNERS, GOING BUSINESS

It is agreed between A. and B. that they shall be partners in the business of , at , under the firm name of A. and B., on the following terms and conditions:—

- 1. The partnership shall be for years from
- 2. The firm shall take over the stock-in-trade of the business at present carried on by the said A., but not the book debts, nor any of the liabilities. The value of the stock-in-trade as at the said is hereby fixed at the sum of £. In addition the said A. has contributed in cash £ of capital, making his total capital contribution £.
- 3. The said B. has contributed no capital, but he undertakes to pay in at least \pounds per annum, but not exceeding in all \pounds . The said A. shall be entitled to require weeks' notice before each such payment. Undrawn profits will not be regarded as fulfilling this obligation.
- 4. Interest at five per cent. per annum shall run on the said capital of £ contributed by the said A. from the said [commencement], and on all capital to be contributed by the said B. from the respective dates of payment thereof. The interest shall be a cumulative charge on profits, and shall be payable half-yearly on and .

5. The partners shall be equally interested in the net profits.

[The other articles may be the same as in the preceding form, except that the clause as to goodwill and name may be in the following terms]:

As regards goodwill and firm name, the following provisions shall apply:

- (1) In the event of the death of either partner, if the survivor elects to acquire the deceased's share and interest in the firm, the goodwill and firm name shall pass to him, and in that case, whether he use the firm name or not, he shall be bound to pay to the representatives of the deceased, in addition to the sum provided for in article , and in instalments and with interest as aforesaid, the following sum: if A. be the deceased, the sum of £ , and if B. be the deceased, the sum of £ , and bills shall be granted therefor as aforesaid.
- (2) In all other cases nothing shall be allowed for goodwill, and neither of the parties shall be entitled to use the firm name, or the name of the other, or any name in which it occurs.

[And the following article may be added]:

The following provisions shall apply to the incidence of losses. That is to say, they shall be paid—

- (1) First, out of profits, including profits divided between and drawn out by the partners, which shall be repaid for that purpose, but not including sums drawn for interest on capital.
- (2) Next, out of the partners' capital, rateably to their respective contributions of capital.
- (3) Lastly, if necessary, by the partners individually in equal shares [or in the proportion of their contributions of capital].

In applying this article, the said B.'s contribution of capital shall be taken at its actual amount, or at the sum to which it would amount at the said rate of \pounds per annum for the full and exact actual period since the commencement of the partnership, whichever may be the larger sum.

SHORT FORM—ESTABLISHED BUSINESS, UNEQUAL SHARES, MINIMUM AND INCREASING SHARES

It is agreed between A. and B. as follows: Whereas the said A. has for some years carried on the business of , at , under the firm name of A. & Son, and it is arranged that the said B., who has for some time acted as manager, shall be admitted to a share in the business to the extent and in manner following; That is to say, the said business shall be carried on by the said A. and B. as partners under the existing firm name of A. & Son, on the following terms and conditions:

- 1. The partnership shall be for years from
- 2. The partnership takes over the whole assets and liabilities of the existing business as at the said [date]. The balance of assets over liabilities is hereby agreed to be £, which is the capital of the firm, wholly contributed by the said A. Interest at five per cent. per annum shall run thereon and shall be a cumulative charge on profits, and shall be payable half-yearly on and

- 3. The partners are interested in the net profits in the proportions following, namely, (1) for the first years the said A. to the extent of four-fifths, and the said B. to the extent of one-fifth; and (2) for the remaining years the said A. to the extent of two-thirds, and the said B. to the extent of one-third: But subject always to this provision, namely, that the share of the said B. shall not be less than £ per annum or an equal half of profits, whichever may be the lesser sum, and that only on an average of years, so that any excess in one year shall be put against any deficiency in any other year, and vice versâ.
- 4. The said A. shall not be bound to give his whole time to the business, but he shall give to it all reasonably necessary time and attention. The said B. shall devote his whole time to the business.
- 5. The salary drawn by the said A. as is not to be brought into the firm, but is to remain his own personal and separate income.

[Insert such of the articles in the previous forms as are suitable to the circumstances.]

FULLER FORM OF CONTRACT BETWEEN TWO PARTNERS

It is contracted between the parties following, namely, (first) A. and (second) B., in manner following; That is to say, they agree to become partners in the trade or business of , on the following terms and conditions, namely:

- 1. The partnership shall endure for years from , if both partners shall so long live, unless the same shall be sooner terminated under the provisions hereinafter contained, and if the same should endure until the expiry of the said term of years, it shall not then or thereafter be terminated so long as both parties survive, unless and until one of them shall give six months' written notice of dissolution to the other and such notice shall have expired.
- 2. The firm name shall be , and the business shall be carried on at , or at such other place or places as may be mutually agreed upon.
- 3. The capital shall be ${\bf \pounds}$, to be subscribed by the partners in equal shares.
- 4. If either partner shall at any time, with consent of the other, make any advance or advances to the firm in addition to his share of capital, the amount thereof shall be a debt due to him by the firm, and shall bear interest at the rate of five per cent. per annum, and the principal may be withdrawn by him at any time on one month's written notice.
 - 5. The partners shall share equally all profits and losses.
- 6. Pending the ascertainment of profits as aftermentioned, each partner shall be entitled to draw out \pounds per month. When profits are ascertained, if there is an excess beyond the sums so drawn out, the same may be drawn by the partners equally, but so that the total drawings of each partner in any year of the firm's business shall not exceed \pounds , any surplus above that figure being left undrawn for the purposes of the business.

And on the other hand, if the profits for the year are less than the monthly drawings, the amount drawn out for the year in excess of the profits shall forthwith be repaid by the partners to the firm.

- 7. Full and proper books shall be kept showing the whole transactions of the firm, and they shall be kept constantly posted up to date.
- 8. All transactions shall be entered into, and all correspondence shall be conducted, in the name of the firm.
- 9. Both partners shall devote their whole time and attention to the business.
- 10. Neither partner shall undertake any cautionary obligation or engage in stock exchange or other speculations.
 - 11. [Annual balance, p. 102.]
- 12. If either partner should become notour bankrupt, or grant a trust-deed for behoof of his creditors, or grant any assignment or other deed absolute or in security of or affecting his share and interest in the firm or any part thereof, or suffer any diligence affecting his share and interest in the firm or any part thereof to remain undischarged for six weeks (all which cases are hereinafter covered by a reference to "the defaulting partner"), the other partner shall in his option be entitled to dissolve the partnership. And in the case of such dissolution or of dissolution by the sequestration or cessio of the estate of either partner, it shall be in the option of the other partner to acquire the share and interest of the defaulting partner in the firm. The said options must be declared within six weeks after the event which gives ground for or operates as dissolution, or within that period after such event comes to the knowledge of the other partner, and the share shall be acquired as at the date of such event (hereinafter referred to as "the dissolution") if the option to that effect is exercised. The price shall be fixed as follows:
- (1) If the elections are intimated before the [end of first year], the price shall be the amount paid in by the defaulting partner, with the addition of interest at the rate of five per cent. per annum from [date of commencement], or the date when the same was paid in to the date of dissolution, but under deduction of all sums drawn by the defaulting partner.
- (2) If the elections are intimated on the day of [annual balance day] in any year, the price shall be the figure at which the defaulting partner's share and interest stand in the balance-sheet made up as on that date.
- (3) In any other case the price shall be the figure at which the defaulting partner's share and interest stood in the balance-sheet last preceding the intimation of option to acquire it, and if such balance-sheet was made up as at a date prior to the dissolution, interest shall be added for the period between those dates at the rate of five per cent. per annum, and in any case deduction shall be made of all sums drawn out by the defaulting partner since the date of such balance.

In any case, the price shall be payable in three instalments, at six, twelve, and eighteen months after the date of the dissolution, with interest at the rate of five per cent. per annum thereon, and on the balance thereof remaining unpaid, from the date of dissolution or of the said balance, whichever is the

later, till paid. The purchasing partner shall give his bills therefor without security [or otherwise, as on p. 102]. Within the said eighteen months he shall produce evidence of discharge of all liabilities existing at the date of dissolution.

- 13. In the event of the death of either partner, the surviving partner shall have as regards the share of the deceased partner the like option of acquisition as is given to the solvent partner under the immediately preceding article, and on the like terms and conditions.
 - 14. [Article 7 on p. 103.]
- 15. On the dissolution of the partnership, except in cases of purchase under articles 12 and 13, the whole assets of the firm shall be realised by public roup or private bargain, but the book debts shall not be sold until one year after the dissolution, in which interval all reasonable means shall be taken to collect them. On any sales by public roup either partner may compete.

Or.

[after "assets of the firm," proceed] shall be valued by , whom failing, by a valuator to be named by the arbiter, and the said A. shall first have the option to acquire same at the amount of the valuation, and failing his intimating his election to exercise such option within one month after the date of the valuation being intimated to the partners, the said B. shall thereafter have the like option, and failing his intimating his election to exercise such option within two months after the date of the valuation being intimated to the partners, then the whole assets shall be realised by public roup or private bargain [as above]. In the event of either partner acquiring the assets under the option hereinbefore in this article conferred on him, the price shall be payable as follows: so much thereof as is required to pay off all debts and liabilities of the firm (including the partners in respect of advances, if any, over and above their stipulated amounts of capital) shall be paid forthwith, and shall be forthwith applied to those purposes, and as regards the balance of the price, the purchaser shall grant his bills to the other partner for the latter's share thereof in three equal instalments at six, twelve, and eighteen months after the date of dissolution, with interest at the rate of five per cent. per annum thereon, and on the balances thereof remaining unpaid, from the date of dissolution till paid.

Or.

[after "assets of the firm," proceed] shall be put up to private auction between the partners at such upset price and on such terms and conditions as they shall mutually agree upon, or as shall be settled by the arbiter. The price shall be payable as follows [as above].

- 16. [Article as to goodwill and firm name, pp. 103, 104.]
- 17. These presents express the fundamental articles of agreement of partnership between the parties, and the same shall not be altered except by mutual consent expressed in writing.
 - 18. [Reference and registration, p. 103.]

CONTRACT OF CO-PARTNERY AMONG THREE PARTNERS

It is contracted between the parties following, namely, (1) A., (2) B., and (3) C., in manner following; That is to say, they agree to become partners in the trade or business of , on the following terms and conditions, namely:

- 1. The partnership shall continue for years from , if all the partners or any two of them shall so long live unless the same shall be sooner terminated under the provisions hereinafter contained, and if the same should endure until the expiry of the said term of years, it shall not then or thereafter be terminated so long as all the partners or any two of them survive, unless and until one of them shall give six months' written notice of dissolution to the others or other and such notice shall have expired, but subject always to the provisions hereinafter written.
- 2. The firm name shall be , and the business shall be carried on at and , or at such other place or places as may be agreed on by the partners.
- 3. The capital shall be £4000, to be contributed by the partners as follows:—The said A. contributes (1) the stock-in-trade of the business at present carried on by him in the said premises at , (2) the property of the said last-mentioned premises, and (3) the lease of the said premises at , which assets are together agreed and taken to be of the value of £2000. The said B. and C. are each to pay in £1000 in cash.
- 4. The partners shall be interested in the capital, and in the profits and losses, in the proportions of their said contributions of capital, namely, the said A. to the extent of two-fourths, and the said B. and C. to the extent of one-fourth each.
- 5. The firm take over the said assets as at said [date], and they shall pay the feu-duty and rent of the said subjects respectively as from that date. The firm do not take over the book debts due to the said A. in his present business, nor do they take over or assume liability for any debts or obligations of the business incurred before the said [date].
 - 6. [Advances beyond capital, p. 105.]
- 7. Pending the ascertainment of profits as aftermentioned, each partner shall be entitled to draw out quarterly sums as follows:-The said A. per quarter, and the said B. and C. each £ When profits are ascertained, if there is any excess beyond the sums so drawn out, the same may be drawn by the partners in the same proportions, but so that the total drawings of the partners in any year of the firm's business shall not exceed the following sums, namely the said A. £ , and the said B. and C. £ each. Any surplus beyond these figures shall be left undrawn for the purposes of the business. And, on the other hand, if the profits for the year are less than the quarterly drawings, the amount drawn out for the year in excess of the profits shall forthwith be repaid by the partners to the firm. [Next four articles as in Nos. 7 to 10 inclusive of preceding form, with verbal changes.]
 - 12. [Accounts, p. 102.]
 - 13. If any partner shall become notour bankrupt, or be sequestrated, or

have an award of cessio pronounced against him, or grant a trust-deed for behoof of creditors, or grant any assignment or other deed absolute or in security of or affecting his share and interest in the firm or any part thereof, or suffer any diligence affecting his share and interest in the firm or any part thereof to remain undischarged for six weeks, such partner (hereinafter referred to as "the defaulting partner") shall thereupon ipso facto cease to be a partner, and the other partners (in proportion inter se to their then existing shares in the firm), or the other partner, if only one other, shall have the option to acquire the share and interest of the defaulting partner in the firm, The said option must be declared within six weeks after the date when the defaulting partner ceased to be a partner to the knowledge of the other or of either of them if more than one, and if the option is exercised the share shall be acquired as at the date when he ceased to be a partner. The price shall be fixed as follows [see p. 106, altering "elections" to "election," and "dissolution" to "date when the defaulting partner ceased to be a partner"]. The price shall instalments at and months after the date when be payable in the defaulting partner ceased to be a partner, with interest at the said rate thereon, and on the balance thereof remaining unpaid, from the date when the defaulting partner ceased to be a partner, or from the said balance, whichever is the later, till paid. The purchasing partners shall give their joint and several bills therefor without security [or otherwise, p. 102]. Within the said [last instalment] they shall produce evidence of discharge of all liabilities existing at the date when the defaulting partner ceased to be a partner.

14. In the event of the death of any partner, the surviving partners or partner shall have as regards the share of the deceased the like option of acquisition as is given to the solvent partners or partner under the immediately preceding article, and on the like terms and conditions.

15. In the events stated in the two preceding articles, if the solvent or surviving partners or partner should not exercise the options thereby conferred, the partnership assets shall be realised, and the proceeds applied as provided in the immediately succeeding article, but the realisation, application, and whole winding-up shall be in the hands of the surviving solvent partners or partner only.

16. On the dissolution of the partnership, except in cases of purchase under articles 13 and 14 [insert one of the clauses on p. 107, but the provision as to the payment in the second and third alternative clauses will run as follows], so much as is required to pay off all liabilities of the firm (including the partners in respect of advances over and above their stipulated amounts of capital) shall be paid forthwith, and shall be forthwith applied to those purposes, and as regards the balance of the price the purchaser shall grant his bills to the other partners for their proportions thereof, in three equal instalments, at six, twelve, and eighteen months after the date of dissolution, with interest at the rate of five per cent. per annum thereon, and on the balance thereof remaining unpaid, from the date of dissolution till paid.

[Add remaining clauses as desired from previous forms.]

CONTRACT OF CO-PARTNERY BETWEEN TWO PHYSICIANS AND SURGEONS

It is contracted between the parties following, namely, (1) A. and (2) B., in manner following; That is to say, Whereas the said A. has for some years practised as a physician, surgeon, and apothecary in , and he now holds ; And whereas it has been arranged that the parties shall enter into partnership on the footing of the said B. paying to the said as premium and (2) the sum of £ , being one-A. (1) the sum of \mathcal{L} third of the agreed-on value of the horses, carriages, harness, instruments, drugs, and other effects used by the said A. in his practice, and at present belonging to him [of which an inventory is signed as relative hereto], and upon the other conditions hereinafter set forth; And whereas of the said two sums, amounting together to £ , it is agreed that £ shall be instantly by instalments, with interest, as hereinafter paid, and the balance of £ expressed; And whereas the said B. has instantly paid to the said A. the said , of which the said A. hereby acknowledges the receipt: Therefore the parties do hereby agree to become partners in the profession and business of physicians, surgeons, and apothecaries, upon the terms and conditions following, namely:

- 1. The partnership shall continue for years from
- 2. The practice shall be carried on without any firm name, but the names of both partners shall appear on all papers and correspondence.
- 3. The firm shall have the use, for the period of the partnership, of the two rooms in the house occupied by the said A., being , and of the stable and coach-house attached thereto, for neither of which any rent shall be charged to the firm, and the said A. shall also relieve the firm of all rates and taxes in respect thereof. The said B. shall, in like manner, give such use of his residence, for the purposes of the firm, as is reasonably necessary, according to the custom of the profession. If any further accommodation, or stabling, or coachhouse is required, it shall be provided out of profits.
- 4. The said horses, carriages, harness, instruments, drugs, and other effects shall become the property of the firm, and the partners shall be interested therein, and in any and all substituted and additional property acquired by the firm, in the proportions of two-thirds to the said A., and the remaining third to the said B., and both partners shall have free use thereof for the purposes of the partnership.
- 5. The said B. shall pay to the said A. the said sum of £ [being the above balance] in five annual instalments of £ each, payable on the day of 1904 and in each of the four following years, with interest on each instalment at the rate of five per cent. per annum, but only after the date of payment thereof till paid; but in the event of the death of the said B., the outstanding instalments shall become immediately payable under discount at the rate of five per cent. per annum. The said A. and the firm for his behoof shall have the first charge upon the share of the said B. in the property and profits of the firm for payment of said instalments and interest, and in security thereof the said B. hereby assigns the said share to the said A.

- 6. The said A. shall retain as his separate income, apart from the firm, his salary and emoluments, present and future, in respect of the said office of held by him.
- 7. Subject to the preceding article, the partners shall be entitled to share in profits in the proportion of two-thirds to the said A., and the remaining one-third to the said B. But so long as any part of the said sum of \pounds remains unpaid, the said B. shall actually withdraw annually only one-fourth of the profits, or the sum of \pounds , whichever may be the lesser amount.
 - 8. [Accounts, p. 102.]
- 9. One separate bank account shall be opened and kept for the firm's banking transactions. It shall be with the branch at of the Bank. It shall be kept in the joint names of the partners. All firm monies shall be paid into it. Cheques thereon shall be signed by both partners.
- 10. Except as regards the office of held by the said A. as aforesaid, both partners shall devote their whole time and attention to the practice. But the intention and agreement is that as far as possible the said A. shall be entitled to devote himself, at least mainly, to the indoor work at his own house and the practice in the town of itself and its immediate neighbourhood, or such part thereof as he can reasonably overtake.
- 11. On the death of either partner the survivor shall be entitled to acquire the deceased's share in the property of the firm on the basis of a valuation to be made by , whom failing by a valuator or valuators to be named by the arbiter. But if he is to avail himself of such option, he must give notice to that effect to the executors or other representatives of the deceased within six weeks after the date of death, and the price shall be paid as follows: one-half within ten days after the delivery of the valuation, and the remaining half within one year from the date of death, with interest in each case at the rate of five per cent. per annum from the date of death till paid. A bill shall be granted for the second instalment.
- 12. Further, in the event of the partnership being dissolved by the death of the said A., the said B. shall, as an absolute obligation irrespective of any option or election on his part, pay for goodwill according to the following scale:—If the said A. shall die on or before , the sum shall be £ [or a sum equal to a year's whole net profit on the basis or average of the profits earned during the period of the partnership]; if on or before , the sum shall be £ [or a sum equal to two-thirds of a year's whole net profits on the basis, etc.; and carry the scale as far as may be desired]. The amount shall be paid in two equal instalments, one within one month (or as soon as the figures can be ascertained), and the other within one year after the date of death, with interest in each case at the said rate from the date of death till paid [or such other periods as the junior partner will be reasonably able to meet].
- 13. On the dissolution of the partnership for any reason other than death, the property shall be valued as before expressed, and the said A. shall first have the option of acquiring same at the amount of the valuation; and failing his intimating his election to exercise such option within one month after the date of the valuation being intimated to the partners, the said B. shall



thereafter have the like option; and failing his intimating his election to exercise such option within two months after the date of the valuation being intimated to the partners, the property shall be realised by public roup or private bargain, but the book debts shall not be sold until one year after the dissolution, in which interval all reasonable means shall be taken to collect them. On any sale by public auction either partner may compete. In the event of either partner acquiring the assets under the option hereinbefore in this article expressed, the price shall be payable as follows:—So much thereof as is required to pay off all debts and liabilities of the firm shall be paid forthwith, and shall be forthwith applied to those purposes; and as regards the balance of the price the purchaser shall grant his bills for the other partner's proportion thereof in instalments [dates], with interest at the said rate thereon and on the balance thereof remaining unpaid from the date of dissolution till paid.

14. Except in the event provided for in article 12, no allowance shall be made for goodwill.

15. In the event of the dissolution of the partnership otherwise than by the death of the said A., or unless the said B. shall purchase under article 13, the said B. shall not thereafter at any time of his life practice as a physician, surgeon, or apothecary in , or within a distance of miles thereof; and if he shall infringe this restriction, he shall pay to said A. the sum of £ of liquidated damages for each and every month or part of a month during which he does so, but without prejudice to the right of the said A. to prevent him.

[Add reference and registration clauses, p. 103.]

CONTRACT OF CO-PARTNERY AMONG FARMERS

It is hardly necessary to point out that a contract of co-partnery among farmers is complicated by the contractual relations with the landlord. The special terms of the lease must be carefully considered in adjusting the contract.

It is contracted among the parties following, viz.: A., B., and C. in manner following; That is to say, they have become and hereby agree to be partners as tenants of the farm of in the parish of and county of (hereinafter called "the farm"), under the lease thereof between D. and the parties hereto dated (hereinafter called "the lease"), on the following terms and conditions, viz.:—

- 1. The partnership shall endure for fifteen years from [being the term of entry under, and the endurance of, the lease] notwithstanding the date hereof, unless the same shall be sooner terminated under the provisions hereinafter contained.
 - 2. The firm name shall be
- 3. The capital shall be \pounds , contributed one-half by the said A. and the other half equally by the said B. and C.
- 4. The partners shall be interested in profits and liable for losses according to their respective shares of capital as aforesaid.

- 5. A manager shall be appointed by the partners, and such manager may be one of their own number, who shall in that case be the managing partner. He shall receive £ per annum as salary and £ per annum for travelling expenses, or such other sums less or more as the partners may from time to time agree upon. Such sums in the case of the managing partner shall be separate from and in addition to his share of profits. The appointment shall be during the pleasure of the partners.
- 6. The bank account of the firm shall be kept with , unless and until the partners agree to change either the bank or the branch, and all cheques thereon shall, unless and until the partners otherwise agree, be signed by the manager or managing partner [or by the said A.].
- 7. Full and proper books shall be kept showing the whole transactions of the firm, and they shall be regularly and continuously kept up to date by the manager or managing partner.
- 8. An annual valuation of the whole stock, crop, farm implements, and other property of the firm shall be made by the manager or managing partner as on the day of in each year.
- 9. A balance-sheet and profit and loss account shall be made up annually as at the day of in each year and submitted to the partners along with the valuation within three months after the said day of, and shall be adjusted and signed by all the partners within two months after said, failing which it shall be made up or adjusted by or under the direction of the arbiter after-named and signed by him, and his signature shall bind the partners and their representatives. Without prejudice to his other powers, the arbiter shall not be bound by the valuation made by the managing partner for the purpose of said balance-sheet, but shall be entitled to obtain a new valuation or valuations in whole or in part from such valuators as he
- 10. The shares of the partners in profits being in the same proportion as their shares of capital, no interest shall be calculated or paid on capital.

may think fit.

- 11. The stock and stocking on the farm shall be kept up to at least the same level of numbers and quality as at present, and no increase in valuation arising from increased market prices shall be treated as profit. The balance-sheet shall always before any profit is divided show capital assets to the amount of the said sum of \mathcal{L} [capital above] over and above the profits for the year. Any decrease in valuation of capital assets shall be represented by cash in bank before any profit is ascertained, and the balance only shall be held as profit, and if there are no sums or not sufficient sums available for this purpose, no distribution of profits shall be made.
- 12. If any partner should become notour bankrupt or be sequestrated, or have an award of cessio pronounced against him, or grant a trust deed for behoof of his creditors, or grant any assignation or other deed absolute or in security of or affecting his share and interest in the firm or any part thereof, or suffer any diligence to be used affecting his share and interest in the firm or any part thereof, or do or suffer anything which in terms of the lease or otherwise may bring the lease to an end or may entitle the landlord in his option to terminate the lease, such partner (hereinafter referred to as

"the defaulting partner") shall, but only in the option of the majority of the other partners [the said A. being a sine quo non of such majority in the event of the defaulting partner being other than the said A.] cease to be a partner as on the day prior to the date of such bankruptcy, sequestration, cessio, trust deed, assignation, diligence, or other thing or event, and the other partners (in proportion inter se to their then existing shares in the firm) or the other partner if only one, shall within three months of the thing or event coming to their or his knowledge have the option of acquiring the share and interest of the defaulting partner in the firm. If the option be exercised, the share shall be acquired as at the date when the defaulting partner ceased to be a partner. The price shall be the figure at which the defaulting partner's share and interest stand in the balance-sheet last preceding the date of intimation of option to acquire it. Deduction shall be made of all sums drawn out by the defaulting partner since the date of such balance-sheet. As to the time of payment of the price, the other partners may postpone payment until the expiry or termination of the lease [or the first break available to the tenants], and such a time not exceeding one year thereafter as may or might enable the estate to be realised. Interest shall run at [three] per cent. per annum on the price and the balance thereof remaining unpaid from the date of the said balance-sheet. The purchasing partner or partners shall give promissory notes therefor without security, and in the case of more partners than one purchasing, they shall give their joint and several promissory notes therefor also without security. On final payment the remaining partners shall produce evidence of discharge of all liabilities existing at the date when the defaulting partner ceased to be a partner, and of all rents and other obligations under the lease so far as exigible at the date of final settlement, and as regards the future obligations in the lease the remaining partners shall be bound to indemnify the defaulting partner.

13. In the event of the death of any partner, neither his heirs, executors, representatives, nor any one claiming by or through such deceased partner shall have, as against the will of the other partners, any right to be admitted as a tenant under the lease or as a partner in the firm, the surviving partners or partner having as regards the share of the deceased partner the like option of acquisition as is given under the immediately preceding article and on the like terms and conditions.

14. In the events dealt with in articles 12 and 13, if the options of purchase thereby given be not exercised, the lease shall be brought to an end as soon as is possible according to its terms, or in the option of the other partners even earlier on such terms if and as they may in their uncontrolled discretion be able to arrange with the landlord. In this case the defaulting partner, or the deceased partner his estate and representatives, shall remain or become partners until the lease is at an end and the business wound up, but shall not be entitled to interfere in the management. The share and interest of the defaulting or deceased partner shall in this case remain in the firm until the termination of the lease. The defaulting partner or the deceased partner his estate or representatives, shall in this case be entitled to their share of profits, and shall bear their share of losses, and shall

be liable in all debts and obligations of the firm contracted and to be contracted until the lease is at an end and the partnership wound up.

- 15. On the dissolution of the partnership, except in cases of purchase under articles 12 and 13, the whole assets of the firm shall be realised as provided in the lease, or by public roup or private bargain, but book debts shall not be sold until one year after dissolution, in which interval all reasonable means shall be taken to collect them.
- 16. On the termination of the lease at its natural expiry or at any earlier or later period, any of the partners may by arrangement between himself and the landlord become sole tenant for his own behoof, or any two or more of the partners may make the like arrangement for their own behoof, and in that event they may acquire the stock and stocking, or any part of it, by private purchase by valuation in terms of the lease. In the event of disposal of the stock and stocking, or any part thereof, otherwise than in terms of the lease, any of the partners may purchase same, but in that event only by public roup.
- 17. All ordinary matters of management shall be determined by a majority of the surviving and solvent partners [the said A. being a sine quo non while surviving and solvent and a partner].
- 18. The whole share, right, and interest of the partners in the lease, farm stock, stocking, and all other property of the firm, and under these presents, in any event and in any manner of way, shall be and are hereby declared to be personal property and personal succession only; and subject to the rights of purchase hereinbefore stipulated, and the other rights of the firm and of the other partners, each partner's share is hereby destined to his heirs in moveables, subject to his testamentary writings. But the partners and their whole estate, heritable and moveable, and their heirs, executors and representatives, all jointly and severally, are and shall be liable to implement and fulfil all the obligations of these presents.

19-21. [Arbitration, registration, and testing clauses.]

POWER TO ONE OF THE PARTNERS TO INTRODUCE AN ADDITIONAL PARTNER, BEING HIS SON

The said A. may at any time, while he remains a partner and the firm is solvent, introduce into the firm, as an additional partner, any one of his sons, being not less than years of age [and duly qualified]; and if he should not exercise this power in his lifetime, he shall, if he is a partner at the time of his death and the firm is solvent, be entitled to do so by testamentary writing to take effect after his death, but subject in either case to the following conditions:—

(1) If such additional partner be introduced in the lifetime of the said A., a deed shall be executed between the said A. and such additional partner, allocating to the latter a definite proportion (not being less than one-nor more than one-half) of the said A.'s share of the capital, property, and future profits of the firm as then existing, except only the share of interest and profits to the date of introduction and any advance by the said A. to the firm

in addition to his stipulated share of capital; and such deed shall be forthwith intimated to the other partners or partner, and a signed duplicate thereof shall be delivered to them or him. And such proportion may be subsequently increased in like manner from time to time, but so that the said A. shall always, while he remains a partner, retain one-half of his present share and interest, but any share and interest so retained may be given to the new partner by testamentary writing.

- (2) If such additional partner be not introduced till after the death of the said A., it shall be a necessary condition of his appointment that the said A. shall bequeath to him, or otherwise give him a title to, the whole share and interest belonging to the said A. in the firm as at the death of the said A., except only the share of interest and profits to the date of death, and any advance by the said A. to the firm in addition to his stipulated share of capital.
- (3) Any testamentary appointment or bequest must be intimated to the other partners or partner, together with a written acceptance thereof by the new partner, within months after the death of the said A., failing which the appointment or bequest shall be held void and of no effect, and time is of the essence of this agreement.
- (4) The new partner shall bear a share of all losses corresponding to his share of profits, and a like share of all liabilities, whether incurred before or after the date of his introduction, and to that extent the said A. shall thereupon be relieved in a question with all the other partners.
- (5) All the articles of these presents shall be binding on such new partner, and he shall, if required, be bound, at the expense of the firm, to execute a deed of agreement, obligation, and otherwise to that effect in such terms as may be adjusted or as may be settled by the arbiter.

Various adjustments may be required on other articles in respect of this special clause, and particularly—

1. If there is an article as to extent of periodical drawings and accumulation beyond a certain figure, it may be proper to add to it:—

If, in terms of the powers contained in article , the said A. introduces an additional partner in his lifetime, the above figures as to the quarterly and maximum annual amounts to be drawn by the said A. shall be apportioned between him and such additional partner in the same proportions as the share of the said A. in the firm in terms of said article.

2. The article regarding the death of a partner will begin with a qualification:—

Subject, in the case of the said A., to the power contained in article if the same should be exercised and come into force.

3. If on dissolution the assets are to be offered to the partners in order, provision must be made for giving the new partner such option, but in the last place.

DEED ON INTRODUCTION OF THE ADDITIONAL PARTNER

It is agreed between the parties following, namely, (1) A., (2) B., (3) C., and (4) D., in manner following, namely:—

Whereas these presents are supplemental to the contract of co-partnery entered into between the said A., B., and C., dated , which is here specially referred to and held as repeated brevitatis causa, under which contract the said A., B., and C. are carrying on the business therein referred to:

And whereas the said D. is a son of the said A., and is over age [and is duly qualified to be a partner in the said business];

And whereas the said A., in virtue of the power reserved to him in the said contract of co-partnery, has resolved to introduce the said D. into the firm on the terms underwritten: Therefore it is agreed as follows:—

- 1. The said A. hereby introduces the said D. as a partner into the firm of X. & Co. under the said contract of co-partnery, and that as from the [date] for the remainder of the endurance of the partnership.
- 2. The said A. hereby assigns to the said D. one-fourth of the share and interest at present belonging to him the said A. in the capital, property, and profits of the firm as from the said [date], except, that is, the share belonging to the said A. of interest and profits to the said [date] [and also reserving to the said A. the sole right to the whole of the advances made by him to the firm over and above his stipulated share of capital]. The share of capital and profits at present belonging to the said A. being one-half of the whole capital and profits of the firm, the share hereby assigned to the said D. is one-eighth of the whole capital and profits of the firm, and as from the said [date] the share of the said A. therein shall be three-eighths instead of one-half.
- 3. The said D. hereby accepts the said introduction and assignation, and becomes a partner in the said firm accordingly.
- 4. The said B. and C. admit that the said introduction and assignation are validly made in terms of the said contract of co-partnery.
- 5. All the parties agree that the business shall be carried on by them under and subject to the terms of the said contract of co-partnery, by which the said D. and all the other parties agree to be bound in all respects; and particularly but without prejudice to the said generality, the said D. shall bear a share of all losses corresponding to his share in the profits, and a like share of all liabilities, whether incurred before or after the said date, without prejudice to any questions between the said A. and D. as to whether such prior liabilities should not be set against prior profits.
- 6. Further, without prejudice to the said general adoption of the said contract of co-partnery, all the parties name , whom failing , as sole arbiter, to deal with and decide not only the matters mentioned in the said contract of co-partnery as referred to him, and all other matters, questions, and disputes which may arise amongst them during the subsistence of the partnership, but also all other matters, questions, and disputes which may arise amongst them or their representatives after its dissolution, and that absolutely and universally without any limitation, with power to him to employ accountants and valuators and to take legal and other skilled advice, and to award and assess damages: And they consent to registration of the said contract of co-partnery and these presents, and all decrees-arbitral, interim and final, to be pronounced under the reference contained in the said contract



of co-partnery and these presents for preservation and execution.—In witness whereof.

LEASE (INCORPORATED IN CONTRACT OF CO-PARTNERY) BY ONE PARTNER TO THE FIRM OF THE BUSINESS PREMISES 1

1. WHILE OWNER IS A PARTNER: CONDITIONS OF ORDINARY LEASE

The said A. hereby lets to himself and the said B. and C. and the survivors of them (the said A. being always one), as trustees for the firm, the [said] premises [identify briefly], and that for the period and on the terms and conditions following, namely:—

- (1) The subjects are hereby let for the period during which the said A. shall continue a partner of the firm.
- (2) The rent shall be £ per annum, payable at the terms of Whitsunday and Martinmas by equal portions, beginning at the term of for the period from the said [beginning of partnership] to that term.
- (3) The premises shall be used for the business of the firm only: Assignees and sub-tenants are excluded.
- (4) The firm accept the premises as in good tenantable condition and repair, and undertake to keep and leave them in the like condition and repair, ordinary wear and tear excepted.
- (5) No notice shall be required before the expiry of the lease in terms of this article, and the rent shall be paid to the date of expiry only.

2. For the Period of the Partnership: Firm Paying all Rates, etc.

The said A. hereby lets to himself and the said B. and C. and the survivors and survivor of them, as trustees and trustee for the firm, the [said] premises [identify], and that for the period and on the terms and conditions following:—

- (1) The subjects are let for the period of years, whether the said A. shall so long live and continue a partner or not.
 - (2) [As above]:
- (3) In addition to the said rent, the firm shall pay the following items ² [or such of them as are intended] for the period of the lease, namely:—
 - (a) The feu-duty of £
- (b) All rates, taxes, and assessments in respect both of property and occupancy, landlord's property tax only excepted:
- (c) The premium on the fire insurance of £ on buildings and £ rent:
 - (d) All repairs which they may desire. [Other conditions as above.]
 - ¹ This will require a lease stamp.

 ² This will require to be considered in the stamp.

CLAUSE PROVIDING FOR PAYMENT TO THE EXECUTORS OF A DECEASED PARTNER OF A SHARE OF PROFITS FOR A LIMITED PERIOD

In the event of the death of either of the partners while the business is carried on under these presents, or any extension or other modification thereof, in writing or otherwise, then, in addition to all other sums to which the executors or other representatives of the deceased partner may be entitled, the survivor shall (subject as after mentioned) be bound to pay to them, for the period of seven years after such death, one-half of the share to which the deceased would have been entitled of the profits of the business if he had survived and the apportionment of profits had remained the same as at his death, but that subject to and with and under the following conditions and regulations, namely:—

- (1) The executors or other representatives of the deceased partner shall be entitled to see the balance-sheets and profit and loss accounts of the business, and to obtain all information and papers to enable them to judge thereof. The accounts shall be made up each year on the anniversary of the death, and submitted within one month thereafter. If no written objection is stated within one month after the accounts are submitted, the same shall be final and conclusive.
- (2) One-half of the annual share of profits shall be payable within one month and the remaining half within six months of the close of the business year to which they relate, with interest at 5 per centum per annum on such instalments only from the respective due dates thereof till paid; but in the event of payment being deferred on account of any difference as to the accounts, the arbiter will determine whether any interest shall be allowed, and if any, then at what rate and from what date.
- (3) The surviving partner shall be bound to continue the business for the said period of seven years, unless he shall commute the said payments as after provided for. But if he should assume a partner without commuting, the share of such partner, not exceeding one-third of the profits, shall be deducted from the whole net profits as a necessary expense of carrying on the business, and the remainder shall be reckoned the whole net profits for the purpose of this article.
- (4) The executors or other representatives of the deceased partner shall not, either as such or as individuals, be partners; nor shall they, either as such or as individuals, or the estate of the deceased, be liable as such; and without prejudice thereto the survivor shall indemnify them and the estate of the deceased against all losses and liabilities. But what is to be shared is net profit, and any loss in one year may be set against profit in a prior or subsequent year of the said seven years; and, if necessary, the executors or representatives of the deceased shall repay to the survivor to such an extent as to secure that they do not receive more over the whole seven years than one-half of what the deceased would have received if he had survived, subject to the preceding sub-clause.
 - (5) If the survivor should intend and be about to sell the business or to



enter into partnership (as to which the executors or other representatives of the deceased may require to be satisfied), it shall be in his option to commute the future payments under this article on the following terms and conditions:—

- (a) The survivor shall give notice to the executors or other representatives, which notice shall fix a date of commutation (hereinafter called "the appointed date"), not being more than six weeks after the date of the notice.
- (b) In addition to the commutation money there shall be paid the share of profits as aforesaid to the appointed date. The same shall be ascertained by a special balance-sheet and profit and loss account, and shall be paid so soon as ascertained, with interest from the appointed date at the said rate till paid.
- (c) The commutation money shall be four times the annual share of profits (that is, two times what the deceased's annual share of profits would have been), calculating the net annual profits on the basis of the three previous complete business years, whether before or after death, but disregarding any broken period between the death of the deceased partner and the previous annual balance, unless the commutation shall be made when there are less than four full years of the seven years unexpired, in which case the commutation money shall be the annual share of profits for the actual unexpired period, calculating the net annual profits as aforesaid, but under discount in this latter case at the rate of four per cent. per annum.
- (d) The commutation money shall be paid so soon as ascertained, with interest at the rate of five per cent. per annum from the appointed date till paid; but if it should not be paid within three months after the appointed date, the commutation shall, in the option of the executors or other representatives of the deceased partner, be treated as null and void, unless the arbiter shall determine that the delay has been due to or has been materially contributed to by them.
- (6) All questions between the surviving partner and the executors or other representatives of the deceased partner under this article are hereby declared to be included in the general clause of reference and submission hereinafter contained.

MINUTE OF EXTENSION OF PARTNERSHIP

It is agreed between A. and B., parties to the foregoing contract of copartnery, that the same shall be extended from the 31st day of December 190 for the period of five years, namely, to the 31st day of December 190, and that all the clauses thereof shall apply in the same manner as if the original endurance thereof had been ten instead of five years, with these exceptions, namely:—

- 1. The said B. having, as is hereby acknowledged, paid in, as on the said 31st December 190, the additional sum of £, the parties are interested in capital as from that date in the proportions following, namely, the said A. to the extent of three-fifths, and the said B. to the extent of two-fifths.
- 2. For said extended period of five years the said parties shall be interested in the profits and liable for losses in the like proportions of three-fifths and two-fifths.—In witness whereof.

AGREEMENT FOR DISSOLUTION—ONE PARTNER RETIRING, THE OTHER TAKING THE BUSINESS AT A VALUATION, PAYABLE BY INSTALMENTS.

MINUTE OF DISSOLUTION OF PARTNERSHIP BETWEEN A. (HEREINAFTER CALLED MR A.) AND B. (HEREINAFTER CALLED MR. B.)

Whereas the parties entered into a contract of co-partnery dated , by which they agreed to carry on the business of at for the period and on the terms and conditions therein stated, and the same has been carried on accordingly up to the [date] under the firm-name of A. & B.;

Or,

Whereas the parties have for some time carried on business as at under the firm name of A. & B. without any written contract of co-partnery, but it is hereby admitted that their shares were equal [or otherwise]:

And whereas Mr. A. has resolved to retire from the business as at the said [date], and Mr. B. is to continue the business, and matters are to be settled between them as is hereinafter expressed;

And whereas all the assets have been valued, or their value has been adjusted between the parties and to their satisfaction, and after allowing for all debts and liabilities affecting the firm, the free balance is mutually adjusted at \pounds , which does not include the goodwill or the right to the firm-name, for which together an additional value of \pounds is mutually adjusted, making a free total of \pounds

And whereas Mr. A.'s share is one-half, being £, and it is arranged that the same shall be paid in four instalments at six, twelve, eighteen, and twenty-four months after the said [date], with interest at the rate of five per cent. per annum on the said sum of £ [his half], and the balance thereof from time to time remaining unpaid from the said [date] till paid:

Therefore the parties hereby agree as follows:-

- 1. The partnership is dissolved as at the said [date], as at which date Mr. A. retires and Mr. B. takes the whole business and assets.
- 2. Mr. B. is to pay Mr. A. the said sum of \pounds in instalments and with interest as aforesaid, for which instalments bills are now delivered: Mr. A. accepts the same in full satisfaction of his share of the capital, property, goodwill, and profits of the said firm and business, and of all claims in any way relating to the said firm and business, saving always the obligations contained in the fifth article of these presents underwritten.
- 3. Mr. A. will, at the expense of Mr. B., grant and concur in all deeds and documents, if any, which may be required the better to enable Mr. B. to obtain possession of the assets.
- 4. Mr. A. binds himself not to carry on business as a in or within miles thereof, at any time during the remainder of his life.
- 5. Mr. B. binds himself to relieve and indemnify Mr. A. of and against all debts and liabilities of the said firm and business, and to produce evidence of discharge thereof before [date].—In witness whereof.



AGREEMENT AMONGST THREE PARTNERS, UNDER WHICH ONE RETIRES AND THE TWO OTHERS TAKE HIS SHARE AND CONTINUE THE BUSINESS

It is agreed amongst the parties following, namely, (1) A., (2) B., and (3) C., in manner following; That is to say,

Whereas the parties entered into a contract of co-partnery, dated , by which they agreed to carry on the business of at for the period of years from , and on the terms and conditions therein expressed, and under the firm-name of , and the business has been carried on accordingly up to the present time [or state date];

And whereas the shares of the parties in the firm are as follows: The said A., four-ninths; the said B., three-ninths; and the said C., two-ninths;

And whereas the said A. has resolved to retire from the business, and the said B. and C. are to continue the business, and all the parties have come to the agreement hereinafter expressed: Therefore they hereby agree as follows:—

- 1. The said A. ceases to be a partner as at
- 2. The value to be received by the said A. for his whole share in the capital, property, goodwill, and profits, and his interest in the firm-name, and all his share and interest otherwise in respect of the firm, is the following, namely:
- (1) A capital sum of \pounds , to be paid by the said B. and C. jointly and severally as follows:—One-fourth thereof, being the sum of \pounds , on the execution of these presents, the receipt of which the said A. hereby acknowledges, and the remaining three-fourths in three instalments of \pounds each, payable at one, two, and three years after the said [date] with interest at the rate of five per cent. per annum on the said sum of \pounds and the balances thereof outstanding from time to time from the said till paid. The said B. and C. have given their joint and several promissory notes for the said three postponed instalments.
- (2) An annuity or yearly sum of £ for the remainder of the life of the said A. from and after the said [date], payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the term of , for the period between the said date and that term and the next term's payment at the term of for the halfyear to that term, and so forth half-yearly, termly, and proportionally thereafter during the life of the said A., with a proportionate part for the period to his death from the term of Whitsunday or Martinmas last preceding, with interest at the rate of five per cent. per annum on each term's payment from that term till paid, which annuity, with interest as aforesaid, the said B. and C. bind themselves jointly and severally, and their heirs, executors, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, to pay to the said A. or his assignees.
- 3. In security 1 of the capital sums and annuity, with interest thereof respectively, all referred to in the immediately preceding article, and all the

¹ This will infer mortgage duty in addition to any other stamps.

other obligations in these presents undertaken by the said B. and C. in favour of the said A., they hereby assign to him the following, namely:

- (1) All their respective shares, rights, and interests in the capital, property, and profits of the firm, including the additional shares taken by them on the said A. ceasing to be a partner as aforesaid.
- (2) The policy of assurance by the X. Insurance Company in favour of the said B. on his own life for the sum of \pounds , numbered and dated , on which there is an annual premium of \pounds payable on the day of , with all bonuses, present and future.
- (3) The policy of assurance of the said insurance company in favour of the said C. [as before].

And the said B. and C. bind themselves and their foresaids, all jointly and severally as aforesaid, to keep the said policies in force; and they grant power to the said A. and his executors and assignees to receive and discharge all sums payable in respect of the said shares, rights, interests, and policies, and in case of default in payment of any capital sum or termly payment of annuity, to surrender the said policies and bonuses, or to sell the same by public roup or private bargain, after one month's written notice of intention to surrender or sell addressed to the said B. and C. or their respective foresaids.

- 4. The said A. will, at the expense of the said B. and C., grant and concur in all deeds and documents, if any, which may be required the better to enable the said B. and C., or the survivor, or their foresaids, to obtain possession of the assets of the firm.
- 5. The said A. binds himself not to carry on business as a in or within miles thereof, at any time during the remainder of his life.
- 6. The said B. and C. bind themselves and their foresaids, all jointly and severally as aforesaid, to relieve and indemnify the said A. [as on p. 121].

And further, the said B. and C. hereby agree between themselves (but which agreements do not affect the said A.) as follows, namely:—

- 1. They acquire the share and interest of the said A. in the capital, property, goodwill, profits, firm-name, etc., of the firm *inter se* in the proportions following, namely, the said B. three-fifths, and the said C. two-fifths, being in proportion to their previous shares in the firm, so that, giving effect thereto, their shares in the firm as from the said [date] are now three-fifths and two-fifths respectively.
- 2. They admit that the said sum of \pounds paid to the said A. on the execution of these presents has been contributed by them in the said proportions of three-fifths and two-fifths, being \pounds by the said B. and \pounds by the said C., and that the future capital sums payable to the said A. and the said annuity are payable by them *inter se* in the same proportions.
- 3. The business shall be carried on by them in terms of the said contract of co-partnery as modified by these presents, and with this alteration, namely, that the period of endurance of the partnership is hereby extended to the [date].

And all the parties hereto consent to registration hereof for preservation and execution.—In witness whereof.

MUTUAL DISCHARGE ON DISSOLUTION (WHERE THERE IS NO DEED OF AGREEMENT)

We, the parties following, namely, (first) A., and (second) B.: Whereas these presents are supplemental to the contract of co-partnery entered into between us, dated , which is here referred to and held as repeated brevitatis causa; And whereas the term of endurance therein specified termin-, but the business was continued by us thereafter until as at which date we agreed to dissolve partnership on the footing that I, the said A., should take over the assets and liabilities at valuation, and that I, the said B., should take my share in cash, to be paid by the said A.; And whereas the assets and liabilities have been valued to our mutual satisfaction, and the net amount of the valuation is £ , as appears from the state annexed and signed as relative hereto; And now seeing that I the said A. have received the said assets, and the firm's books, and that I the said B. have received from the said A. the sum of \mathcal{L} , being one-half of the said , as we hereby respectively acknowledge: Therefore, in the first place, we mutually discharge each other of all claims arising out of, or in any manner of way in connection with, the said contract of co-partnery and extension thereof and the business carried on thereunder and the winding up of the same, saving always the obligations hereinafter contained: In the second place, I, the said A., bind myself and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to relieve and indemnify the said B., and his heirs, executors, and representatives whomsoever, of and against all liabilities of and in connection with the said business, of whatever number, nature, or amount the same may be for the liabilities detailed in the said state annexed and signed as relative thereto], and, so far as not already done, to exhibit discharges thereof [so far as known], within six months from this date, and also to relieve and indemnify the said B. and his foresaids of and against all expenses which he or they may incur in connection with any such liabilities [or the said liabilities, declaring that all other liabilities if any of or in connection with the said business shall be borne by us equally]: In the third place, I, the said B., bind myself and my foresaids to grant, at the expense of the said A. and his foresaids, such other deeds, if any, as may be necessary for giving them an effectual title to the said assets or any part thereof, or enabling them to deal with the same, or to receive and discharge the proceeds thereof; but declaring that these presents by themselves alone shall be a sufficient irrevocable mandate and authority to all persons to pay and make over to the said A. and his foresaids all debts and other assets due or belonging to the said firm: And, in the fourth place, it is admitted that goodwill is not amongst the assets paid for and taken over as aforesaid, and that neither party is to be entitled to use the firm-name of A. & B., under which the said business was carried on by us, or to use the name of the other: And we warrant these presents to each other absolutely.-In witness whereof.

¹ When a retail business is sold without entitled to the books. *Morrison* v. M., limitation or restriction, the purchaser is 1900, 2 F, 382,

SECTION IX

MISCELLANEOUS—SHARES, BOOK DEBTS, BUILDING CONTRACT, TRUST-DEED FOR CREDITORS, GENERAL DISCHARGE

I. SALE OF SHARES

In connection with sales of this kind, there are several special matters which should be attended to.

Uncalled Capital.—When there is a liability on the shares for uncalled capital, the seller will, under the Companies Acts, be liable, under certain limitations, for one year after his name is off the register. In view of this, three things are to be noted:—

- 1. Purchaser's Solvency.—The seller may stipulate that he may require to be satisfied on this head. But it is to be kept in view that this is an obnoxious condition and may have a most prejudicial effect. A power to the exposer to cancel the sale may work better.
- 2. Veto on sub-sales.—In like manner it is the seller's interest that his solvent purchaser when found should take the transfer in his own name, and therefore there may be a condition against sub-selling.
- 3. Registration.—Finally the seller is concerned to see that the purchaser goes on the register in respect of all the shares sold, and does so at once; for the sooner he does the sooner the seller's year of contingent liability will expire. The purchaser may be taken bound to produce proof within a short limited time of the registration of his title.

Pre-emption.—It is now very common to find in articles of association a right of pre-emption in favour of the directors or their nominees, or a right of rejection of a proposed transferee with or without conditions. These clauses must of course be carefully considered before the shares are offered for sale. If the right is to be waived, a letter or resolution to that effect will be obtained. Otherwise the seller must be careful to avoid a claim of damages at the instance of the purchaser on the ground of bad delivery. The nature of the clause to be inserted will, of course, depend on the terms of the articles of association. Further, it will be kept in view that the seller may desire to test the question with the company. But, again, if the company's refusal be based on the purchaser's financial position, there appears no reason why there should be any liability on the seller. A suggested form is given on p. 129.

Other Restrictive Regulations.—Though the pre-emption or power of rejection is the most important fetter usually found in articles of association, there are many others, and the proper course is a perusal of the articles and an enquiry of the company whether there are any regulations affecting the right of transfer or creating any difficulty in the way of what is in the particular case proposed to be done. Amongst these other regulations the following may be mentioned, viz.:—

Amount.—It is not uncommon to find a minimum prescribed, i.e. that no transfer will be passed for less than say £100 stock, or, again, that a debenture bond may not be assigned in parts.

Liability for Calls.—In the case of partly paid shares, it will be stipulated that the purchaser is to pay any call which has been made, and, in any case, any call which may be made after the date of the conditions of sale, or if it should be paid by the seller, then that the purchaser shall repay it with interest.

Question of Expenses.—The rule of the Stock Exchange is, that the parties pay their respective expenses and the purchaser pays the stamp duty and the fee for registration. It will be just as well to make this express in detail and not merely by reference to the rules of the Exchange.

Warrandice.—There appears no reason why, even in the case of shares, there should not be an express clause of qualified warrandice if desired. But if so, of course, the conditions of sale must expressly provide for it. More particularly when a company is in liquidation it may very well be that the seller has been a party to some resolution or arrangement affecting his rights as a share- or debenture-holder which might be held to be a breach of even warrandice from fact and deed.

Payment of Price.—This will usually be within a very few days after the sale, but care should be taken that there is time to obtain the seller's signature to the transfer, so as to avoid the possibility of any claim at the instance of the purchaser on the ground that he has lost the market, or has incurred liability in connection with a re-sale.

CONDITIONS OF SALE OF FULLY-PAID SHARES 1

Conditions of sale of 100 shares of £1, each bearing to be fully paid, of the X. Company Limited, numbered 1 to 100, both inclusive, which shares (hereinafter referred to as "the shares") are to be exposed to sale by auction by A. within [place] on the day of at o'clock afternoon, or at such other time and place as the sale may be altered or adjourned to, and that under the following conditions or such other conditions as may be inserted in any minutes to follow hereon:—

1. The shares are to be exposed to sale by public roup in one lot, or in any other number of lots of such number or varying number of shares respec-

¹ This form will readily be altered to suit a sale of debentures.

tively, at the upset price of per share, or at such other upset price, all as shall be specified in any minutes to follow hereon [or as may be declared by the judge of the roup at the roup whether there be any minutes annexed hereto or not]. Each offerer shall, if and when required, subscribe his offer, and whether he subscribe or not, he shall be bound for the sum per share offered by him on the conditions expressed herein and in any minutes annexed hereto. If there be more offerers than one for the shares, or for any lot, each successive offer shall exceed the immediately preceding one by at least the sum of , and the offerer offering the upset price, or in case of more offerers than one, the highest offerer, shall be preferred to the purchase.

- 2. The shares are exposed tantum et tale as they exist and as the exposer has power to sell the same and not otherwise. The purchaser or purchasers and all offerers by offering at the roup shall be held to have satisfied themselves regarding the shares and the exposer's title and power of sale, and on all matters and questions of fact and law, and on all matters and things whatever, and to be satisfied and ready if preferred to the purchase to complete the same and to accept a transfer from the exposer by himself alone, and to pay the price to the exposer, all in terms of these conditions and any minutes annexed hereto, without any question, objection, requisition, or condition of any kind whatever.
- 3. The price or prices shall be payable to the exposer within [place] before o'clock noon on the day of with a fifth part further in name of liquidate damages and expenses in case of failure in punctual payment, and with interest at the rate of five 1 per centum per annum from the said day of until payment.
- 4. If, in point of fact, the price of the shares or of any lot be not punctually o'clock noon on the said day of , the purchaser shall, but only in the option of the exposer, forfeit his purchase, and be liable to the exposer in one-fifth part of the price offered by him in name of liquidate damages, which option the exposer may declare and intimate after any interval. and notwithstanding anything that may have intervened. In the event of the exposer intimating to the immediately preceding offerer that the highest offerer has failed in implementing his purchase and that his purchase has been forfeited, and requiring such immediately preceding offerer to fulfil his offer, then such immediately preceding offerer shall be deemed the purchaser and be bound to pay the price within three days after the intimation to him, with interest thereafter and penalty as aforesaid, and so forth through the whole course of the offerers until these conditions be fulfilled, the only limitation as to time in this respect being that any offerer who shall not within fourteen days after the roup have received an intimation requiring him to fulfil his offer shall thereafter be free. In no case shall any offerer unless preferred at the roup have any right or claim to be preferred.
- 5. Upon due payment of the price [of each lot respectively], with interest and penalty if any, the exposer shall grant a transfer to the purchaser. The exposer shall grant no warrandice and none shall be implied. Along with the transfer the exposer will either deliver the share certificate, or a

¹ Or higher if to correspond with the return from the shares.

certificate by the secretary or other official of the company, that a share certificate covering the shares in question is with the company.

- 6. The exposer is to receive the dividend payable on , and any purchaser who may receive the dividend on the shares purchased by him shall forthwith repay same to the exposer without deduction.
- 7. The exposer shall be entitled to have in the transfer either a general reference to and adoption of these conditions or a detailed insertion of any or all of the conditions herein contained or both. But in any case these presents express the terms of the contract binding on both parties, except in so far as the same may be expressly and in terms altered.
- 8. Each party shall pay his own expenses, and the purchaser or each purchaser respectively shall pay the whole stamp duty and the expense of completing his title.
- 9. , auctioneer in , shall be judge of the roup with all usual powers, including power (first) to determine whatever questions and differences may arise between the exposer and offerers, or among the offerers themselves in relation to the roup; (second) to adjourn the roup from time to time; and (third) to prefer the highest offerer to the purchase in manner above specified.

Lastly. All questions between the exposer and purchaser [or purchasers] and offerers regarding the meaning of these conditions, or the implement thereof, are submitted to the amicable decision of X., whom failing Y., as sole arbiter, and whatever the arbiter shall determine in the premises, the exposer hereby binds himself and the purchaser [or purchasers] and offerers by offering bind themselves and their respective heirs, executors and representatives without the benefit of discussion, to implement and fulfil to each other.—In witness whereof.

SHORTER FORM OF CONDITIONS OF SALE OF FULLY-PAID SHARES

Title [as in preceding form]. 1. The shares shall be put up in one lot or in such lots and at such upset price per share for each lot respectively, all as may be declared by the judge of the roup at the roup. Each offerer shall subscribe his offer if required, but he shall be bound whether he subscribes or not.

- 2. The sale is subject to the rules of the Stock Exchange, except if and so far as altered by these conditions.
 - 3. [As in preceding form.]
- 4. , auctioneer in , shall be judge of the roup.—In witness whereof.

CONDITIONS OF SALE OF PARTLY-PAID SHARES

Title. Omit "bearing to be fully paid," and say, on each of which per share bears to have been paid.

- 1-2. [As on pp. 126-7.]
- 3. The exposer shall be entitled [without reason assigned] to cancel any sale by letter signed by himself or his agent addressed to the purchaser and

posted within seven days after the sale, and in the event of cancellation under this article no claim shall exist or arise on either side.

- 4. Each purchaser shall be bound to produce to the exposer, within seven days after the sale, evidence of his solvency to the satisfaction of the exposer, of which the exposer shall be sole judge, failing which, and without prejudice to the immediately preceding article, the exposer shall be entitled to cancel the sale by letter as aforesaid, which may be posted at any time; and in the event of cancellation under this article the purchaser shall be liable in per share of liquidate damages.
- 5. Each purchaser shall pay the call of per share payable on , and all subsequent calls on the shares purchased by him and all interest thereon.
 - 6. [No. 3, p. 127.]
 - 7. [No. 4, p. 127.]
- 8. Upon due payment of the price of each lot respectively, with interest and penalty if incurred, and provided the purchaser shall have fulfilled his obligations under these presents, the exposer shall grant a transfer to the purchaser, but not to any sub-purchaser from or nominee of the purchaser, nor to anyone but the purchaser himself. The exposer shall grant no warrandice. [Continue as in No. 5, p. 127.] The purchaser shall register his transfer and go on the company's register in respect of the shares purchased by him within ten days of the sale, and shall forthwith produce evidence thereof to the exposer.
 - 9. [To the end, Nos. 6 and subsequent articles on p. 128.]

CLAUSE AS TO REJECTION OF TRANSFEREE

If the company shall decline to register the purchaser or any purchaser on the ground of any regulation of the company authorising them so to decline, such purchaser shall (subject as aftermentioned) be entitled to require the exposer to return the price and interest, if any paid, with interest at bank deposit receipt rate on price and interest from the day following the dates on which the same were paid until the date of repayment, but interest shall be payable only if that interval be such that bank deposit receipt interest has or would have become payable, and in exchange for such repayment the purchaser shall hand back the transfer and share certificate if delivered to him. The exposer shall also repay the stamp duty on the transfer in exchange for a mandate addressed to the Commissioners of Inland Revenue, requesting them to repay the stamp duty to the exposer. notwithstanding the foregoing, the purchaser shall be bound if required by the exposer to grant a transfer, assignation, or other document in favour of any third person, such document bearing, if desired by the exposer, that the purchaser has received the money from such third person, and transferring the shares and assigning all rights and claims on account of the rejection by the company, it being made clear that the purchaser incurs no warrandice other than warrandice from his own facts and deeds only. In order to entitle the purchaser to return of his price, he must fulfil all the following conditions in addition to the foregoing, viz.:—(1) he must make his demand

in writing within thirty days after he pays the price [or, before specifying a date]; (2) he must at the same time produce evidence that the company have declined to register his transfer on the ground of some regulation as aforesaid; and (3) the ground of declinature to register must not be the financial position of the purchaser. No purchaser shall have any claim against the exposer on account of the company declining to register his transfer except only as specified in this article and subject to all the terms and exceptions foresaid.

II. SALE OF, AND SECURITY OVER, BOOK DEBTS

Sale by Trustee in Sequestration.—As sales of this kind are most commonly made in bankruptcy, it is assumed that that is so in the following forms. But these may be readily adapted to other cases. regards sequestrations, attention will be paid to the terms of s. 136 of the 1856 Act. The requirements are (1) that one year must have elapsed from the deliverance actually awarding sequestration; (2) there ought to be a minute of the trustee and commissioners after the expiry of the year bearing that it appears to them to be expedient to sell the outstanding book debts and fixing a date for holding a meeting of creditors to consider it; (3) Gazette notice of the meeting; (4) circulars by post to the creditors fourteen days before the meeting, stating time and place of meeting and a valuation of the debts; (5) a resolution by three-fourths in value of the creditors at the meeting in favour of a sale, stating whether to be sold in whole or in lots, and what, if any, advertisements are to be made beyond the Gazette; (6) advertisement, one month before the sale, once in the Gazette, and in such other papers if any as the creditors shall have appointed. Note that in view of the wording of the section in this respect the resolution of the creditors should be carefully expressed as to the advertisements, e.g. one in the Gazette and one in each of the (other papers), all at least one month previous to the sale, and such further advertisement during the currency of that month as the trustee may think fit; and (7) the sale must be by public roup.

Assignation or Mandate.—When many debts are sold probably the most convenient method will be to have a short formal assignation referring to an inventory. If the debts have been exposed to public roup, there will no doubt be an inventory with reference to the articles, and it may serve again for the assignation. To that, however, there is this objection, that it is not so convenient if it be desired to record the assignation for preservation. Another method is to have the inventory annexed to the articles, and then to make the assignation a further annexment, which enables it to be very short, as shown on p. 133.

Finally it is not strictly necessary to have an assignation at all, for if copies of the accounts are made out, orders for payment may be written thereon in the form given on p. 132. An advantage of this is

that a 1d. stamp is sufficient on each order, whereas an assignation of course requires the ordinary conveyance on sale duty of 10s. per cent. on the price. An objection is that it involves copying out the accounts, if not already done.

Decrees; Diligence.—If decree has been obtained or diligence done in any of the cases, there should be a special assignation, as to which see p. 25.

Warrandice.—In the ordinary case of a general sale of book debts warrandice of any kind appears to be inadmissible from the seller's point of view. At the same time he will, of course, make it clear in which cases if any he has obtained payments on account, and the The case of debts payable by weekly or other amount of these. frequent instalments is somewhat special. It appears that in these cases it is not uncommon to make it a condition that the seller is to retain all sums collected by him after the inventory is made up and before the sale. This seems very objectionable and undesirable. the collection cannot be interrupted (as to which there may be difficulties), a condition can be inserted that there shall be deducted from the price all sums if any collected by the seller on account of any of the debts between the specified date at which the inventory was made up and the date of actual payment of the price, under deduction of such specified percentage as may reasonably meet expenses of collection, and that the seller shall give particulars of these items, but without vouchers, his bare statement being all that the purchaser is to be entitled to.

ARTICLES OF ROUP

Articles of Roup of the book debts specified in the inventory signed as relative hereto, if and so far as the same subsist, and are resting owing to and may be sold by A., as trustee on the sequestrated estate of B., conform to act and warrant of confirmation by the Sheriff of , dated at on , with interest if any due on the said debts, and which debts, subject as aforesaid, are to be exposed to sale by public roup by the said A. as trustee foresaid (hereinafter called "the exposer"), with consent of C., D., and E., the commissioners on the said sequestrated estate, within , on , at o'clock afternoon, or at such other time or place as the roup may be adjourned to, and that under the following conditions or such other conditions as may be inserted in any minutes to follow hereon:—

- 1. The said debts, subject as aforesaid, are to be exposed to sale by public roup in one lot at the upset price of \mathcal{L} [take in Article 1, p. 171].
- 2. No guarantee is given or responsibility undertaken as regards the subsistence, resting owing, or amount of the said debts or any of them, nor as to the title thereto if and so far as they exist, nor as to the existence, addresses, or solvency of the debtors, nor as to any other matter or thing. The purchaser and offerers are held to have made their own enquiries and to have satisfied themselves on all points as to facts, law, and otherwise. The

¹ Murison v. Templeton & Co., 1864, 2 M. 501; Ritchie v. M'Lachlan, 1870, 8 M. 815.

said inventory is not warranted, and it is no objection to the sale and no ground for refusing or delaying to pay the price, or for demanding any reduction thereof that the said debts or any of them have been paid or are otherwise affected or extinguished in whole or in part, or are not due to or may not be sold by the exposer. These articles are not to be qualified in any way by any information given by or on behalf of the exposer, whether in the said inventory or in advertisements or otherwise.

- 3. Without prejudice to or by the terms of the preceding article, the purchaser and all offerers shall be held to be satisfied and ready if preferred to the purchase to complete the same, and to pay the price to the exposer in terms of these articles without any question, objection, requisition, or condition of any kind whatever.
 - 4. [Article 6, p. 666.]
- 5. In the event of the purchaser failing in punctual payment of the price, he shall, but only in the option of the exposer, forfeit his purchase [Article 4 on p. 173, altering the words "failed in implementing this article or any part thereof" to "failed to make punctual payment of the price"].
- 6. Upon due payment of the price, with interest and penalty if any, the exposer, with consent foresaid, will grant in favour of the purchaser, if required, an assignation of the debts subject as aforesaid. The assignation shall embody the terms of these articles, and shall further expressly declare that no warrandice of any kind is granted or incurred, and that the purchaser is not to be entitled to sue in the name of the exposer, or to use his name in any way whatever in connection with the recovery of the debts. The expense of preparing and revising the assignation and the stamp duty thereon shall be payable by the purchaser. Or, instead of an assignation, the exposer will sign docquets on copies of the accounts of the said debts in the following terms, if the copies are made and the docquets written thereon, at the purchaser's expense, viz: "[Place and date.] Pay the above account, with interest if any due thereon, to [the purchaser]. Without warrandice or recourse." These docquets will be attested if desired. Any stamps thereon shall be paid by the purchaser.
- 7. On payment of the price, with interest and penalty if any; the exposer will hand over to the purchaser the books containing the accounts belonging to the said B., consisting of ledgers. But the purchaser shall have no right or claim to any account or debt not specified in the said inventory, and the purchaser shall be bound to make the said books furthcoming, free of expense, on all occasions when desired by the exposer or anyone deriving right from him.
 - 8. [Take in Article 8, p. 173.]
 - 9. [Take in last Article, p. 174.]

SEPARATE ASSIGNATION OF BOOK DEBTS

I, A., trustee on the sequestrated estate of B., conform to act and warrant of confirmation by the Sheriff of , dated at on , with consent of C., D., and E., the commissioners on the said sequestrated estate, in implement of the contract of sale and purchase embodied in

articles of roup executed by me with consent foresaid, dated , and minute of enactment and preference thereon, dated , in favour of F., do hereby sell and assign to the said F. and his executors and assignees whomsoever, absolutely and irredeemably, All and Whole the book debts specified in the inventory signed as relative hereto [or, annexed and signed as relative hereto, if and so far as the same subsist and are resting owing to and may be sold by me as trustee foresaid, with the interest if any due on the said debts: But declaring (first) that no guarantee is given or responsibility undertaken as regards the subsistence, resting owing, or amount of the said debts or any of them, nor as to the title thereto if and so far as they exist, nor as to the existence, addresses, or solvency of the debtors, nor as to any other matter or thing; and (second) that the said F. and his foresaids shall not be entitled to sue in my name, or to use my name in any way whatever in connection with the recovery of the debts; and further and generally that these presents are in all respects subject to the terms and conditions of the said articles of roup, which are here specially referred to and held as repeated: And no warrandice is granted or is to be incurred: And I have herewith delivered to the said F. volumes of ledgers, but he and his foresaids shall have no right or claim to any account or debt not specified in the said inventory, and he and his foresaids shall be bound to make the said ledgers furthcoming, free of expense, on all occasions when desired by me and my successors in office and any one deriving right from me, and also to the said B. or his representatives after the sequestration is at an end.—In witness whereof.

ASSIGNATION OF BOOK DEBTS ANNEXED TO ARTICLES OF ROUP TO WHICH AN INVENTORY OF THE DEBTS IS ALSO ANNEXED.

I, A., trustee on the sequestrated estate of B., designed in the foregoing articles of roup, with consent of C., D., and E., all therein designed, the commissioners on the said estate, in implement of the said articles and the foregoing minute of enactment and preference, do hereby sell and assign to F., and his executors and assignees whomsoever, absolutely and irredeemably, All and Whole the book debts specified in the foregoing inventory if and so far as the same subsist and are resting owing to and may be sold by me as trustee foresaid, with the interest if any due thereon, but with and under and subject in all respects to the terms and conditions of the said articles of roup, all of which are hereby imported into these presents.—In witness whereof.

SECURITY OVER BOOK DEBTS

I, A. [ordinary personal bond]: And in security of the personal obligations hereinbefore and hereinafter written, I assign to the said B. and his foresaids, but redeemably as aftermentioned, yet irredeemably in the event of a sale or extinction total or partial, but in the last case only to the extent of the extinction, by virtue hereof, All and Whole the book debts specified in the schedule annexed and signed as relative hereto, with the interest due and to become due thereon, and all obligations and securities if any held therefor,

and all decrees and diligence which have followed or may follow thereon: With power to the said B. and his foresaids to sue for, uplift, receive, and discharge the said debts and interests, and to give time and to waive interest, and to take and accept bonds, bills, notes, decrees, or other documents or new documents of debt which, without further authority from me or my foresaids, the said B. and his foresaids are hereby authorised to take and accept, and the debtors are hereby authorised to grant, and to allow to pass, in name of the said B. and his foresaids absolutely, and to accept a part for the whole as regards both principal and interest, and to compromise or submit and refer all questions as to liability, amount, abatement, compensation, or otherwise, and to give a full and absolute discharge in exchange for a dividend or other partial amount, whether instantly paid or only undertaken or decerned to be paid at an interval or by instalments or otherwise, and that not only in sequestration or other bankruptcy process, but also under any private arrangement, whether concurred in by all the creditors of the debtor in question or limited to the debt in question only or otherwise, and to release any obligants or securities, and to postpone securities, and further and generally to do whatever is or may be or become or would, if these presents had not been granted, have been competent to me or my foresaids, all which powers may be exercised without the consent of or notice to me or my foresaids, and at such time or times and from time to time, and on such terms and conditions, all as the said B. or his foresaids may in their uncontrolled discretion think fit, and further in the event of the said debts or any debts or obligations which may come in place of them under the foregoing powers or otherwise or any part thereof being unpaid at the term of said B. or his foresaids may sell the same or any of them in one or more lots by public roup or private bargain at such price or prices and with such allowance of credit to the purchaser, with or without caution or security, and generally on such conditions as the said B. or his foresaids may in their uncontrolled discretion think fit, and that without consent of or notice to me or my foresaids; and for all or any of the purposes foresaid the said B. and his foresaids may use the name of me or my foresaids, and may employ debt collectors, solicitors, auctioneers, and otherwise, and may delegate to them or any of them all or any of the said powers, and may allow them to retain moneys in their hands even beyond the time customary in such matters, and may dispense with their finding caution or security: And declaring that the said B. and his foresaids are and shall be under no obligation to require payment or to take any action or use any diligence or other steps for the purpose of obtaining payment of any of the said debts, or to prosecute or follow forth any demand, action, diligence, or other steps if made, commenced, or taken, but shall be entitled to abandon the same or otherwise to allow the same to drop or expire, nor to enforce any document, decree, or other if obtained; nor shall the said B. or his foresaids be responsible for the insolvency or default of any debtor, purchaser, debt collector, agent, solicitor, auctioneer, or other person, or any loss or prejudice which may be sustained by exercise of any of the powers hereby conferred, whether by accepting part for the whole or other compromise or abandonment, total or partial, or any insolvency



or default, and the same shall not affect the obligations hereinbefore and hereinafter undertaken: And I declare that all receipts and all deeds of submission, discharge, restriction, postponement, assignation, or otherwise to be granted by the said B. or his foresaids, whether during my life or after my death, shall be as valid and effectual to the receivers thereof or other parties thereto and to all others as if the same were made and subscribed by myself, and that no debtor, purchaser, or other person paying money to the said B. or his foresaids shall be concerned to enquire whether any money remains due under these presents, nor as to the application of the money to be paid by them: And I agree that the said B. and his foresaids shall not be bound to accept payment of the principal sum due by me as aforesaid except in sums of £ or multiples thereof, and that any sum at any time recovered may be placed on Bank D/R in such terms as the said B. or his foresaids may think fit: And I oblige myself and my foresaids for the expenses which may be incurred in enforcing or endeavouring to enforce the obligations hereby undertaken, or in recovering or endeavouring to recover the said debts, or otherwise in exercise of the powers hereby conferred, or in consequence hereof, or in relation hereto, or to the said debts, which expenses may be charged whether the proceedings be prosecuted to a conclusion or not, and for the expenses of assigning and discharging these presents: And I consent to registration for preservation and execution.—In witness whereof.

III. BUILDING CONTRACT

General conditions relative to the erection of [describe the works generally] for A. (he and his successors being hereinafter called "the employer"), under the superintendence of B. (he and any other architect appointed in succession to him by the employer being hereinafter called "the architect"), by the following parties (hereinafter called "the contractors"), in their several departments, in consideration of the respective contract prices underwritten, viz.:—

- 1. Mason work by C. for the sum of £
- 2. Carpenter and joiner work by D. for the sum of £
- 3. Plumber work by E. for the sum of £
- 4. Slater work by F. for the sum of £
- 5. Plaster work by G. for the sum of £
- 6. Glazier work by H. for the sum of £
- 1. The contractors are in their several departments to provide all materials of the best quality, and to perform in the best manner all work mentioned or indicated in the specifications and drawings signed as relative hereto in strict conformity therewith, and including all work which in the judgment of the architect is reasonably implied therefrom or necessary to render the whole united and finished. Everything must be done according to the directions of the architect and to his satisfaction. The contractors shall leave the whole works and grounds and surroundings in perfect condition. They shall remove all surplus materials, rubbish, machinery, tools, tackle, scaffolding, sheds, and anything else requiring in the opinion of the architect to be removed, and that to

such distance at least as the architect shall prescribe, subject always to any exercise of the employer's lien.

- 2. Schedules of measurements are furnished merely for the convenience of the contractors. Their sufficiency or correctness is not guaranteed. The contractors are held to have satisfied themselves as to the schedules, and shall not be entitled, on pretext of any error or omission therein, to demand for the execution of the work any sums beyond those abovementioned. The schedules are to be paid for by the contractors out of the first moneys earned by them respectively under this contract. The respective proportions shall be determined by the architect.
- 3. Power is reserved to the employer to require that the work be proceeded with in such order and at such times as he may deem expedient, and that only a part or parts of the work in any of the schedules be executed, in which latter case the contractors shall be entitled to only a proportion of the contract prices corresponding to the work actually done, and such proportion shall be fixed by the architect. The contractors shall not be entitled to any compensation for work not executed. It shall also be in the power of the employer to require other work to be done in addition or substitution, and the remuneration therefor shall be determined by the architect in accordance with the rates entered by the contractors in the schedules of measurements, and for any work of a kind not given in the schedules the remuneration shall be at such rates as shall be agreed on in writing between the parties before the execution of such work. All orders for the omission of work, or for extra work, or for alterations, shall be valid only if given in writing.
- 4. All materials shall become the property of the employer so soon as they are brought on or to the ground subject to the obligation of the contractors to remove all surplus materials when the work is finished, and all their other obligations hereunder fulfilled, and subject to the right of the employer to reject in case of defect or default. But the whole materials, machinery, tools, tackle, scaffolding, staging, temporary buildings, sheds, tramways, plant of every description, and the work shall be at the risk of the respective contractors during the progress of the works, and they may be required by the employer to keep the same insured against loss by fire. The whole machinery and others foresaid brought on or to the ground by each contractor respectively shall be subject to a lien and retention in favour of the employer for satisfaction of all his claims against the contractor.
- 5. The contractors shall be liable for all injury and damage respectively done by them or those employed by them or brought by them on or to the works, whether such damage be done to any persons or to property heritable or moveable and whether belonging to the employer or not, and they shall relieve the employer of all claims in connection therewith and all expenses, including expenses of litigation irrespective of the result thereof. In the event of any damage being caused by one contractor to the work of another, both contractors shall be jointly and severally liable to the employer to make good the damage, but without prejudice to any questions of relief between the contractors, with which the employer has no concern.
 - 6. The architect shall have power to prohibit the employment of any

materials which he may think unsuitable for the work or of any workmen who appear to him to be incapable or doing work improperly, or otherwise undesirable; and should any workman misconduct himself, he may be removed instantly from the ground by the employer, or the architect, or the clerk of works. The contractors and their servants are admitted to the ground only for the purpose of performing this contract, and shall not be entitled to use or to be on the ground for any other purpose.

7. The several contractors shall have their whole work completed within the following times, which shall all count from the date of the respective notices by the architect ordering them to commence, or from the date of their commencing work, whichever shall be the earlier (but they shall not be entitled to commence before such notice if the architect shall object) namely:—

The contractor for the mason work shall have the walls ready for the roofs in months, and the whole work completed in months.

The contractor for the carpenter and joiner work shall have the roofs ready for the plumber in [after the plaster work is dry], and the whole work completed in months.

The contractor for the plumber work shall have the whole external work ready for the slater in , and the whole work completed in .

The contractor for the slater work shall have the whole work completed in

[And so with plasterer and glazier.]

No extension of time shall be allowed or pleadable in respect of any extra work or alterations unless an allowance thereof has been obtained in writing from the architect previous to the commencement of the extra work or alterations, nor for any other cause, except only that in case of a bona fide trade dispute occurring in, or directly affecting, any of the contractors' trades, and general in its extent or effect in the district, the contractor affected shall be entitled to such additional time as the architect shall consider to be reasonable.

- 8. In the event of any contractor failing to complete his work or stage thereof within the above specified times, or failing within six days after the posting of a notice by the architect (1) to begin or continually pursue the work, or (2) to employ proper men or materials as regards number, quantity, or quality, or (3) to cease impeding other contractors, or (4) to obey or attend to any other directions of the architect, such contractor shall, if his contract be not cancelled, be liable in pactional damages of £1 per day, or in the option of the employer of one per cent. per day on the amount of his full contract price, in either case until his work or stage thereof is completed, or until such notice is complied with, as the case may be.
- 9. Alternatively in each of the cases stated in article 8, or in the event of any contractor becoming bankrupt or insolvent, or failing to find security as aftermentioned, it shall be in the option of the employer to cancel the contract as regards such defaulting contractor, which he may do by letter signed by himself or the architect addressed to the contractor. The contractor shall thereupon become liable to the employer for all loss, damage, and expense occasioned by the cancelling of the contract as the same shall be determined



by the architect. When the above option shall have been exercised the employer shall be entitled, but not bound, to retain and use for the completion of the work the whole or any part of the machinery, tools, tackle, scaffolding, temporary buildings, staging, sheds, tramways, plant of every description, and materials which the defaulting contractor has brought upon or to the ground, allowing therefor in final account such sum as the architect shall determine. The materials so far as not used, and the machinery and others foresaid so far as not used or after being used, shall be removed by the contractor if and as the architect shall direct, but without prejudice to the employer's lien and retention for satisfaction of all his claims against the contractor.

- 10. So long as no default or liability occurs on the part of the contractors, payment shall be made to them at the rate of eighty per cent. of the value of the work done as certified by the architect at such periods as he may think suitable. Subject to the same condition the balance shall be paid to the contractors on the expiry of [six months] from the completion of their respective works to the satisfaction of the architect. But notwithstanding these certificates and payments, and notwithstanding that the work may have been taken off the contractors' hands, they shall be bound to uphold their work for [one year] from the date of the architect's final certificate, and shall also remain liable to replace any work which may afterwards be discovered to have been done ill or not according to the contract either in execution or materials. In particular and without prejudice to the foresaid generality, if any mason work or joiner work within said year cracks or opens in the joints, it shall be made good, not by patching but by substituting new work, which shall be subject to the same condition. The employer, when such discovery is made, shall be entitled to retain any sum which may be due to the contractor until such work is replaced. In any case the employer shall at no stage be bound to pay while any obligation of the contractor which ought then to have been performed has not been performed to the architect's satisfaction.
- 11. No contract shall be sublet without the written consent of the architect, and if such consent be obtained, the sub-contractors shall be subject to the same conditions as the contractors, but without prejudice to the full and continuing liability of the contractors.
- 12. Any contractor may, prior to the commencement or during the progress of the work, be required upon six days' notice by letter from the employer or the architect to find security to the employer's satisfaction for the due performance of his contract and all his obligations under these presents. The amount of the security required shall be one-third of the contractor's contract price or of the unearned proportion thereof as certified by the architect, as the case may be.
- 13. Wherever any power, option, or right is given or reserved to the employer, whether herein specially mentioned or not, the same may be exercised by the architect, and either in the name of the employer or in his own name. The clerk of works, if such be employed, shall, in the absence of the architect, give all needful oral directions, which the contractors shall be bound to obey.

- 14. Whenever any matter or thing is hereinbefore referred to the architect or expressed to be settled by him, he is hereby appointed sole and final arbiter to determine same. Further, all matters, things, questions, and disputes of whatever kind which may arise between the employer and any one or more or all of the contractors are referred to the architect in like manner, and that whether such matters, things, questions, or disputes be of ' the same nature as those herein mentioned or not, and whether they arise before the commencement, during the execution, or after the completion of the works. In all cases the arbiter shall be bound to hear the parties if so desired, but he shall not be bound to hear proof, but shall be entitled to decide by his personal skill and knowledge, and he shall be entitled to order the execution and performance of works and things, and to award and assess damages.
- 15. The expenses of these presents shall be paid one-half by the employer and one-half by the contractors in proportion to their contract prices herein stated, and that on the signature hereof.
- 16. No alteration hereon shall be binding unless made in writing.—In witness whereof.

IV. TRUST DEEDS FOR BEHOOF OF CREDITORS

These will vary somewhat with the nature of the estate, but the form on p. 141 will, it is thought, be found fairly serviceable in the great majority of cases. The only matters to which it appears necessary to refer specially are the following:-

Companies under the Companies Acts may not grant a deed of this nature.1

Illegal Preferences.—As the debtor has no power to reduce these, the trustee, as his assignee, has not this power either. Any power to that effect must flow from creditors with a title to reduce. The direct way in which to confer it is by an express power from the creditors, which may be introduced in the deed of accession, if any. It appears, however, that an express power from the debtor coupled with a deed of accession in general terms might be held sufficient.2 A trustee in cessio with a disposition omnium bonorum has no title to reduce.8

Discharge of Debtor.—A clause in the trust deed to the effect that the drawing of a dividend shall imply a discharge is not binding on the creditors, and a direct action by the creditor against the trustee for the dividend will be sustained.4 But, of course (1), if the creditor accede to the trust, which need not necessarily be a formal act, or (2) if he sign a receipt containing a discharge or a statement that the dividend is accepted on the terms of the trust deed, his claim will be discharged, and (3) it may even be that that result will be brought about by the

¹ Companies Act, 1862, s. 164. ² Fleming's Trs. v. M'Hardy, 1892, 19 R.

^{542;} M'Laren's Trs. v. Nat. Bank, 1897, 24 R. 920.

³ Forbes' Tr. v. F., 1903, 5 F. 465.

⁴ Ogilvis & Son v. Taylor, 1887, 14 R. 399; Raimes, Clark & Co. v. Swan's Tr., 1902, 10 S. L. T. No. 206.

circumstances under which the dividend is paid and accepted, e.g. special terms of circular intimating dividend.

Interest.—The usual rule is that the deed provides, either expressly or by importation of the rules of bankruptcy, for accumulating principal and interest of the debts at the date of the deed. That being done, dividends ought to be paid indefinitely without drawing any distinction between principal and interest. This point may become of importance if it should happen that a surplus emerges. In that case the creditors will be entitled to interest for the period after the date of the deed, and the interest will then be ascertained on the footing that each dividend is to be held as imputed primo loco to interest, to the date on which the dividend was paid, on the whole debt then outstanding. In the case quoted words in the receipts which purported a contrary appropriation of successive dividends were not allowed to defeat the creditor's right in this respect.¹

Creditor's Accession and Actings.—This has already been so far dealt with. Further if the creditor hold any security he should not accede unless the trust deed contains clauses clearly reserving his security. And if the security be not realised when the dividend comes to be paid, the receipt should repeat the reservation. If, again, the creditor hold any other obligant bound along with the granter of the trust deed, his only safe course appears to be not to accede and not to accept any dividend except on a receipt bearing expressly that it is a general payment on account, reserving both debtors' joint and several liability for the balance, unless, of course, he has a written request or consent from the co-obligant. Sec. 56 of the Bankruptcy Act extends only to sequestration proceedings.

Trustee's Powers.—It appears that all the powers conferred upon gratuitous trustees under the Trust Acts were by the Act of 1884 ² extended to trustees under trust deeds for creditors.³ In like manner the Court can appoint a new trustee.³

Power of Sale.—It may be that this is an implied power from the nature of the case. But no doubt should be left on the point. Express power of sale should be inserted, and it should expressly be exerciseable by public roup or private bargain. Further it should be aptly expressed so as clearly to refer to the whole estate, a point in which a good many of these deeds are defective. When the sale is by public roup it may be inferred on the analogy of the Bankruptcy Act 4 that any creditor may purchase, and as to a sale by private bargain see Lord M'Laren in Hay's case.⁵ It is well to have a special clause in the deed.

Trustee's Security.—In order to give the trustee security it is necessary that he should have a completed title by infeftment, or

⁵ Hay v. Rafferty, 1899, 2 F. 302.



¹ Wilson's Tr. v. Watson & Co., 1900, 2

^{2 47 &}amp; 48 Vict. c. 63, s. 2.

³ Royal Bank, Petrs., 1893, 20 R. 741.

⁴ P. 301 infra.

intimation, or actual possession, according to the nature of the property, and there ought also to be evidence that creditors had acceded, in order that the trustee's possession may be for them and not merely for the debtor.¹

Debtor's Death.—Founded apparently on the case of Gilmour, 2 a doubt is sometimes stated as to whether a trust deed of this kind does not fall on the death of the truster or, at least, whether the powers, e.g. power of sale, are exerciseable after that event. There is no doubt that in the ordinary case, and apart from any special clause in the deed, the debtor's death has no effect on either the trustee's title or his powers. ground of doubt may be introduced by taking the concurrence of the truster's heir to, e.g. any disposition by the trustee, without any title having been completed in the heir's person by service or otherwise. It is settled that, if there is a residue of heritage, a disposition by the trustee to the heir is not a competent title.2 From which it follows that if the purposes have been fulfilled, and if the heir is the true seller, a disposition by the trustee and the heir, without service or clare constat recorded, is not a good title to a purchaser. If, on the other hand, the sale is necessary for the execution of proper trust purposes, e.g. payment of debts, the title is really better if granted by the trustee alone; and if the concurrence of the heir is to be taken, the disposition ought to narrate that there are truster's debts unpaid requiring the present realisation, and the sale will be expressly in exercise of the trustee's power under the trust deed, and the whole price will be paid to and acknowledged by the trustee alone.

TRUST DEED

I, A., considering that my affairs have become embarrassed, and that I have been requested to grant these presents for behoof of my creditors as aftermentioned:

CONVEYANCE

Therefore I do hereby assign, dispone, and convey to B. whom failing to any trustee from time to time in succession to be appointed by my creditors under these presents by a majority in number and value of those personally present at a meeting called for the purpose (the trustee acting for the time being hereinafter referred to as "the trustee"), as trustee for behoof of my whole lawful creditors at the date hereof, and who shall accede hereto, or who shall be assumed into the benefit of the trust hereby created, and to his assignees, All and Sundry the whole means and estate, heritable and moveable, real and personal, belonging s to me wherever the same may be, together with the vouchers and instructions thereof, and all action and execution that has followed or is competent to follow thereon, declaring that these presents shall

¹ Mess v. Sime's Tr., 1898, 1 F. (H. L.)

² Gilmour v. G., 1873, 11 M. 835.

³ As to effect of including acquirenda, see Carrick v. Edin. and Glasg. Propy., etc., Co., 1902, 10 S. L. T. No. 66.

be as effectual as if every particular of my means and estate were herein specially enumerated and conveyed: Which disposition and assignation and the powers hereinafter conferred shall endure and be operative as well after my death as during my life, and I warrant the same to the trustee and all others concerned absolutely:

Powers

And I hereby confer on the trustee the powers following, namely, To take immediate possession of my whole means and estate, heritable and moveable, complete titles thereto, and without any further advice of me or my creditors to sell the same by public roup or private bargain, in whole or in lots, and on such conditions and at such prices as he shall think fit, and on any sale, whether by public roup or private bargain, any of my creditors may purchase: To ask, sue for, recover, discharge, or assign the debts due to me, and in general to do everything in his opinion expedient for the recovery and realisation of my means and estate: To continue and carry on my business, and that for such period as he may be of opinion that it is expedient so to do: To compromise and transact or submit and refer any questions or differences that may arise between him and any other person or persons in regard to the trust estate in any manner of way: To raise, insist in, and defend all actions: To grant dispositions, assignations, and other deeds and writings, and with such clauses all as he may consider necessary or desirable: To appoint a law agent and allow him the usual professional remuneration; and in general every other thing to do which I could have done before granting these presents or if the same had not been granted: Declaring that no purchaser or other person paying money to the trustee shall be concerned with the application thereof, or with anything herein contained, but the receipt of the trustee shall be a sufficient discharge and exoneration to debtors, purchasers, and all others:

PURPOSES

1. Expenses, etc.

But these presents are granted in trust for the purposes following, namely, In the first place, the trustee shall apply the said means and estate and proceeds thereof in payment of the expenses hereof, and of executing the trust hereby created, and in payment, repayment, or relief of all expenses, outlays, advances, obligations, and liabilities which may be incurred, made, or undertaken in exercising the powers herein contained or otherwise possessed by the trustee, or such of those powers as he may in his discretion elect to exercise, or in relation to the trust hereby created in any manner of way, including remuneration for his own trouble and responsibility:

2. Payment of Debts

In the second place, the trustee shall apply the proceeds that shall remain of the said means and estate in or towards payment of the whole debts due by me, rateably and proportionally, according to their respective legal rights and preferences, and that by such dividends and at such times as the trustee shall judge proper, and after giving such notice of the dividend as he may think fit: Declaring that the trustee shall proceed under this trust deed, and that the rights of creditors and all matters and questions shall be determined, in all respects on the same footing as if on the date of these presents an award of sequestration of my estate had been made under the Bankruptcy Statutes in force in Scotland at the time; and particularly, but without prejudice to the said generality, the same principles and rules which would in that case apply shall regulate the admission and rejection of claims, the valuation and deduction of securities, the ranking of creditors, the payment of dividends, and the distribution of the trust estate, but the trustee shall not be bound, except so far as he shall see fit, to adopt any of the formal procedure of a sequestration:

3. Residue, if any

And in the third and last place, the trustee shall hold count and reckoning with me, and pay to me or my representatives the residue, if any be, of his intromissions with the said means and estate in exchange for a discharge by me or my foresaids:

RESERVATION OF SECURITIES AND OTHER OBLIGATIONS

Reserving always to my creditors all securities and preferences which they legally have, as well as their claim against any other person or persons who may be bound along with me or otherwise:

DEBTOR'S DISCHARGE

But declaring that these presents are granted on the condition, and it is hereby specially provided and declared, that the creditors who accede hereto or who draw any dividend from the trustee, shall thereby discharge my personal liability for the whole debts due by me to them:

TRUSTER'S IMMUNITY

And declaring that the trustee shall not be liable in exact diligence, but, on the contrary, shall not be bound to do diligence unless or otherwise than as he shall think fit, and shall be responsible for his own actual intromissions and receipts only, and nowise for omissions:

MANDATE FOR SEQUESTRATION

And in the event of the trustee judging the same desirable, I hereby authorise him, at any time during the currency of this trust, to apply on my behalf for sequestration of my estate in terms of the Bankruptcy Acts, for which purpose this shall be his sufficient mandate:

DEBTOR'S POWER TO SETTLE

But it is hereby specially declared that it shall be in my power at any time hereafter, and during the subsistence of this trust, to settle with my creditors by composition or otherwise; and when the concurrence of my creditors is

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obtained to such settlement and denuding, the trustee shall be obliged to denude of the trust on receiving payment of all expenses and outlays, and relief of all obligations and liabilities incurred by him, and a suitable remuneration for his trouble and responsibility, and in exchange for a discharge by me.

—In witness whereof.

V. MUTUAL GENERAL DISCHARGE REFERRING SPECIALLY TO CROSS ACTIONS BETWEEN THE PARTIES

We, the parties following, viz.: (first) A. and (second) B. and C., considering that four actions are at present pending in whole or in part between us, viz. : (first) an action for payment of £100 (balance of a promissory note for £300) and interest at the instance of me the said A. against us the said B. and C., which action was brought in the Sheriff Court of at , and on appeal to the Court of Session decree was obtained against me the said B. for the said sum of £100 with interest and expenses, and quoad ultra the action is still in dependence in the Sheriff Court; (second) an action for payment of £200 and interest at the instance of us the said B. and C. against me the said A., which action was brought in the Court of Session, and has been dismissed so far as at the instance of me the said B., and the defender has been found entitled to expenses against me, and quoad ultra the action is still in dependence; (third) an action at the instance of me the said A. against me the said C. for count reckoning and payment of a sum of £500, which action was brought in the Court of Session and is still in dependence; and (fourth) an action at the instance of me the said C. against me the said A. for delivery of certain articles of furniture, which action was brought in the Sheriff Court of and is still in dependence: Further considering that an arrangement has been made for the settlement not only of the said actions, but also and further and generally of all matters between me the said A. on the one part and us the said B. and C. and each or either of us on the other part, whether such matters have been raised or stated or not, and that on the footing that the decrees already obtained in the said actions shall be discharged, and that I the said C. shall be allowed to take the said furniture, or so much of it as exists, and as it exists, and that a general discharge shall be granted in the terms underwritten: And now seeing that I the said C, have with the approval of me the said B. received delivery of the said furniture, and having examined it I am in all respects satisfied therewith, as I hereby admit: Therefore in consideration of the delivery of the said furniture, and also in consideration and in pursuance of said agreement for settlement, I the said A. of the one part, and we the said B. and C. jointly and severally of the other part, do hereby respectively discharge each other of all matters, questions, disputes, and differences, and of all claims and demands existing between us or competent to us or any of us against the other or others respectively as aforesaid, and that whether the same have been raised or stated or not, and without limitation by reason of anything herein contained or otherwise, and particularly but without prejudice to the said generality, we respectively as aforesaid do hereby discharge each other of all matters and claims referred to in the said four actions and of the decrees obtained therein, and the grounds of debt and claim referred to in the

said actions, and we agree that the said actions, so far as still in dependence, shall forthwith be taken out of Court by joint minutes on the footing of absolvitor, with no expenses to any of the parties, and we respectively certify to each other that no diligence has been used by any of us against the other or others whether on the dependence of the said actions or otherwise, and without prejudice thereto we undertake to discharge any such diligence if any such there be, and that at the expense of the user of such diligence. And we each warrant these presents absolutely so far as granted by us respectively.—In witness whereof.

SECTION X

SALE AND PURCHASE OF HERITABLE PROPERTY

It is difficult, and in some respects impossible, to separate the matters requiring to be treated under this section from those falling to be dealt with under the immediately following section on completion of title. In many cases, including almost all purchases by public roup, it is necessary for the purchaser to examine the title before making a contract, and in all cases it is unsafe for the seller to make a contract without a like examination, for there may be many matters in the title regarding which he ought to give notice, and make express stipulation, if he is to be able to hold the purchaser to his bargain. Still, it has seemed better on the whole to deal with contracts and examination of title in separate sections, with cross references.

Probative Writing.—In the absence of rei interventus the contract must be in writing, and the writing must be holograph or tested.1 The contract may be made by the principals or by their authorised agents. and in the latter case the authority may be verbal.2 The rule is absolute that, without rei interventus, there must be holograph or tested writing of both parties. If only one of the parties has given a holograph or tested writing, either may resile, for it makes no difference that the party who wishes to resile has given the holograph or tested writing.3 This, however, is limited to cases of mutual contract, for it appears that there may be a binding unilateral obligation on one party to convey to another on payment of a stated sum, and that this obligation, if holograph or tested, will be enforceable though there is no writing on the other side, the point indeed being that the other party shall not be bound.4 As to whether the missives may be completed by the witnesses' signatures being adhibited, and the testing clause being filled up, after one of the parties has repudiated the transaction, see obiter dicta in Stewart v. Burns.⁵ If both parties are agreed that the written contract does not truly express the agreement, then parole evidence is admissible. in which case improbative writings may be proved by witnesses and so

¹ Shiell v. Guthrie's Trs., 1874, 1 R. 1083; Scot. Lands and Buildings Co. v. Shaw, 1880, 7 R. 756.

³ Malcolm v. Campbell, 1891, 19 R. 278.

⁴ Malcolm, supra, and cases cited. ⁵ 1877, 4 R. 427.

² Whyte v. Lec, 1879, 6 R. 699.

made parts of the evidence.¹ An extra-judicial settlement of actions relating to heritage is binding though contained in improbative writings.²

Time Limits.—The following are the leading points as to the endurance and recal of an offer, and the completion of the contract, viz.: (1) if nothing be said to the contrary, an offer will fall if not accepted within a reasonable time, what is a reasonable time being, as usual, a question of circumstances; 3 (2) though a time limit be specified in the offer it may be recalled within that time if done before the contract is complete; 4 (3) the posting of an unqualified acceptance completes the contract, unless a recal of the offer has first reached the acceptor. 5

Rei Interventus.—As to what constitutes r. i, see Bell, Pr. 26, and Lord Shand in *Gardner* v *Lucas.* Quære whether acts done by the party seeking to resile can be founded on by the other party. The following are comparatively recent cases:—

Rei interventus sustained:

Stewart v. Burns 8 . . Seller warned tenant to remove and

purchaser re-let.

Westren v. Millar 9 . . . Unfinished

Unfinished house. Correspondence complete except that purchaser wrote "will finally arrange it on my return." Actings on both sides, including taking down of sale ticket.

Colquhoun v. Wilson's Trs.10

Seller's conditions held to be accepted by purchaser taking possession without repudiating them.

Rei interventus rejected:

Heiton v. Waverley Hydropathic Co. 11

All adjusted except servitude to secure amenity. Draft disposition revised and returned reserving right to sellers to go over it, in case conditions might have been overlooked. Possession of a kind.

Gardner v. Lucas 12 . Mowat v. Cal. Bank 18

Purchaser gave up a separate business.

Improbative offer accepted. Purchaser incurred trouble and expense investigating value and trying to form syndicate.

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<sup>1</sup> Grant's Trs. v. Morison, 1875, 2 R. 377;
Grant v. Mackenzie, 1899, 1 F. 889.
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² Anderson v. Dick, 1901, 4 F. 68.

* Hall-Maxwell v. Gill, 1901, 9 S. L. T. No. 182.

4 Heys v. Kimball & Morton, 1890, 17 R.

⁸ Thomson v. James, 1855, 18 D. 1; Household Fire Ins. Co. v. Grant, 1879, L. R., 4 Ex. D. 216.

6 1878, 5 R. 638 at 656.

⁷ M'Lean v. Scott, 1902, 10 S. L. T. No.

289.

8 1877, 4 R. 427.9 1879, 7 R. 173.

¹⁰ 1860, 22 D. 1035.

¹¹ 1877, 4 R. 830. ¹³ 1878, 5 R. 638.

¹⁸ 1895, 23 R. 270.

M'Lean v. Scott 1

Purchaser had paid £5 on account and a plumber's account, and incurred legal expenses.

Notice of Doubtful Points.—" I have fully in view the rule that if a question is a doubtful one, the seller is bound to give notice of it. . . . The mere fact, however, that the purchaser had access to the titles would probably be sufficient to prevent challenge on the ground that there was a burden undisclosed." 2

Jurisdiction. — Held by Lord Low that when a foreigner has concluded a contract for the purchase of heritage in Scotland, that is sufficient to subject him to the jurisdiction of the Scottish Courts in an action on the contract.3

Special Points.—The leading elements in the contract are (1) identification, (2) price, (3) term of entry. These ought always to be dealt with in the contract. But in addition there are very numerous matters which may require consideration and stipulation, according to circumstances, in the interests of one or other of the parties. include the following:-

Allocation of feu-duty, etc.

Alterations or use intended by purchaser whether permissible under titles.

Annuity.

Apportionment—

Common charges.

Current income and outgoings. Bonds, arrangements regarding—

(1) Taking over.

(2) Notice before repayment.

(3) Time bargains.

(4) Seller to leave part of price on the property.

Casualty.

Change of ownership, notice of.

Consignation.

Custody of deeds.

Feu-duty.

Feu-duties

} purchase of. Ground-annuals

Fire. Fittings. Gables.

Ground-annuals.

Heritors' assessments.4

Leases.

Light and air.5

Machinery.

Pre-emption rights.6

Removal of occupant.

Rents.

Roof.

Salmon fishings.

Searches.

Tenants' claims.7

Tenement property.

Teinds.

"Title as it stands."

Unfinished (or new) property.

Water supply.8

Allocation. - See Feu-duty, Feu-duties and Ground-annuals, purchase of; also p. 250.

¹ 1902, 10 S. L. T. No. 289.

² Per Moncrieff, L.-J.-C., in Davidson v. Dalziel, 1881, 8 R. 990.

³ Thorburn v. Dempster, 1900, 2 F. 583

⁴ See p. 150.

⁵ See p. 190.

⁶ See p. 202.

⁷ See p. 157.

⁸ See p. 316.

Alterations, or use, intended by Purchaser.—It frequently happens that, unknown to his solicitor, the purchaser intends to make structural alterations on the property or to use it for purposes different from those for which it is used by the seller. Then it may turn out that the changes and purposes intended are forbidden under the titles or by reason of servitude. It is not suggested that in the case of say a house there could be any professional liability, though it would probably be different in regard to a piece of vacant ground. But in any case the consequences are unsatisfactory, and the matter is one to be kept in view.

Annuity.—If there is an annuity secured over the property, it will not be safe for the proprietor to enter into a contract of sale unless and until he ascertains that the annuitant is competent and willing to come to terms, and discharge the annuity either for a lump sum or in exchange for an annuity from an insurance company, or at least to release the property in consideration of substituted security. As to the competency of a discharge of the annuity or the security therefor, an alimentary annuity cannot be discharged if secured by a trust; if not so secured, it appears that it is not truly alimentary, and may be discharged.¹ The same distinction applies to antenuptial provisions to wives. The specialty in this case is that when there is a trust, the provision, although not declared alimentary, is presumed to be protected against the wife herself, and it may not be discharged during the subsistence of the marriage.² Where there is no trust it is otherwise.³

If, however, a discharge of the annuity or security be refused by the creditor, various methods are available to the parties, provided the purchaser consent. They are (1) the deduction from the price of a sum representing the actuarial value of the annuity: this introduces a speculative element from the point of view of both seller and purchaser; (2) the purchase by the seller, in name of the purchaser, from an insurance company, of an annuity on the same life and of the same amount as that which creates the difficulty; this introduces a speculative element as regards the seller; (3) the retention by the purchaser of part of the price, the interest of which, at an agreed-upon rate, is equal to the annuity; with an agreement published in the register of sasines, that the sum is retained as a security against the annuity; that the interest is to be paid by the purchaser to the seller in exchange for the annuitant's receipt for the annuity, or that the purchaser may in his option pay the interest direct to the annuitant in satisfaction of the annuity, and that the principal sum shall be paid by the purchaser to the seller on the expiry and full satisfaction of the annuity. The retained sum ought to be created a real burden on

 ¹ Murray v. Macfarlane's Trs., 1895, 22 R.
 2 Standard Prop. Inv. Co. v. Cowe, 1877, 4 R. 695.

² Menzies v. Murray, 1875, 2 R. 507.

the purchaser's infeftment in favour of the seller, subject to the due discharge of the annuity.

Apportionment.—1. Common charges.—When the property sold is part of a larger holding, it may be necessary to provide for the apportionment as between seller and purchaser in the future of, e.g. (1) feuduty, (2) ground-annual, (3) land tax, (4) stipend.

2. Current income and outgoings.—In many cases it is proper to make express stipulation regarding apportionment of both income and outgoings. As to income, see Rents, infra; as to outgoings, the matter is of most importance when the entry is not at Whitsunday. The view is, however, submitted that the parties are by implication entitled to an apportionment though the missives are silent.³ It may be useful to note the end of the financial year as regards the following charges:—

Land tax, 24th March, . . . County
Property tax, 5th April, . . . Parochial, School
Inhabited house duty, 15th May, . Burgh

The following require special remark:-

Feu-duty may be payable annually and not at the term of entry. See p. 305.

Stipend (grain) is not payable until the Spring following the year to which it applies. On a Whitsunday entry it is equally divided; on a Martinmas entry the seller pays the whole.⁴

Heritors' assessments fall, without relief, upon the proprietor at the date when the assessment is imposed, although the money may be applied to meet expenditure incurred before the date of his entry. This may be a heavy item, e.g. rebuilding or repairing church or manse, and it may in a fitting case be proper to make enquiry beforehand of the clerk to the heritors. At the same time enquiry may be made as to whether the heritors have the church and manse insured against fire.

Fire insurance is in a special position, as, of course, it is in no sense a burden or charge, and the purchaser has no duty to the seller in that respect. If the seller has paid a premium covering a period after the entry, he ought expressly to stipulate that the purchaser shall pay the proper proportion, the policy being endorsed in terms to the satisfaction of both.

Repairs.—It appears fair that repairs incurred before, though paid after, the beginning of the rent term current at the date of settlement, should not be brought into account against the purchaser, and on the other hand care will be taken to see that allowance is made for repairs ordered during the current rent term though not yet actually paid for.

¹ See p. 250.

² As to redemption, see 42 Geo. III. c. 116, and Rankine (Land Ownership), 727.

² E. Glasgow's Trs. v. Clark, 1889, 16 R. 545; see further, p. 805 infra.

⁴ Maitland v. M., 1877, 4 R. 422 (heir and executor).

Expenses, if to be brought into account, ought to be specially mentioned.

In an ordinary case the following may serve:-

Rent and ordinary outgoings (other than expenses and repairs) to be apportioned between seller and purchaser in proportion to their respective periods of ownership before and after the said term of entry.

Bonds, arrangements regarding.—These are commonly—

- 1. Taking over.\(^1\)—Three consents are in question: seller, purchaser, and creditor. The creditor's consent is necessary if the seller is to be discharged of his personal obligation, or if there is no time bargain with a reasonable unexpired period and if the purchaser is not prepared to take the risk of having the loan soon disturbed. The seller cannot but be advised to require an immediate discharge by the creditor. See the table of fees for the implied rule as to expenses.
- 2. Notice before Repayment.—In selling burdened property, regard should be had to the matter of notice which the creditors may require before accepting their money, or otherwise claims for interest in lieu of notice may be incurred.
- 3. Subsisting time bargains.—This is specially important when there is a time bargain for a period extending beyond the proposed term of entry. In that case the consent of purchaser or creditor, one or other if not both, must be obtained, either the purchaser taking over the debt or the creditor accepting anticipated repayment.
- 4. Seller leaving part of price.—Provisions are required as to (1) security of bond and disposition in security, or personal bond and real burden; (2) ranking; (3) endurance; (4) rate.

Casualty.—Liability to casualties does not constitute an incumbrance which the seller is bound to discharge, nor will it entitle the purchaser to resile. But this is not to be taken without qualification. It holds good as regards all proper "casualties," and even as regards an untaxed composition. These are ancient legal incidents of tenure, and may naturally be expected. Another element is introduced with definite sums payable at fixed intervals. There is nothing casual about them as regards either amount or period of payment. A simple duplicand, or even a duplicand over and above the feu-duty of the year, payable say every nineteenth year, is very familiar in practice, and will be within the rule. But suppose there were a conventional "casualty" of a duplicand every tenth year or every fifth year. This is surely just an additional feu-duty. If, then, the annual feu-duty had been disclosed and nothing said about this "casualty," it would appear that the purchaser would be entitled to resile. If, on the other hand, there had been no representation as to feu-duty or casualty, the question would appear to resolve itself into this-whether, treating

¹ See p. 326, and Section XXXIII.

the casualty as distributed in the form of annual or additional feu-duty, the total feu-duty would then be of such amount as to be unreasonable according to the nature of the property. See Feu-duty.

The practical advice is, in any offer to state what the casualty or duplicand is understood to be, and to make the offer on that condition.

As regards duplicands, care must be taken to distinguish between a simple duplicand and a duplicand over and above the feuduty. If the feuduty is £5, is the additional payment £5 or £10? See p. 210.

When the casualty falls due on the entry of heirs and singular successors, and there is a casualty due which is to be paid by the seller, the purchaser may prefer that the receipt therefor should be in his (the purchaser's) name, rather than in the name of the seller, so that the next casualty may depend on the life of the purchaser, not of the seller. In that case a special provision will be made to that effect.

If a duplicand falls due at the term of entry, it should be made express who is to pay it. There appears no reason, however, to doubt the seller's liability.

It will be remembered that the seller must pay any casualty falling due between the date of the contract and the date of entry. If it is intended to limit his liability to the former date, this will be done expressly. When it is the case of a creditor selling under his power of sale, it appears proper to make it a rule to stipulate that the purchaser shall pay all casualties, duplicands, etc. It is for consideration whether the same rule should not be observed when trustees sell. Otherwise the result may be that the sellers are confronted with claims under their obligations of relief long after they have parted with all the funds.

Change of Ownership, Notice of.—In connection with possible casualty claims, it may be in the interest of the purchaser to stipulate that the seller shall *not* intimate to the superior the change of ownership.

Consignation; Interest.—The rule is that the purchaser must consign if he is to avoid paying five per cent. interest, assuming that he is getting the benefit of the possession or rents, and although the delay may be the fault of the seller.¹ The same case made it clear that the consignation must be in such terms as to put the price beyond the sole control of the purchaser or his agent; the usual method is to consign in the joint names of the two agents. It must be assumed that partial consignation will be wholly ineffectual, notwithstanding the case cited,² where the interest on so much of the price as had been consigned was restricted to two per cent. Interest runs from 15th May

where 4 per cent. only was allowed though the purchaser was in possession.

² Dickson v. Munro, 1855, 17 D. 524.

¹ Grandison's Trs. v. Jardine, 1895, 22 R. 925. See Traill v. Connon, 1877, 5 R. 25,

or 11th November, although the tenants' removal terms may be later.¹ Income-tax is deductible.²

Custody of Deeds.—Various provisions may be required on this subject, according to circumstances. Under articles of roup, when two or more properties are being sold, it will be remembered, in connection with provisions on this subject, that it is quite a possibility that two properties will be sold for the same price; also that when writs are common to three properties, A. may buy one for £1000, and B. may buy two for £750 each: who is to obtain the custody of the writs? Again, if the owner of two properties is selling one of them, the ordinary practice is that he retains the titles. His right to do so is clear if the property retained is of greater value than that sold; but if not, it may be prudent for him to stipulate for retention. See Searches.

Feu-duty.—(See Casualty.) Liability to a reasonable feu-duty is not an incumbrance, and will not entitle the purchaser to resile. But beyond the question whether the feu-duty is reasonable, there may be the further question whether it is not more than the purchaser reasonably understood it to be, e.g. if it were double the amount of any similar house in the district.

If the purchaser wishes to have the feu-duty allocated by the superior, he ought to stipulate for that expressly.³ In that case (which was decided by three judges to two, one of the majority hesitating, and Ld. Rutherfurd Clark being in the minority) it appeared that all the parts of the feu-duty were well secured, and it is no authority for the contention that the purchaser must proceed without the superior's allocation if there is even a reasonable doubt as to the security for any part of the feu-duty, much less if a liability have actually emerged against the property for any portion of the cumulo feu-duty beyond its own share as represented by the seller. From the seller's point of view, it may therefore often be advisable to stipulate that the purchaser is not to be entitled to require an allocation by the superior; vice versa from the purchaser's point of view.

But, on the other hand, the seller will be very careful in accepting an offer in these terms, for (1) he may not be able to obtain an allocation at all, and (2) even if he can, there will probably be an augmentation, against which he may require to indemnify the purchaser in the shape of a reduction in the price.

Feu-duties and Ground-annuals—Purchase of.—In purchasing feu-duties and ground-annuals, the following special points require attention: (1) to ascertain that the obligations of the granters of the feu or ground-annual right have been implemented to the proprietor of the property; for if not, of course they will affect the purchaser of the feu-duty or ground-annual, who will not be entitled to enforce

Stewart v. E. of Cassillis, 21 Dec. 1811,
 Bebb v. Bunny, 1854, 1 Kay and J., 216.
 Robertson v. Douglas, 1886, 13 R. 1133.

payment except on condition of implementing these obligations; 1 (2) to have regard to the powers of redemption or allocation possessed by the feuar or other proprietor under the titles. In Bell's Principles 2 it is suggested that there is something of the nature of an implied allocation of ground-annuals; but the case referred to does not at all support that view; (3) to stipulate that there is no liability for any over feu-duty or casualty; or if there be any feu-duty, at least to make certain that it is not part of an unallocated over feu-duty, for if it were, a subsequent allocation might be a serious matter; (4) to stipulate for an assignation to arrears of casualties; (5) to see that the proprietor of the property is bound to insure in the name of the holder of the feu-duty or ground-annual; and (6) to obtain delivery of the chartulary containing full copies of the charters, full inventories of the vassals' titles, the names and addresses of the vassals and their solicitors, particulars identifying the properties, e.g. plans, street numbers, etc., copies of last receipts for casualties, and information as to the residences of the persons on whose lives the next casualties depend.

On the other hand, when selling superiorities, it is necessary to keep in view that it may be necessary to make express reservations. This is particularly the case under articles of roup which describe the subject of sale as the lands themselves. Thus the same title may embrace valuable mineral fields which have been excepted from the feuar's title, and which there is no intention of selling, and which therefore ought to be expressly reserved.

Fire.—As the risk passes with the purchase, the purchaser must insure at once. But it is sometimes expressly stipulated that if the property is not, at the date of entry, in existence and in substantially the same condition as at the date of sale, the purchase is to be void.

If the whole property is not in existence in its present condition at the term of entry, the contract to be void in the purchaser's option, without any claims on either side.

As to apportionment of premiums, see p. 150.

Fixtures or Fittings. This is a matter of great importance. It is apt to be overlooked, and whether overlooked or not, it is apt to give rise to considerable vexation. Fixtures are part of the heritage 5: fittings are moveable, and as such are not included in a contract of sale and purchase of a house or other building unless expressly so included. As to what are fixtures and what are fittings respectively, see the cases collected under Fixtures in Green's *Encyclopædia*. When there are current leases, the omission to include the fittings in the sale has somewhat curious results. There are three parties

¹ Arnott's Trs. v. Forbes, 1881, 9 R, 89.

² S. 888.

³ Orr v. Mitchell, 1898, 20 R. (H. L.) 27.

⁴ See further, p. 308.

⁵ Jamieson v. Welsh, 1900, 3 F. 176.

interested: the seller, purchaser, and tenant. The seller retains the property of the fittings, but he cannot remove them during the subsistence of the lease as granted by him, because he is liable in warrandice to the tenant. It would appear, however, that he will be entitled to some part of the rent as representing the annual value of the fittings; and if the purchaser of the property does not finally buy the fittings also, the seller will be entitled to remove them when the lease runs out. But while these may be the general rules, may it not be suggested that an exception occurs when rental is a material part of the transaction, e.g. the purchase of a tenement for investment, or perhaps any sale where there has been a representation by the seller as to rental? If that rental is receivable only from the heritage plus the fittings, must not the seller convey both? Teinds 1 and steelbow 2 are analogies.

On the other hand, the seller must be careful to limit the inclusion of fittings to those which belong to himself, otherwise he will get into difficulties when it is found that some of the fittings are not his to sell, but are the property of the tenant. If importance is attached to the fittings, there had better be an inventory of them relative to the missive.

It may sometimes be proper to require evidence of the seller's title to the fittings; and in special cases it may be necessary to bear in mind that they may be affected by arrestment in the hands of, e.g. a tenant.

Flowers, etc.—The purchaser may wish to include all flowers, plants, and shrubs. Disputes are very apt to arise over matters of this kind, and care ought to be taken on both sides to have the agreement of parties clear and express. It may in like manner be proper to expressly include or exclude a conservatory.

Gables.—If the gable of the property is mutual and the other half has not been used (or whether used or not, if not paid for), the seller must be careful to reserve the right to recover the half cost from whoever may come to use it. Even this reservation, however, imposes no obligation on the purchaser.

The pursuer (the builder) imposed no obligation on his disponee to maintain the gable. Neither did he put any restriction on the purchaser in the use of his feu with a view to preserve the gable. It would seem to follow that the purchaser might have put the feu to whatever lawful uses he pleased, although they involved the total destruction of the gable. Neither am I able to see that the pursuer would have any right to damages or recompense if the purchaser had chosen so to act. No doubt it would not have been in his power to destroy the gable without the consent of the neighbouring feuar, but with his consent it would.

³ Per Lord Kincairney in Calder v. Pope, 1900, 8 S. L. T. No. 184.



¹ Ersk. ii. 10, 40.

² Ersk. ii. 6, 12.

In the case of tenements the reservation should be made on the sale of the houses on the off side as well as of those actually abutting on the gable. Where the reservation is not made, the right to the other half passes to the purchaser, even though the seller is the adjoining owner. It is not sufficient to declare that the gable shall be mutual, for that is held to mean only that the adjoining owner (even though he is the seller) shall be entitled to use the gable, but subject to the usual condition, namely, payment of one-half of its cost. On the other hand, if it is to be included in the sale it ought to be express in both missive and title, for otherwise questions will be very apt to arise between seller and purchaser and between the latter and adjoining feuers.

Including [or reserving to the seller, as the case may be] right to recover the half or other proper proportion of the cost of all common or mutual gables, walls, roads, and drains, from the other users thereof or others who may be or become liable therefor, [and in the case of the reservation add] and also to use the same without payment.

The leading rules regarding payment for gables are: if the claim rests on the common law of recompense, it arises only when the gable is used; if it rests upon contract, the terms may be such as to infer immediate liability irrespective of use; and interest runs from the date of use in the former case, and in the latter from the date when the contract is complete.⁵

Ground-annual.—See Feu-duty.—On the original constitution of a ground-annual the purchaser of the property ought to make it clear that there is no permanent liability on him for the ground-annual, but that his liability is to cease when he sells the property. The proper way is for the seller to constitute the ground-annual before he sells, and to give the purchaser a simple disposition.

There is to be no permanent liability on the purchaser or his representatives for the ground-annual, or for any relative obligations, all which are to cease on termination of ownership, except as regards any arrears then due.

Leases.—As it is at least not clear that an ordinary lease according to the nature of the property is an incumbrance which the seller is bound to purge, the purchaser should make enquiry, and if necessary a stipulation, as to the non-existence of leases or the nature of any that exist. If he is buying for occupation, this point, which is easily overlooked, becomes of even greater importance, for then a lease would be fatal

¹ But see *Roberts* v. *Galloway*, 1898, 6 S. L. T. No. 35.

² Hunter v. Luke, 1846, 8 D. 787.

³ Glasgow Royal Infirmary v. Wyllie, 1877, 4 R. 894.

⁴ Berkeley v. Baird, 1895, 22 R. 372; Baird v. Alexander, 1898, 25 R. (H. L.) 35.

⁵ Sinclair v. Brown Bros., 1882, 10 R. 45. Further as to gables, see Stark's Trs. v. Cooper's Trs., 1900, 2 F. 1257 (taking down tenement, rebuilding gable, contribution to cost: Sheriff's jurisdiction).

⁶ Duff, 89. Bell, Convey. 644.

no matter how favourable its terms from an investment point of view. This also holds in a very marked degree regarding salmon fishings (q.v.).

When leases exist they should be examined before any offer is made, so as to see whether there are any special conditions prejudicial to a purchaser. The points requiring attention include the following:—

- 1. Endurance.
- 2. Rents—(1) amount, (2) how paid, and which is the purchaser's first rent.¹
- 3. Obligations on landlord—(1) nature and amount, (2) how far implemented.
 - 4. Claims for improvements.

Obligation on landlord.—In order that conditions and stipulations in a lease shall affect a singular successor they must be inter naturalia of the lease. What possesses that character may vary with the duration of the lease, and in this connection an averment and proof of custom will be important. If not inter naturalia, it apparently does not matter that the singular successor has full knowledge of the condition or even that it has been published on record, as, e.g., by being contained in a recorded lease. This was held in the case cited 2 in regard to an obligation, contained in a recorded building lease for 999 years, to grant a feu of the same property. But, of course, the purchaser may be barred, e.g. if the lease and its clauses and obligations are excepted from and made burdens on the conveyance in his favour. But to this end an exception from the warrandice, though specially referring to the particular lease, is not enough.

The most common obligations which will affect a singular successor are—to erect or repair buildings, fences, drains, etc., to make roads, to take over a sheep stock at valuation (which may mean a heavy loss if the landlord has to buy at acclimatisation value and resell at market value), to take over straw, etc., of waygoing crop.³

Claims for improvements are liabilities, the amount of which, and the expense of determining that amount, can scarcely be even approximately fixed, and which must in ordinary course be taken over by the purchaser. The purchaser may call for evidence of any consents given by the landlord, and notices given by the tenants, under the Agricultural Holdings Acts. It is for consideration whether the seller should not give the purchaser notice at least of the former, say, consents by him to the execution of improvements by the tenants.

Machinery.—In the purchase of manufacturing property the missives ought to be clear and express, so as to include all machinery, fixed and unfixed, with belting, etc., according to the intention of the client.

¹ See p. 158. ² Bisset v. Mags. of Aberdeen, 1898, 1 F. 87

³ As to setting up these obligations by custom only, see *Maclaine* v. *Stewart*, 1898, 36 S. L. R. 233.

Removal of Occupant.—Assuming that the tenant's right of occupancy comes to an end at the term of entry, it ought to be arranged between seller and purchaser for the former to give the tenant notice to remove. But suppose the tenant refuses to remove, and legal proceedings are necessary to get him out. Or again, suppose the property is sold by a bondholder, and the proprietor in natural possession refuses to remove without judicial proceedings. On whom do the burden and expense of these proceedings fall? There is no breach of warrandice, for ex hypothesi the tenant or occupant has no title and must be unsuccessful. On the other hand, if the purchaser has contracted for natural possession at the term of entry, does the seller implement this without giving natural possession in fact? Difficulties under these circumstances are not infrequent; and when there is any reason to anticipate difficulty, a special clause may be introduced into the missives making it the seller's duty to have the property unoccupied at the removal term.

In the purchaser's option, which must be intimated before 20th March 19 [i.e. for a Whitsunday entry; see 49 & 50 Vict. c. 50, s. 4], the seller shall be bound to remove any tenant or occupant, and to take and carry through all steps to that end, and to have the property unoccupied at the removal term of Whitsunday 19, all at the seller's expense.

Rents.—There is no question on which greater difficulty and more litigation arise between seller and purchaser than this: which is the first rent which the purchaser is to receive? The practical advice and only safe course is to make an express stipulation identifying beyond all question the first rent which is to go to the purchaser. A form is given on p. 167. The same special clauses will, of course, be exactly repeated in the disposition. Assuming that the rights of parties are left to be regulated by the statutory clause, "and I assign the rents," the purchaser receives—

- 1. The rents to become due for the possession following the term of entry according to the legal and not the conventional terms, unless in the case of forehand rents,
- 2. In which case [the purchaser receives] the rents payable at the conventional terms subsequent to the date of entry.

In applying this, three leading rules are: (1) the rent of an arable farm is legally due one-half at Whitsunday after sowing and the other half at Martinmas after reaping; (2) the rent of a pasture farm is legally due one-half on entry at Whitsunday, and the other half at Martinmas following; ² and (3) a farm must be either arable or pastoral; if it partake of both it is classed as the one or the other according as the one element or the other prevails.³

^{1 31 &}amp; 32 Vict. c. 101, ss. 5 and 8.

Note that these are not forehand rents, and that pasture rents practically cannot be forehand.

³ Mackenzie's Trs. v. Somerville, 1900, 2 F. 1278.

- 1. Non-forehand rents, i.e. rents either (a) payable at the legal terms, or (b) postponed, i.e. backhand. Disregard the postponement and conventional terms. Suppose the rents were payable at the legal terms, whether they are or not. On that assumption what would be the first half year's rent payable after the purchaser's entry? Trace out that rent. No matter when it may be conventionally payable, it is the first rent which the purchaser receives. A purchaser entering at Martinmas gets the whole rent of next year's crop, and no part of the rent of the crop of the year of his entry. A purchaser entering at Whitsunday receives the second half of the rent for that year's crop.
- 2. Forehand rents.—The purchaser (1) has no drawback for rents received before, but applicable to the period after, his entry; (2) does not receive rents payable at his entry for the period following, but (3) is restricted to rents conventionally payable after his entry.

Note the words "to become due" in the statutory interpretation as regards non-forehand rents. It is laid down that these words exclude the purchaser under all circumstances from any rent legally due at the term of entry. This makes two conditions which the purchaser must prove in order to support his claim, viz., that the rent was (1) legally due after his entry, and (2) so due for possession after his entry. This has its chief application in the case of pasture rents, e.g. if the purchaser and the tenant of a grass farm both enter at Whitsunday, and if the assignation of rents is not qualified, the seller, and not the purchaser, is entitled to the tenant's first half year's rent irrespective of when it is conventionally payable. The reason is that it is legally due at the term of entry, and therefore cannot then be included among rents "to become due."

Examples:

ARABLE FARM

- 1. Tenant's entry, Martinmas 1903. Rent, £100. Under lease first £50 payable Whitsunday 1904; second, Martinmas 1904. These are the legal terms. Purchaser entering Martinmas 1903 receives the 1904 £100; entering Whitsunday 1904 receives Martinmas 1904 £50.
- 2. Tenant's entry to houses and grass at Whitsunday 1903 and to arable land at Martinmas 1903. Rent and terms as in No. 1. Again, these are the legal terms. Purchaser entering Whitsunday 1903 receives outgoing tenant's last half year's payment and all the new tenant's payments.
- 3. In either of cases 1 and 2 the lease provides that first £50 payable at Martinmas 1904 and second at Whitsunday 1905. Legal terms would have been Whitsunday and Martinmas 1904. This is six months' backhanding. Purchaser entering Martinmas 1903 receives nothing till Martinmas 1904.
- 4. In either of cases 1 and 2 the lease provides that first £50 payable Martinmas 1903 and second Whitsunday 1904. This is six months' forehanding. Whenever purchaser enters he receives all rents payable after his entry,

¹ Mackenzie's Trs. v. Somerville, supra.

but not rent payable at his entry. If he enter between terms, viz., 1st August, he receives the Martinmas rent.

PASTURE FARM

- 5. Tenant enters Whitsunday 1904. Rent, £100. Under lease, first £50 payable Whitsunday 1904, and second Martinmas 1904. These are the *legal* terms for a pasture farm; this is not forehand. Purchaser, entering Whitsunday 1904, receives as his first rent £50 payable Martinmas 1904.
- 6. Tenant enters Whitsunday 1904. Rent, £100. Under lease, first £50 payable Martinmas 1904 and second Whitsunday 1905. This is six months' backhanding. Purchaser, entering Whitsunday 1904, receives nothing until Whitsunday 1905.

URBAN PROPERTY

7. Forehand rents only need be referred to. Tenant enters Whitsunday 1904. Under lease, half year's rent payable on entry. Purchaser entering Whitsunday 1904 appears entitled to nothing until Martinmas 1904, seller taking Whitsunday 1904 rent. For this is forehand, and in that case the Act carries only "rents payable at conventional terms subsequent to the date of entry." There is, however, reason to believe that in the case of say tenement sales, the purchaser is usually allowed to receive and retain forehand rents which strictly ought to go to the seller, and this without any qualification of the assignation of rents. This is no doubt because it is recognised that justice requires that the purchaser should receive the full rents for the possession after his entry. But obviously it is not proper to run the risk of question, and the missives ought to be clear.

GAME AND OTHER SEASON'S RENTS

On the authority of Lord Glasgow's Trustees v. Clark, these fall to be apportioned in respect of the periods of the shooting, or other seasons, before and after the term of the purchaser's entry.

Special Qualifications.—The following have been held not to be special qualifications and to have the same effect as the statutory clause, viz.: (1) "the rents due and payable from and after the term of entry," and (2) "the rents payable by tenants from and after the term of entry." But clearly if no alteration be intended, the statutory clause ought to be strictly adhered to.

Roof.—In purchasing the whole or part of the top flat of a tenement, special regard must be had to the matter of liability for the expense of upholding the roof. It appears that at common law the top flat is alone liable, and that where the ownership of the top flat is divided, each owner is liable for the maintenance of so much only of the roof as covers his own property.

³ Macdonald v. Baillie, 1900, 8 S.L.T. No. 187.

¹ 1889, 16 R., 545.

⁴ Sanderson's Trs. v. Yule, 1897, 25 R. 211.

Lord Glasgow's Trs., supra.
 Macdonald v. Baillie, 1900, 8 S.L.T.

The roof includes the rhones. But chimney stalks are in a different position, and the practice in Edinburgh is to charge repairs to the owners who have vents in them, and in proportion to their number. Chimney cans, of course, are maintained by their respective owners. The hatchway to the roof is a common charge to all who use it.

That the house is liable for not more than one-share of the expense of maintaining the roof.

See further, p. 188.

Salmon Fishings.—Differing from shootings and other fishings,2 salmon fishings are or may be a separate feudal estate. From which it results, on the one hand, that the seller of the lands may not own the salmon fishings, and on the other that if he does, he may not be bound to convey them unless the contract is express, and further they may be the subject of a lease which will be valid against a purchaser and have the effect of excluding him from sporting privileges, or at least (according to its terms) from full control. Even if the view stated on p. 316 be correct, viz., that a seller who has right to salmon fishings must convey them with the lands though not expressly purchased, that does not touch the other case, viz., where the purchaser is relying on getting the fishings, but they are not mentioned, and the seller has not a title to them. In that case it appears clear that the purchaser must proceed though the want of the fishings may have deprived the place of its chief attraction in his eyes. The moral is to specify (1) salmon fishings, (2) their extent both geographically and in respect of right, whether sole and exclusive or what, and (3) full natural possession if desired.

As regards trout fishings, and also as regards shootings, a purchaser is safe enough, for independent rights to these, effectual against a purchaser, cannot be created, either by way of property or even lease, except (1) rights to kill ground game under the Ground Game Act, 1880; (2) perhaps trout fishing rights expressly given to agricultural tenants; and (3) perhaps rights accompanied by exclusive possession of the land, which are practically limited to deer forests, on the purchase of which special enquiry will always be made as to any subsisting lease.⁸

Searches.—The implied obligation for searches does not bind the seller to deliver the search. The rule is the same as in the case of title deeds: see custody. Therefore if delivery be wished, the purchaser may require to make that express. Further, the implied obligation may in other respects be inadequate, or at least unsatisfactory, as leaving doubt, e.g. (1) searches against creditors (see p. 285), and (2) in certain burgage cases (see p. 280), and finally it is to be noted that, while it appears to be the case that a solicitor is professionally safe in accepting

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¹ Whitmore v. Stuart & Stuart, 1902, 10 S. L. T. No. 180.

² See Sec. XXXVII.

³ As to these exceptions, see ibid.

an unofficial search if made by a searcher who is habit and repute competent, a purchaser is apparently not bound to accept anything except an official search.

Teinds.1—The considerations which apply are to a large extent the same as in the case of salmon fishings. The personal element does not enter in, but great pecuniary prejudice may be sustained if it be found, e.g. that the seller of the land has no title to the teinds, and yet that the purchaser must proceed on account of the absence of any mention of teinds in the contract. Very much the same result may follow though there is a title, e.g. by reason of the special position of these teinds in relation to stipend. It is possible to ascertain the whole position with a considerable degree of accuracy, but it is not practically possible to be perfectly certain, as witness the occasional cases of rectification of overpayments, reduction of valuations, etc., etc., matters as to which it is clear that in most instances legal responsibility could not attach to a conveyancer.

Tenement Property.—The special points requiring attention have reference to the ownership of the front plot of ground (if any), and the restrictions upon the use of it and of the ground flat of the tenement. The purchaser of the ground flat may wish to have the sole right of property in the front plot, and the purchaser of any of the flats above may wish to be able to prevent building on the front plot, and the conversion of the ground flat into shops.

In offer for ground flat, describe it as that house being the eastmost (or otherwise) house on the ground flat of the tenement 1 King Street, Edinburgh, with exclusive right to the plot of ground in front thereof, and right to back green, with the pertinents and with all fittings.

In offer for upper flats, insert a condition that building on the plot of ground in front of the tenement, and also the conversion of any of the houses into shops, are prohibited, except with the consent of the purchaser or his successors.

Unfinished 2 (or New) Property.—In the purchase of property which is in course of erection special stipulations are required regarding the completion of the property, including (1) the actual building of the property, enclosing, etc.; (2) the painting and papering, about which the purchaser may stipulate that he shall be consulted; (3) the supply of fittings, on which also the purchaser may reasonably desire to be consulted; (4) the laying out of the garden and green; (5) the completion of all roads, causeway, and pavements; (6) drains; and (7) the certificate, as regards houses, by the burgh engineer or sanitary inspector.

The seller to paint and paper the property and put in all fittings (the purchaser to be consulted as to choice of paper and fittings), and to lay out

² Westren v. Millar, 1879, 7 R. 173.

the green and garden, and to complete and pay for all roads (including causewaying), pavements, and drains, and to complete the property in all respects, and to produce the certificate of the burgh engineer, all before the term of entry.

And as to causeway, see p. 187.

"Title as it stands."—An agreement that the purchaser shall accept the title as it stands is construed on the assumption that, notwithstanding it, (or rather that it itself recognises that), in exchange for the money, the purchaser is entitled to get the property, i.e. that the seller has in truth the real right to the property. If that be not so, the purchaser may resile although this stipulation is in the contract. But, all the same, the condition may have very important results, e.g. the seller may have the real right, but his title may be very defective in point of form, and the expense of perfecting it may be considerable. Under these circumstances, if the purchaser has agreed to accept the title, he must proceed and he must bear all the expense of rectifying the title. The case cited goes further, and gives some ground for the statement that the stipulation may be refused effect, although it is not established that the title is bad, and that it is enough to free the purchaser that there is serious doubt as to whether the title is good or bad, if the defect or alleged defect is one which does not resolve itself into a question of expense. In Carter the objection was that, whereas the lease in question stipulated, in terms of the Montgomery Entail Act, that a dwelling-house should be erected on the ground, no dwellinghouse had been put up, but a factory instead. Lord Adam said:

Now, it is admitted that the building erected is and always has been a factory, and that no dwelling-house has been erected, and therefore the objection to the lease is that in terms of the Act it is null and void. I do not know that we are bound in this case to decide whether it is an absolutely bad title as regards a question with an heir of entail. It is enough to say that, having on its face so patent an objection, it is not a marketable title, or such a title as a purchaser is bound to take. . . . The purchaser would have been bound to accept the title if it could have been made marketable by some expenditure on his part.

In that case the purchaser had agreed to accept the title "as it stands, and subject to all exceptions of any nature." Possibly a more liberal interpretation might be given to a contract in which the purchaser admitted that he had had the title examined and accepted it as satisfactory in all respects.

But to the rule as to expense there is one exception, namely, defective stamp duties. Neither a general nor a special condition will bar the purchaser from objecting to stamp duties on deeds dated after 16th May 1888.²

¹ Carter v. Lornie, 1890, 18 R. 853.

² Stamp Act, 1891, s. 117.

OFFER FOR HOUSE FOR PURCHASER'S OWN OCCUPATION

On behalf of my client A., I offer to purchase the house 1 King Street, Edinburgh, with pertinents and all fittings, and that on the following terms and conditions, namely:—

- 1. The price to be £
- 2. Entry at , when the price shall be payable.
- 3. Actual natural possession to be given by the seller on
- 4. It is to be shown that the feu-duty is \mathcal{L} , that the casualty is taxed at an additional sum of \mathcal{L} , payable not oftener than every [nineteenth] year, that both feu-duty and casualty are allocated by the superior, and that there is no other charge, annual or otherwise.
- 5. The titles to be sent within seven days after the acceptance, and for seven days after that again I am to be sole judge of whether the title and its conditions, if any, are satisfactory.

This offer, if not sooner withdrawn, may be accepted by a letter reaching me not later than [date] at noon.

Holograph (Signature.)
Adopted as holograph.
(Signature.)

The following additional points are specially referred to:-

- 1. Apportionment (if entry not Whitsunday), p. 150.
- 2. Unfinished or new property, p. 162.
- 3. Garden, p. 165.
- 4. Ground-annual and duplicand, if existing, will be referred to under condition 4.

OFFER TO PURCHASE TENEMENT FOR INVESTMENT

On behalf of my client A., I offer to purchase the tenement 20 X. Street, Edinburgh, consisting of four flats, and containing in all twelve houses, with back green, pertinents, and fittings, and that on the following terms and conditions, namely:—

- 1. The price to be £
- 2. Entry at , when the price shall be payable. The purchaser to receive all rents for the possession after the term of entry whenever payable.
- 3. It is to be shown that the feu-duty is \pounds , that the casualty is taxed at an additional sum of \pounds , payable not oftener than every [nineteenth] year, that both feu-duty and casualty are allocated by the superior, that there is no other charge, annual or otherwise, and that the actual rental is \pounds .
- 4. The titles to be sent within seven days after the acceptance, and for seven days after that again I am to be sole judge of whether the title and its conditions, if any, are satisfactory.

This offer, if not sooner withdrawn, may be accepted by a letter reaching me not later than [date] at noon.

Holograph $\left\{egin{array}{l} (Signature.) \\ Adopted as holograph. \\ (Signature.) \end{array}\right.$

The following additional points are specially referred to:-

- 1. Apportionment (if entry not Whitsunday), p. 150.
- 2. Unfinished or new property, p. 162.
- 3. Gables, pp. 155-6.

LANDED ESTATE

The lands and estate of X., in the county of Y., conform to printed particulars supplied by you, with teinds and pertinents, and with all fittings on the lands and in the houses and other buildings;

Or,

the lands and estate of X., in the county of Y., embracing the mansion-house, gardens, and policies, and the farms occupied by Y. and Z., with teinds and pertinents, and with all fittings on the lands and in the houses and other buildings;

Or,

the lands and estate of X., in the county of Y., embracing the mansion-house, garden, and policies, and the farms and other possessions of which a rental is signed as relative hereto and is herewith enclosed, with teinds and pertinents, and with all fittings on the lands and in the houses and other buildings.

SALMON FIBHINGS

With the salmon fishings on the coast and in the river X. and otherwise and all other fishings.

GARDENS

With all conservatories, hot-houses, frames, and all glass-houses and con tents, and all stoves, piping, and other heating apparatus, and all shrubs, plants, and flowers, whether in the ground or not, and whether in the open or under cover.

MANUFACTURING PROPERTY,

with all machinery, fixed and unfixed, with boiler, engine, belting, etc.

OFFER TO PURCHASE FEU-DUTIES

On behalf of my client A., I offer to purchase the feu-duty of £10, with an additional sum of £10 [or £20], payable at and every [nineteenth] year thereafter [or with all casualties and arrears thereof], payable for the tenement 20 X. Street, Edinburgh, and that on the following terms and conditions:—

- 1. The price to be £
- 2. Entry at , when the price shall be payable.
- 3. The conveyance to the purchaser to be a disposition of the property under exception from the warrandice of the feu-right under which the said feu-duty is payable.
- 4. It is to be shown that there is no liability for any over-feu-duty or casualty, and that the rental of the property is \pounds

Or,

4. It is to be shown that the over-feu-duty is \pounds , that the over-casualty is taxed at an additional sum of \pounds , payable not oftener than

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every [nineteenth] year, that both are allocated by the over-superior, and that the rental of the property is \pounds

- 5. It is conditioned that the feuar has no power of allocation or redemption, and that he is bound to keep the property insured in the name of the superior.
- 6. The original charter under which the feu-duty is constituted, or an official extract thereof, to be produced at the seller's expense, or an official extract of the original charter under which the feu-duty is constituted to be delivered to the purchaser at the seller's expense. [Delivery of chartulary, etc., p. 154.]

This offer, if not sooner withdrawn, may be accepted by a letter reaching me not later than [date] at noon.

OFFER TO PURCHASE GROUND-ANNUALS

On behalf of my client A., I offer to purchase the ground-annual of £10, with the additional sum of £10 [or £20], at and every [nineteenth] year thereafter, payable for the tenement 20 X. Street, Edinburgh, and that on the following terms and conditions:—

- 1. The price to be £
- 2. Entry at , when the price shall be payable.
- 3. The conveyance to the purchaser to be a simple disposition and assignation.
- 4. It is to be shown that the rental of the property is \pounds , and that the only charge prior to the ground-annual is the feu-duty of \pounds .
- 5. It is conditioned that the proprietor has no power of allocation or redemption, and is bound to keep the property insured in name of the holder of the ground-annual.
- 6. The original contract of ground-annual under which the ground-annual is constituted [and as in preceding form].

This offer, etc. [as above].

$$Holograph$$
 $\left\{ egin{array}{l} (Signature.) \\ Adopted as holograph. \\ (Signature.) \end{array} \right.$

MINUTE OF SALE OF LANDED ESTATE

It is contracted between A. (hereinafter called "the seller") and B. (hereinafter called "the purchaser"), in manner following; That is to say:

1. The seller agrees to sell, and the purchaser agrees to purchase, All and Whole the lands and estate of X., in the county of Y., with pertinents, and with the teinds [if and so far as belonging to the seller], and all grates, blinds, and gas-fittings, and other fittings and fixtures [so far as belonging to the seller]. A rental is annexed and signed as relative hereto.

- 2. The price shall be \pounds , which the purchaser binds himself, his heirs, executors, and representatives whomsoever, without the benefit of discussion to pay to the seller at the term of , with interest thereafter at the rate of per cent. per annum till paid.
- 3. The purchaser shall be entitled to the occupation of the mansion-house offices, garden, and policies, and all other houses and buildings in the occupation of the seller or his servants, on the [specify exact date]. But as regards the garden, he shall be entitled to entry thereto, for the purpose of doing any work which may be reasonably necessary, on [date] and thereafter, and accommodation shall then be provided for implements, tools, and garden materials.
- 4. As to the purchaser's right to rents and feu-duties, the first rent and feu-duty which he shall uplift in the case of each holding shall be as follows (the numbers having reference to the numbers in the said annexed rental):—

 Nos. 1 to 10 The half-year's rent or feu-duty payable at the term both inclusive of

 No. 11 . . The half-year's rent payable at the term of

 Nos. 12 to 15 The year's feu-duty payable at the term of

 both inclusive next. The purchaser shall allow to the seller, at the settlement of the price, the sum of £ (less property tax), in respect of those feus for the half-year from
- No. 16 . . . The whole rent for season 19 payable at . The purchaser shall be entitled to all casualties payable for feus, whether before or after his entry.
- 5. The purchaser has had the leases and missives of let produced to him, and has examined the same, and is satisfied therewith. The seller has satisfied the obligations in the lease of the farm of by the erection of a new steading, and he has allowed and paid to the tenant of the farm of the sum of £ in respect of drainage work executed by the tenant. The purchaser shall relieve the seller of all other claims of tenants in any way under their leases or missives of let, or under the Agricultural Holdings Acts, or otherwise.
- 6. The purchaser shall pay and bear all property tax after 5th April 19, and all heritors' assessments payable at or after the said term of , and the stipend falling to be paid on or about.

 All other rates, taxes, and assessments, and all fire insurance premiums, shall be apportioned between seller and purchaser in respect of time before and after the said term of . [Casualties not dealt with, see p. 170.]
- 7. Upon payment of the price, with interest if incurred, the seller shall grant a disposition in ordinary form, with the following modifications, viz.:—
- (1) The term of entry shall be stated to be , subject to the terms of the clause of assignation of rents and obligation of relief of public burdens.
- (2) The clause of assignation of rents shall be qualified in terms of article 4 hereof.
- (3) The clause of obligation of relief from public burdens shall be qualified in terms of article 6 hereof.

- (4) From the warrandice clause there shall be excepted (a) the feu and other subaltern rights granted to feuars and others, and (b) the leases and missives of let and claims of tenants as aforesaid, but without prejudice to the right of the purchaser to quarrel or impugn the said feu and other subaltern rights and leases on any ground not inferring warrandice against the seller or his authors.
- 8. One-half of the expense of the disposition, including revisal and stamp duty, shall be paid by each party.
- 9. The parties refer to the amicable and final decision of , whom failing, of , all questions and disputes with reference to the meaning and effect of these presents, the rights and obligations of parties, the adjustment of the disposition, or otherwise in any manner of way with reference to, or arising out of, the said sale and purchase.

Lastly. The parties consent to the registration of these presents, and of any decree or decrees arbitral, interim and final, to be pronounced under the reference clause herein contained, for preservation and execution.—In witness whereof.

MINUTE OF SALE OF LANDED ESTATE, CONTAINING SPECIAL CLAUSES AS TO (1) Taking over Debt; (2) Home-Farm in Natural Occupation; (3) Taking Farm Stock and House Furniture, etc., at Valuation; (4) Taking over Lease held with Estate; (5) Accepting Title as it Stands; (6) No Search; (7) Casualty; (8) Removing Tenants; (9) Leases not Current and Game Leases; (10) Expenses

It is agreed between A. (hereinafter called "the seller") and B. (hereinafter called "the purchaser") in manner following; That is to say:

- 1. The seller agrees to sell, and the purchaser agrees to purchase, All and Whole the lands and estate of X., in the county of Y., as described in the disposition by C. in favour of the seller, dated , and recorded in the division of the general register of sasines for the county of Y. on , together with the pertinents, and with the teinds [if and so far as belonging to the seller], and with all rights of fishing [if and such as these go with the title].
- 2. The price shall be £20,000. To account thereof the purchaser shall take over the bond and disposition in security for £10,000 over the said subjects granted by the seller and at present held by D., and the purchaser shall undertake to relieve the seller thereof and of the interest thereon for the period after the term of . The balance of the price, namely, £10,000, shall be payable at the said term of , and if not punctually paid shall bear interest thereafter at the rate of five per centum per annum till paid. If desired by the creditor in the said bond and disposition in security, the purchaser shall further grant a bond of corroboration, with or without a new disposition in security, for the said debt of £10,000. The seller is to be entitled to obtain a discharge of his personal obligation for that debt from the creditor.
- 3. The purchaser has made enquiry and has satisfied himself regarding the boundaries, extent, nature, value, and rental of the lands, and buildings thereon,

and as to the conditions under which the same are held, and servitudes, if any, affecting the same, and on all other matters affecting or which might be supposed to affect the value or the transaction, as to all which he declares himself satisfied; and particularly, but without prejudice to the said generality, the rental hereto annexed is not warranted by the seller.

- 4. The purchaser shall be entitled to the occupation and possession of the mansion-house, offices, garden, policies, and home-farm (including as aftermentioned) on [date]. But he shall be entitled to entry to the home-farm (including as after-mentioned) and to the garden on [date] for all reasonably necessary farming and garden operations, and accommodation shall then be provided for men, horses, and implements for those purposes. [The seller will do all necessary ploughing, seeding, harrowing, rolling, and planting, if and as desired by the purchaser, the purchaser supplying the seed and paying for the work as the same may, failing agreement, be fixed under the deed of submission after-mentioned.]
 - 5. [Purchaser's right to rents, No. 4, p. 167.]
- 6. The seller agrees to sell, and the purchaser agrees to purchase, also the following, namely:—
 - (1) The whole live and other stock and stocking on the home-farm, including, without prejudice to the said generality, horses, cattle, cows, sheep, pigs, poultry, hay, straw, implements, and manure not applied to the land. The seller is to have no claim for unexhausted manure applied to the ground, nor for young grass, nor for seed or labour, except as expressly herein stated.
 - (2) The plants in the conservatories and greenhouses. The seller is to have no claim for plants or shrubs in the open.
 - (3) The furniture, furnishings, and plenishing in the mansion-house, including, without prejudice to the said generality, all books, pictures, napery, plate, china, and crystal, and the garden seats and chairs, and all grates, blinds, and gas fittings, and all other fittings, but excepting [specify any pictures, etc., not intended to be sold].

All the effects referred to in this article shall be sold and purchased so far and as they exist on , but no alteration on No. 3 shall be purposely made, nor shall Nos. 1 and 2 be unduly increased or decreased between that date and the date of these presents. The prices shall be fixed by valuations to be made on the said [date]. The prices of Nos. 1 and 2 shall be fixed by E. and F., as arbiters appointed by the seller and purchaser respectively, and in case of their differing in opinion, then by G. as oversman. A formal submission for this purpose is signed by the parties of even date with these presents. The price of No. 3 shall be fixed by H., as sole arbiter mutually appointed. The prices shall be payable along with the price of the lands, and shall bear interest at the rate of five per centum per annum thereafter during non-payment. The expenses of the arbitration as to Nos. 1 and 2 are provided for in the said formal submission. The fee to the said H. and the stamp on his valuation shall be borne by seller and purchaser equally.

7. Whereas the seller occupies, along with the estate, the subjects described

in the lease by K. in his favour, dated , he agrees to grant, and the purchaser agrees to accept, an assignation of that lease for the remainder thereof from and after the term of . These subjects are occupied as if they were part of the home-farm, and the provisions of these presents as to the home-farm and the stock and stocking thereon shall apply to the said subjects and the stock and stocking thereon. The seller shall implement the provisions of the lease, and relieve the purchaser thereof up to and including the said term of , and the purchaser shall implement the same and relieve the seller thereof after that term. The first rent payable by the purchaser shall be that payable at the term of

- 8. The purchaser has had the title deeds produced to him and has examined the same, and hereby accepts the same, and the seller's title and power to sell and convey, as complete and satisfactory in all respects.
- 9. In respect the seller knows of no incumbrance except the said bond for £10,000, he will give no search. But as the purchaser requires a search, he is to make one at his own expense, and is to exhibit the same to the seller, brought down to the date of these presents, and that on or before [specify an early date before anything else is to be done under the minute]. If any other incumbrance is found to exist, the seller shall pay the cost of the search, and shall have the option either to purge the record or to cancel the bargain of sale, which he shall be entitled to do without being liable in damages or otherwise. He shall intimate his option in writing within fourteen days after the search is submitted to him, failing which he shall be held to have elected to purge the record and to go on with the transaction. If he elects to cancel the bargain, these presents in all their parts, and the said submission, and all that may have followed hereon and thereon, shall be ipso facto null and void.
 - 10. [Leases, No. 5, on p. 167.]
 - 11. [Apportionment of outgoings, No. 6, on p. 167.]
- 12. The seller shall not be liable to pay any casualty, composition, or duplicand. All such, whether due before or after the date of these presents, and all interest, if any, thereon, shall be paid by the purchaser. If the seller should, after the date of these presents, be called upon to make any such payment, the same shall be repaid to him by the purchaser along with the price, and with interest thereon at the rate of five per cent. per annum from the date of disbursement till repaid. The seller binds himself not to intimate change of ownership to the superior.
- 13. The seller shall give notice of removal to the following tenants, requiring them to remove at [state term], namely [name tenants and their possessions].
- 14. The leases produced to the purchaser as aforesaid include (1) a lease of the farm of to , at the rent of £ , for the period of years from , under which lease, accordingly, possession has not been taken, and (2) a lease of the shootings and fishings to for the season 19 , at the rent of £ . The purchaser specially agrees to recognise and give effect to those leases, and to accept his title subject thereto.
- ¹ Landlord's consent probably necessary, and must be obtained before this minute is entered into.

- 15. Upon payment of the prices, with interest if incurred, the seller shall grant a disposition in ordinary form, describing the property as in his own title hereinbefore referred to, but with the following modifications, namely [specify them in a similar style to that on pp. 167-8, or say], but with such modifications as are required to carry out the terms of these presents.
- 16. One-half of the expense of the disposition of the property and the assignation of the said lease, including revisal and stamp duties, shall be paid by each party. But this does not include any expenses to be incurred to the agents of the said D. [creditor] or of the said K. [landlord], as to which it is agreed as follows:—The expense of the agents of the said D. examining the disposition shall be paid by the seller, who shall also pay their expenses in connection with any discharge of his personal obligation which he may desire. The purchaser shall pay the expense of any bond of corroboration. The seller shall pay any expense to the agents of the said K.
- 17. Subject to the references for valuation hereinbefore contained or referred to, the parties refer (as on p. 168, saying disposition and assignation).

 Lastly. [Registration as on p. 168, saying reference clauses.]

ARTICLES OF ROUP BY PROPRIETOR

ARTICLES OF ROUP of All and Whole that house No. 1 King Street, in the city and county of Edinburgh, with the site thereof and ground attached thereto, being the subjects particularly described in the disposition granted by A. in favour of B., dated , and recorded in the division of the general register of sasines for the county of Edinburgh on , both days of , which subjects are to be exposed to sale by the said B. (hereinafter called "the exposer") within [place] upon [day of the week] the day of at o'clock afternoon, or at such other time or place as the exposure may be adjourned to, and that under the following conditions, or such other conditions as may be inserted in any minutes to follow hereon:—

First. The subjects are to be exposed to sale by public roup at the upset price of \pounds , or at such other upset price as may be specified in any minutes to follow hereon. Each offerer shall, if and when required, subscribe his offer, and shall be bound under these articles for the price offered by him, on the conditions herein expressed. If there be more offerers than one, each successive offer shall exceed the immediately preceding one by at least the sum of \pounds , and the person offering the upset price, or, in case of more offers than one, the highest offerer, shall be preferred to the purchase.

Second. The subjects are exposed tantum et tale as they exist, and as the exposer has power to sell the same, and not otherwise. The purchaser and all offerers, by offering at the roup, shall be held to have informed themselves and to be satisfied on all matters and questions of fact and law, and on all matters and things whatever, and to be satisfied and ready, if preferred to the purchase, to complete the same, and to accept a disposition from the ¹ Contrast table of fees, No. 29.

Contrast table of fees, No. 29.

exposer, and to pay the price to the exposer, all in terms of these articles, without any question, objection, requisition, or condition of any kind whatever. And particularly, but without prejudice to or limitation of the foregoing generality, the purchaser and all offerers, by offering at the roup, shall be held to have informed themselves and to be satisfied regarding the following matters, namely, (first) the existence, identity, nature, extent, boundaries, value, and rental of the subjects; (second) the feu-duty, rates, taxes, servitudes, [burdens], and others affecting the subjects, the conditions under which the same are held, and all other particulars of or affecting, or which may be supposed to affect, the subjects; and (third) the existence, sufficiency, and validity of the title and of the title deeds, and of the security-writs and transmissions and discharge thereof, and the exposer's power to sell the subjects. And the purchaser shall not be entitled to resile from or object to or reduce the sale, or to refuse or delay to grant bond with security, or to deposit, as aftermentioned, or to refuse or delay to pay the price, or to claim any deduction therefrom, or to retain any part thereof, on any ground whatever; and particularly, but without prejudice to or limitation of the foregoing generality, the purchaser shall not be entitled to do any of the things foresaid on the following grounds, namely (first) any misunderstanding or error on any matter or question, whether hereinbefore mentioned or not, and that even although the same should have been contributed to or induced by information or documents supplied publicly or privately by the exposer or by anyone on his behalf, all which information and documents shall be deemed to have been accepted on the footing that the exposer does not warrant them; (second) any alleged, admitted, or proved total or partial defect, want, absence, or nullity in or of the title or title deeds, or the security-writs or transmissions or discharge thereof.

Third. The term of entry shall be Whitsunday 19, but the exposer shall be entitled to the rents for the possession to the ordinary removal term. The price shall be payable to the exposer in [place] on the 15th day of May 19, with a fifth part further in name of liquidate damages and expenses in case of failure in the punctual payment thereof, and with interest on the price at the rate of per centum per annum from the said 15th May until payment.

Fourth. The purchaser shall be bound, in the option of the exposer, and that within fourteen days after intimation of such option—which intimation may be made at any interval after the roup, or the devolution of the purchase, as the case may be—either (first) to grant at his own expense a bond in favour of the exposer for the price offered by him, with sufficient caution or sufficient security to the satisfaction of the exposer, and of which sufficiency he shall be bound within the said fourteen days to produce proof to the satisfaction of the exposer, which bond shall be payable at the office of the [Bank] in [place], with a fifth part more of liquidate damages and expenses

titles. The question appeared on the titles. These were exhibited. Articles stated that certain other sums were the only known incumbrances. *Held* purchaser must take subject to burden,

¹ Davidson v. Dalziel, 1881, 8 R. 990. There was a question whether a certain sum was a real burden. In the articles the disposition was to be accepted subject to burdens, conditions, etc., specified in the

in case of failure, and with interest on the price at the rate of per centum per annum from the said 15th day of May 19 till paid, or (second) to deposit one-fifth part of the price offered by him in the office of the said Bank in [place] in the joint names of the exposer and himself, and that on specially earmarked deposit-receipt, which shall within the said fourteen days be handed to the exposer. In the event of any purchaser failing to fulfil the foregoing provisions of this article to the satisfaction of the exposer, or even if he should fulfil the same, if in fact the price is not paid punctually on the said 15th day of May 19, he shall, but only in the option of the exposer, forfeit his purchase, and be liable to the exposer in onefifth part of the price offered by him in name of liquidate damages, which option the exposer may declare and intimate after any interval, and notwithstanding anything that may have intervened. In the event of the exposer intimating to the immediately preceding offerer that the highest offerer has failed in implementing this article, or any part thereof, and that his purchase has been forfeited, and requiring such immediately preceding offerer to fulfil his offer, then such immediately preceding offerer shall be deemed the purchaser, and so forth through the whole course of the offerers until these articles be fulfilled, the only limitation as to time in this respect being that any offerer who shall not, within six weeks after the roup, have received any intimation requiring him to fulfil his offer, shall thereafter be absolutely free. In no case shall any offerer, unless preferred at the roup, have any right or claim to be preferred. Every intimation may be given by letter, signed by the exposer's agents, put into any post office, and addressed to the person for whom it is intended, and it shall be sufficient to address him as he is designed in his offer. The expression "the purchaser," wherever occurring throughout these articles, includes not only the original purchaser, but also any purchaser, or successive purchaser, on whom the purchase may be devolved as aforesaid.

Fifth. Upon due payment of the price, with interest and penalty, if any, the exposer shall grant a disposition of the subjects to the purchaser, under the reservations, restrictions, prohibitions, declarations, conditions, and obligations contained or referred to in the title deeds and in these articles.

Sixth. The exposer shall be bound to relieve the purchaser of the feu-duty and public burdens for the period to the said term of entry, but not of any duplicand, relief, composition, or other payment or casualty which may be due or in arrear, all which the purchaser shall be bound to pay without relief.

Seventh. There shall be delivered with the disposition to the purchaser the documents forming Nos. of the inventory annexed and signed as relative hereto. The exposer shall bind himself to make Nos. forthcoming on all necessary occasions on a receipt and obligation for re-delivery in the usual form; and as regards the other writs, he shall assign his right to require exhibition thereof.

Eighth. , auctioneer in , shall be judge of the roup, with all usual powers, including power (first) to determine whatever questions and differences may arise between the exposer and offerers, or amongst the offerers themselves, in relation to the roup; (second) to adjourn

the roup from time to time; and (third) to prefer the highest offerer to the purchase in manner above specified.

Lastly. All questions between the exposer and purchaser or offerers regarding the meaning of these articles, or the execution or implement thereof, are submitted to the amicable decision of , whom failing, of , as sole arbiter, and whatever the arbiter shall determine in the premises, the exposer by subscription hereof, and the purchaser and offerers by subscribing their offers, bind themselves and their respective heirs, executors, and representatives whomsoever, without the benefit of discussion, to implement and fulfil to each other.—In witness whereof.

Other clauses, which may be required according to circumstances, may be adapted from the Minutes of Sale on pp. 166, 168, e.g. Apportionment of income (p. 167), and outgoings (p. 167), Leases (p. 167), Search (p. 170), Tenants' claims (p. 167), Warrandice, exceptions from (p. 168). Under the above form, of course, the seller must give a full search.

SHORT FORM OF ARTICLES

ARTICLES OF ROUP of All and Whole that house being the westmost first flat entering by the common stair No. 1 King Street, Edinburgh, to be exposed to sale within , on the day of , 190 , at o'clock afternoon, by A. upon the following conditions, viz.:—

- 1. The upset is £ and the bids £
- 2. Not only is the house exposed tantum et tale as it exists and without reference to description, advertisement, or any other particulars or information as to accommodation, rental, feu-duty, burdens, servitudes, or any other matter or thing, but the purchaser admits that he has enquired and satisfied himself on all these and all other matters and things.
- 3. Not only is the title to be taken as it stands, but the purchaser admits that he has examined and satisfied himself regarding it and regarding these articles, and he accepts the title as it stands. The house shall be disponed under the burdens, etc., appearing in the titles or otherwise affecting it [subject only to article 7].
- 4. The entry shall be at when the price shall be payable with interest at 5 per cent. thereafter till paid.
- 5. The purchaser shall in the exposer's option grant bond of caution with a sufficient cautioner at his own expense or deposit one-fifth part of the price in joint names in either case within fourteen days of the roup. Failing his doing so, the next highest offerer shall be deemed the purchaser and shall be bound to carry out the transaction and to implement these articles in all respects.
- 6. There shall be delivered to the purchaser the disposition in favour of the exposer dated 1880, the writs therewith delivered to the exposer [and the bond referred to in article 7].
- 7. [The trustees of the late B. hold a bond for \pounds . It will be paid off out of the price, and B.'s surviving and acting trustees will concur in the

disposition to disburden the property. The purchaser shall have no claim for expenses or increased expenses on this account. The exposer knows of no other incumbrance.] A search ending not later than 1880 is exhibited. It will not be completed or continued.

- 8. The purchaser shall pay and relieve the exposer of all duplicands or casualties due as well before as after the term of entry.
 - 9. , auctioneer in , shall be judge of the roup.
- 10. All questions are submitted to the amicable decision of C., whom failing, of D., as sole arbiter.—In witness whereof.

ARTICLES OF ROUP BY BONDHOLDER 1

Alter the form on p. 171 as follows:-

Title. After "the exposer" insert-

in virtue of the power contained in a bond and disposition in security (hereinafter referred to as "the bond"), dated , and recorded in the said division of the general register of sasines on , for the sum of \pounds , granted by C. in favour of the exposer, and that within .

Art. 2 (1). Omit the words "existence, identity, nature."

Art. 2 (3). Omit the word "existence."

After "sell the subjects" insert-

and the accuracy and sufficiency of the bond [and transmissions thereof], and whole notices, advertisements, and proceedings required by statute or otherwise.

Omit the words "want, absence, or nullity."

After "title deeds" insert "or the bond or proceedings thereunder."

Art. 4. Add at end-

In no case shall it be incumbent on the exposer to require bond, caution, security, or consignation, though he shall in his sole discretion be entitled to do so.

Introduce a new art. after art. 4, as follows:---

The exposer, on receipt of the price, shall be bound to hold count and reckoning therefor with the said C. [debtor], and the postponed creditors, if any such there be, or with any other party having interest, and to consign in [the Bank in bond], in the joint names of the exposer and purchaser, for behoof of the party or parties having best right thereto, the surplus, if any, which may remain after payment of the principal sum, interest, and others due under the bond and expenses in reference to the possession of the subjects, including the expense of insurance, repairs, and management, and whole expenses attending the sale, and after paying all previous incumbrances, if any, and expenses of discharging the same. But the exposer shall not be bound to make such consignation until three months after receipt of the price. If there should be no surplus for consignation, a certificate of no surplus shall be prepared and recorded by the exposer's agents at the expense of the purchaser if the purchaser desires such a certificate, and that within three months after receipt of the price.

¹ As to power of sale and conditions of its exercise, see p. 513.

Art. 5 (now 6). Add at end-

The disposition shall contain a clause of warrandice on the part of the exposer from his own facts and deeds only, and an assignation of the warrandice contained in the bond. The disposition shall also contain a clause disburdening the subjects [but those only] of the real security constituted by the bond, but without prejudice to the bond in all other respects. Or, in the purchaser's option, the exposer shall assign the personal obligation to the purchaser to the extent of the price and the real security [but only over the subjects sold], to the same extent but under the following conditions, namely: (1) if the claims of the exposer under the bond are not fully paid, there shall be reserved to him so much of the principal sum contained in the bond as shall be equal to the balance remaining due to him; (2) such assignation shall be accepted and held under the declaration that the personal obligations [p. 556]; (3) the exposer shall not be bound to grant such assignation until three months after receipt of the price; and (4) the purchaser shall pay the whole expense of the assignation.

To the clause as to delivery of writs, add such a provision as may be proper under the circumstances regarding custody of and access to the bond and transmissions.

ARTICLES OF ROUP WHEN THE TITLE IS TO BE A CONTRACT OF GROUND-ANNUAL

Title. Insert the following after description:—
But with and under the real lien and burden of the ground-annual of \mathcal{E} and additional sum of \mathcal{E} over and above every [nineteenth?] year, and whole other obligations, burdens, and others, and irritant and resolutive clauses, specified in the draft contract of ground-annual docqueted and signed by the exposer with reference hereto.

The art. as to granting title will run-

Upon the purchaser making payment of the price, and executing a contract of ground-annual in terms of the draft thereof docqueted and signed by the exposer with reference hereto, the exposer will also execute the same. The said draft is here specially referred to, and held as repeated. The contract of ground-annual shall thereupon be recorded by the exposer's agent in the division of the general register of sasines for the county of for preservation and execution as well as for publication, with warrants of registration on behalf of both parties, and the exposer's agent shall be entitled to sign the warrant on behalf of the purchaser if the purchaser's agent should refuse or for forty-eight hours delay to do so; but neither the exposer nor his agent shall be under any obligation to sign such warrant, nor shall incur any responsibility to the purchaser by reason of doing so, or for any error therein or in the recording. Two extracts shall be obtained. One shall be retained by the exposer, and the other shall be delivered to the purchaser.

¹ This last ought not to be omitted. as to creditor's liability on account of Park v. Alliance Her. Secy. Co., 1880, 7 R. depreciatory conditions of sale. See p. 517 546. This case may be consulted generally infra.

And the expenses clause will run-

One-half of the expense of the contract of ground-annual, including revising fee, stamp duty, record dues, and expense of the two extracts, shall be paid by the exposer, and the other half by the purchaser. Each party shall pay his own agent's fees for writing the warrants of registration, and for recording; and though the exposer's agent should write and sign both warrants, he shall not have any charge against the purchaser therefor, or in respect of recording. No charge shall be made against the purchaser for engrossing in any chartulary.

Or it may be preferred to provide as follows:-

The fees of the respective agents, and the incidence of all expenses, shall be regulated by the Table of Fees and professional rules therein contained.

ARTICLES OF ROUP OF SUPERIORITY

Alter the form commencing on p. 171 as follows—

Art. 2. (1) Alter so as to read "and value of and return from the subjects."

Art. 3. The term of entry shall be The price, etc.

Art. 5. Add at end-and under exception from the warrandice clause of the feu rights of the subjects granted by the exposer or his predecessors or authors, without prejudice nevertheless to the purchaser quarrelling or impugning the same on any ground of law not inferring warrandice against the exposer or his foresaids.

As to reservations, see p. 154. In the case of important reservations, such as coal, it will be better to sell the feu-duty and casualties only, in which case the articles of roup may run in much the same terms as the following

ARTICLES OF ROUP OF A GROUND-ANNUAL

ARTICLES OF ROUP of All and Whole the ground-annual of £ , payable at the term of annum and additional sum of £ 19 , and at the same term in every [nineteenth] year thereafter all furth of All and Whole the subjects Nos. 1, 2, and 3 King Street, in the city and county of Edinburgh or some part thereof, the said subjects being those particularly described in, and all conform to, contract of ground-annual between X. and Y., dated and recorded in the division of the general register of sasines for the county of Edinburgh, on , which ground-annual and additional sums (all hereinafter called "the ground-annual") are to be exposed [as

Follow generally the conditions on pp. 171-4, altering "subjects" to 'ground-annual" throughout, and making also the following changes: —Art. 2. Alter "disposition" to "assignation."

12 Digitized by Google

From ("first") let the article run :-

(first) the existence, nature, amount, and conditions of and affecting the ground-annual; (second) the existence, identity, nature, extent, boundaries, value, and rental of the subjects over which the ground-annual bears to be secured, the extent and ranking of the security, and as to all prior charges; (third) the allocations which have been or may competently be made [and the power of redemption], and (fourth) the existence, sufficiency, and validity of the title [etc., as on p. 172].

Art. 3. The term of entry shall be

The price, etc.

Art. 5. Alter "disposition" to "assignation."

Art. 6. Omit it.

Note that under this form the exposer must apparently give a search. If not intended, so provide, or qualify the obligation.

SECTION XI

EXAMINATION OF HERITABLE TITLE

THE matters falling under this head necessarily somewhat run into those treated in the previous chapter, and in order to avoid repetition reference is made to it in this connection also.

The following may be useful as a vidimus of matters which may require attention according to circumstances, though in the case of some of them it is not necessary to do more here than mention them. Some of them have already been dealt with in the preceding chapter, but it is convenient at least to note them here again.

PAGE

180 Prescriptive progress.

184 Validity of steps in progress.

- 1. Capacity and powers of granters.
- 2. Description, and valid reference to burdens if necessary.
- 3. Authentication.
- 4. Stamps.
- 5. Warrants of registration.

185 Identity of property.

- 185 Special conditions of title, and particularly—
 - 1. Limited time for feudalising.
 - 2. Restriction on subinfeudation.
 - 3. Pre-emption.
- 186 Building conditions, whether the buildings which have been erected are authorised, and particularly-
 - 1. Nature.
 - 2. Situation.
 - 3. Style and details.
 - 4. Value and rental.

PAGE

187 Gables, walls, roads, and drains.

- 1. Ownership.
- 2. Completed?
- 3. Paid for?
- 188 Roof, maintenance of. Whole or what share?
- 188 Reservations and restrictions, and particularly-
 - 1. Minerals.
 - 2. Use of property.
 - 3. Whether enforceable purchaser against adjoining owners (see p. 206).
- 190 Servitudes.
- 190 Light and air.
- 190 Water rights.
- 190 Leasehold rights.
- 190 Teinds.
 - 1. Included in sale and in title?
 - 2. Burden of stipend and possible increase.

PAGE 191 Fou-duty	185 Real warrandice, liability
156 Ground-annual	thereunder.
151 Casualties How much	150 Leases.
209 Duplicands Allocated superior	1. Enqurance.
(Two or three Paid to dat	2. Ivenus.
times the annual sum?)	(a) Amount. (b) How paid, and which is
•	nurchaser's first rent!
250 Rights of relief from feu-dur stipend, etc.	5. 197 5. Congations on landlord.
• • • • • • • • • • • • • • • • • • •	(a) Nature and amount.
1. Whether secured.	(b) How far implemented!
1 0	as- 4. Claims for improvements.
, ,	see 154 Fittings.
p. 191).	1. Included ?
191 Terce.	2. What are?
192 Courtesy.	3. Title.

tors.

192 Government duties.

195 Preference of ancestor's credi-

276 Clear searches.

Capacity and power of seller

or borrower.

195 Time for stating objections.
196 Expense of deciding them.

In ordinary cases it will be found that the matters of most practical importance are—

- 1. Casualties.
- 2. Government duties.
- 3. Terce and (more rarely) courtesy.

As to sales under bonds, see Section XXXII.

PRESCRIPTIVE PROGRESS

In order that prescription may operate two things must concur, viz, (1) title, and (2) possession.

Title.—1. Ex facie valid.—The foundation infeftment must, under the 1874 Act, answer this description. For instance, a disposition granted by a married woman so designed without her husband's consent would, it is submitted, not do; but if it set forth that she held the property free from the jus mariti and right of administration, it would then appear to be ex facie valid whether in point of fact the statements were true or not. Then in the case of dispositions by trustees, proceeding on sales, is a deed of that kind ex facie valid if it does not even assert that the granters had express power of sale, that power not being implied? This appears at least doubtful, and it is thought that a purchaser would not be bound to take the risk. At the same time the point must not be pressed too far, for "a title may be good as a foundation for prescription even when it bears evidence in gremio of an objection the full ground of

which has to be collected extraneously." 1 Quære, when a deed is not ex facie valid, does proof of the validity bring it within the twenty years rule or otherwise make it a good basis for prescription?

2. Title need not be unambiguous.—Assuming that the title is one which is capable of bearing the construction sought to be put upon it though it might also bear a narrower interpretation, then if there has been the more extended possession, the title is made out. A. and B. disponed to C. "all and whole the several shares belonging to us of all and whole." This rather indicates that A. and B.'s shares did not make up the total of the property; but it is at least capable of being read the other way also, and it was sustained as a basis of prescriptive possession of the whole. The following dicta are important:—

Moncrieff, L.J.-C., at p. 666. Whether the title founded on be one on which possession for forty [now twenty] years can establish a right of property depends solely on the terms of the written charter or disposition itself, and neither on extrinsic evidence nor on possession. A habile title does not mean a charter followed by sasine which bears to convey the property in dispute, but one which is conceived in terms capable of being so construed. The terms of the grant may be ambiguous or indefinite or general, so that it may remain doubtful whether the particular subject is or is not conveyed, or, if conveyed, what is the extent of it. But if the instrument be conceived in terms consistent with and susceptible of a construction which would embrace such a conveyance, that is enough, and forty [now twenty] years' possession following on it will constitute the right to the extent possessed.

Inglis, L.-P., at p. 681. I hold it to be now settled law that a charter and sasine containing a description which can be so construed as to embrace an entire subject, though it may also be so construed as to embrace part of it only, if followed by forty [now twenty] years' uninterrupted and exclusive possession of the whole, will, under the statute 1617, c. 12, exclude all enquiry and protect the person holding it against all challenge from any person holding even an express title prior in date to the whole or any part of the subject.

- 3. But must not be contradictory of possession, e.g., a title to property east of a certain road will give no title to property west of it, not even with twenty years' possession. This applies chiefly to bounding titles, where the safe rule is to assume that the possession cannot carry the title beyond the boundary. But see p. 317.
- 4. How old?—Till 1874 the foundation of the prescriptive progress required to be forty years old. But by s. 34 of the 1874 Act this is reduced to twenty provided the document in question is an ex facie valid irredeemable title. Accordingly as a decree of adjudication is not irredeemable, it is clear that a recorded decree by itself alone does not satisfy the requirement of the 1874 Act. In regard to this matter of adjudication titles it seems necessary to distinguish two separate things,

Simpson v. Marshall, 1900, 2 F. 447.
 Auld v. Hay, 1880, 7 R. 668.
 See very full dista in Fraser v. Lord Lovat,
 1898, 25 R. 608.

viz.: (a) what will make the adjudication absolute and irredeemable as against the debtor, and (b) what will make it the foundation of a prescriptive progress against the world. Prior to 1874 the decree became absolute in one or other of two ways, viz.: (a) expiry of the legal and declarator of its expiry in foro, (b) completion of a real right by infeftment and possession for forty years after the expiry of the legal, without any declarator. So far the 1874 Act made no change. Accordingly it follows as regards the other matter, the foundation of a prescriptive progress, that if there is no valid declarator of the expiry of the legal, there is no change here either by the 1874 Act. But quid juris if there is a valid declarator in foro recorded in the register of sasines? Suppose that in 1890 there is an adjudication, in 1900 a valid declarator of expiry of the legal, and in the same year a notarial instrument is expede proceeding on both decrees: is not this an "ex facie valid irredeemable title?" If so it is not correct to say that the 1874 Act made no change in the length of title necessary when the initial writ is an adjudger's title, for here there would be a prescriptive title against the world thirty years after the decree of adjudication.1 All this, of course, is on the assumption that it is necessary to treat the adjudication as the foundation of the progress, and that it is not possible to connect with an earlier infeftment. If that can be done, then the adjudication becomes only a link, as to which see infra, p. 184.

5. Must Warrants be produced?—This refers to cases where the infeftment is evidenced by some instrument apart from the grant or other title. Before de plano recording was introduced it was a matter of much importance, but now as a practical question it is limited to cases of notarial instruments. Prior to 1874 the rule was that the warrants of all sasines and notarial instruments required to be produced along with the sasines or notarial instruments themselves, except in the case of sasines or instruments in favour of heirs, when the warrants (service or clare constat) were not required. Has the 1874 Act made any difference? Is a notarial instrument, without its warrant or warrants, a title in the sense of s. 34?

Three cases may be distinguished:—

- (a) A notarial instrument in favour of a disponee or adjudger in implement. It is not settled whether this is enough without its warrant. It has been indicated that it is not.²
- (b) A notarial instrument in favour of an heir. It appears that this is sufficient without the warrants. This is on the ground that a sasine in favour of an heir was, as above stated, a good foundation, and the modern instrument is the equivalent of the older sasine. This may very well still be a matter of practical importance, e.g. in the case of

² Glen v. Scales' Trs., 1881, 9 R. 317; Simpson v. Marshall, 1900, 2 F. 447; Lord Stormonth Darling at p. 454.



¹ In *Hinton* v. *Connell's Trs.*, 1883, 10 R. 1110, the declarator of expiry was in absence and was not recorded.

an heir's title completed by general service, followed by a notarial instrument proceeding on the ancestor's infeftment and the service. In that case, if the view now submitted be sound, the instrument by itself alone, without either of the warrants, is a good foundation of a prescriptive progress. If the title were completed by special service or clare constat, the point could hardly arise, for either of these would be recorded de plano.

(c) A notarial instrument in favour of an adjudger for debt. This is not a basis of prescription without production of the decree. The reason is, that except for the 1874 Act the warrants must be produced, and in this case the Act does not apply because the adjudication is not irredeemable.

Possession.—1. Period.—This has necessarily been already so far dealt with in connection with the title. The only other point to be mentioned is the reference to thirty years in s. 34 of the 1874 Act. When there is that length of possession on an irredeemable title no deduction is to be made for minority or legal disability of the parties against whom prescription is running. This, however, does not entitle a purchaser to a thirty years title on an irredeemable infeftment. These deductions are competent as against the twenty years, but so they were before 1874 against the forty years. But the case would be different if the purchaser could produce prima facie proof that the period had been reduced below twenty years by reason of the deduction. The terminus a quo is midnight of the day of infeftment, i.e. that day is excluded.

- 2. Deductions and interruptions.—The causes for which deduction may require to be made from the period of prescription have just been mentioned. But that deduction does not prevent the periods before and after being added together to make up the requisite total. Interruption, on the other hand, breaks the possession altogether, so that the prior possession is lost. The register of interruptions is merged in the register of sasines. Short of strict interruption there may be personal bars, as by agreement, against founding on prescription, e.g. where the rents have by agreement been set aside to await the decision of the question.²
- 3. Nature.—The words of the 1617 Act are "continually and together and that peaceably and without any lawful interruption." The 1874 Act is to the same effect.
 - 4. Extent.—Lord Watson has the following dictum 3:—

There is in my apprehension, or ought to be, a practical distinction between the prescriptive possession which establishes a new and adverse right in the possessor, and the prescriptive possession which the law admits for the purpose of construing or explaining, in a question with the author, the limits of an antecedent grant or conveyance. In the first case the rule obtains tantum

¹ Simpson v. Marshall, supra.

² Ibid.

³ Lord Adv. v. Wemyss, 1899, 2 F. (H. L.) 1 at p. 9.

prescriptum quantum possessum. In the second it appears to me that a much more liberal effect has been given to partial possession of the whole in cases where the subject of controversy has been in itself a distinct and definite tenement.

Bona-fides.—It is laid down that prescription does not require bona-fides. The Act 1617, c. 12, excepts only falsehood, which there means forgery.¹

VALIDITY OF STEPS IN TITLE

Infeftment.—There must, of course, be a good connecting chain of title from the foundation infeftment to the present owner if that infeftment was not in his favour. But it is unnecessary that there should be infeftment all through. An heir, though uninfeft, is allowed the benefit of his ancestor's infeftment, and so with disponee and disponer.

In this connection it appears desirable to draw attention to two different cases, viz., the titles of heirs and adjudgers as mid-couples.

- 1. Heirs.—When two or more heirs take in succession it is sufficient to produce their infeftments without the warrants of these infeftments. The words of the 1617 Act are that in this case there shall be produced "instruments of sasine, one or more, continued and standing together for the said space of forty years, either proceeding upon retours or upon precepts of clare constat." What was stated above was limited to the foundation infeftment, but this goes further and extends to the intervening links if two or more infeftments of heirs run in succession in the progress, the point being that the warrants need not be produced.
- 2. Adjudgers for debt.—Suppose A., a disponee, is infeft in 1880, B., a creditor of A., adjudges in 1895. The result is that a prescriptive title is completed in 1900 as against everyone claiming adversely to A. But of course as between A. and B., and those deriving right from them respectively, the adjudication is redeemable until 1905 (when the legal expires) and thereafter until B. has either (1) obtained decree of expiry, or (2) had forty years' possession after the expiry.

Decrees in Absence.—A decree in absence is equivalent to a decree in foro if the following elements concur, viz.: (1) personal service of the summons, or appearance entered by authority, (2) the decree of such a nature as to warrant a charge, (3) a charge given, and (4) the expiry of an induciæ of sixty days. A decree of declarator or other decree on which a charge is not competent becomes final in twenty years if it has been preceded by personal service of the summons, or by the entering of appearance by authority.² These matters are referred to because it has been recently held that a title which depends on a decree in absence which has not become final is not a marketable title,³



¹ Ersk., iii. 7, 15.

³ Bruce v. Stewart, 1900, 2 F. 948.

² Court of Session Act, 1868, s. 24.

Excambions.—Note (1) as to trustees' powers,¹ (2) the burden of real warrandice if an excambion is a step in the title; the purchaser is entitled to have this cleared off if within,² but not beyond, the prescriptive period, which for this purpose might require to be taken at thirty years, notwithstanding and contrary to what is stated on p. 183.⁸

Reference to Burdens.—Note that this is necessary only if there be an irritant or resolutive clause applicable to the omission to insert a reference. For form of waiver by superior or other party, see p. 224.

Stamps.—Defect in stamp duty will not prevent prescription operating. The deed is valid, but a tax is due and will have to be paid, with or without penalty.

IDENTITY OF PROPERTY

If it be not clear on the titles that the property described in them is identical with the actual property intended to be dealt with—in other words, that the description covers the particulars and rental—enquiry may be necessary. Thus it may be found (1) that the seller has no other title (or at least no recorded title) to any property in the burgh, parish, or county, and (2) that he has been on the valuation roll for a period of years in respect of the property in question. Further, in all these cases it is recommended that the description be brought up to date and connected with the older deeds. See p. 315.

In this connection reference may be made to one of the points in the case of Macdonald, where—

in a question as to what were the subjects included in a sale of the property known as the Royal Hotel; held (aff. judgment of Lord Kyllachy) that it was competent to lead parole evidence to show what were the subjects known to the purchaser under that name, and for that purpose to ascertain what were the subjects pointed out to and described to her prior to the sale.

But with reference to the words "known to the purchaser," which occur above, the opinions in the case do not warrant the view that the purchaser's state of knowledge would be at all conclusive if it were proved that the descriptive words had a well-known meaning different from that maintained by the purchaser, and if there had been no misrepresentation.

SPECIAL CONDITIONS OF TITLE

The production of a prescriptive progress does not make it unnecessary to examine the *reddendo*, for which purpose some charter must be produced.⁵ This follows from the mutuality of the contract of feu farm.

¹ P. 405.

² Durham's Trs. v. Graham, 1800, Mor. 16641, per Lord Trayner in Bruce v. Stewart, 1900, 2 F. 948.

⁸ Durham, supra.

Macdonald v. Newall, 1898, 1 F. 68.
 Strachan v. Dickson, 1900, 7 S. L. T.

Strachan v. Dickson, 1900, 7 S. L. T
 No. 348.

which is renewed on every infeftment, which operates entry with the superior. It will be remembered that an ordinary charter by progress was not a competent medium of effecting a change in the terms of the holding, and the same would no doubt be held now regarding a writ of clare constat. The proper form is a charter or clause of novodamus.

Apart from conditions as to buildings, walls, etc., and reservations and restrictions, the most common clauses in charters which may require attention are—

- 1. Limit of time for feudalising.—This is a very common clause, and it must be seen that it has been complied with. If any mistake should occur, a consent by the superior will cure it, assuming that there is no mid-impediment The consent will, of course, be in writing, and probative, and will be recorded.
- 2. Restriction on sub-infeudation. See p. 202.—This may come up in different ways. Thus (1) A. may be proposing to grant a feu to B., and may produce a prescriptive progress but no charter from his own superior. B. is not safe without perusing this over-charter, because if the fact be that it contains a prohibition against sub-infeudation, the proposed sub-feu will be invalid, A.'s prescriptive possession being irrelevant; (2) the case is the same if in any transaction the title produced is a charter on which prescriptive possession has not run. Thus A. feued to B. (no matter how long ago if not beyond the prescriptive period, or if, in law, prescription has not operated); B. now proposes to deal with C.; C. is exposed to the risk that the over-charter under which A. held may have prohibited sub-infeudation. As to both these cases the over-superior may be barred from effective interference by the want of a proper irritant clause in the charter held off him. (3) Whenever prescription has run upon a charter it is elementary that it is safe from challenge on the ground that the granter of it was by his own holding prohibited from sub-feuing: the sub-charter would be validated by prescription even though the granter of it had held no title at all, and the case supposed is a fortiori.
 - 3. Clause of Pre-emption. See p. 202.

Building Conditions

(See p. 204.)

It is necessary for a purchaser or lender to know that the building conditions of the charter or otherwise have been complied with. But is a purchaser entitled to this evidence at the seller's expense? This is not at all clear, but it is thought that the seller is not bound to produce the evidence.¹ Practically the question is whether seller or purchaser is to pay a fee to the superior's architect.

¹ But in an English leasehold case in which the lease stipulated that the leasee should build to the satisfaction of the lessor's surveyor, it was held that the vendor must

at his own expense produce the surveyor's certificate, re Moody and Yates, 1885, 30 Ch. D. 344.

GABLES, WALLS, ROADS, DRAINS, ETC.

It is necessary for the purchaser to satisfy himself that gables, walls, roads, and drains have been completed and paid for. He is entitled to evidence of payment at the seller's expense.

What is referred to under "roads" is merely the construction of the roads if required under the titles. But in addition there is also the matter of pavement and causeway; and a similar question may arise as to other matters, especially drainage assessments. Six dates may be taken: (1) notice by the authority requiring the work to be done; (2) expiry of the time allowed by the notices for the owners themselves doing the work; (3) execution (meaning by that probably completion) of the work by the authority; (4) payment by the authority of the tradesmen's accounts; (5) allocation and assessment; (6) due date of assessment.

In a case ² between seller and purchaser with usual clause of relief of public and local burdens, Lord Kyllachy said:

The question is whether the payments were in the sense of the clause due when the work was done, and the tradesmen's accounts paid by the corporation, or only when the corporation had gone through the process of allocating the total expenditure in the manner prescribed upon the different properties. . . . I am of opinion that the former is on the whole the sound, as it certainly is the just and equitable, view. But even if I thought otherwise, it appears to me that the question is foreclosed by the decision in *Currie* v. *Macgregor*.⁸

Although this opinion introduces an apparent doubt as between the third and fourth of the possible dates stated above, it appears clear enough that the third is the true criterion, for even though the corporation became bankrupt and could not pay the tradesmen, the question between the corporation and the owners would be the same. notice is not enough, for it might never be followed up, and then there could be no burden at all. In like manner, until the work is completed to the extent stated in the particular notice, there can be no burden, for if the corporation should not act up to the notice, they would not be able to found on it to make any claim at all, though as to this (and indeed on the whole matter) something may depend on the particular Act. Reference may be made to an English case,4 in which notice to pave was given before the sale; the pavement was not laid; the seller did not disclose the notice to the purchaser, and it was held that the purchaser had no claim of relief, for he bought it unpaved and he must have known that he might any day be required to pave.

There is another aspect in which dates are important, viz., date of

⁴ In re Leyland and Taylor's contract, Court of Appeal [1900], 2 Ch. 625.



¹ See p. 155.

² M'Intosh v. Mitchell Thomson, 1900, 8 S. L. T. No. 39.

³ 1871, 44 Jur. 18.

contract of sale or date of entry? It is assumed that these questions arise under the clause of relief of local burdens, and that, in terms of the statute, is applied to the term of entry. If warrandice were looked to, the result would be the same.

It appears to be practically impossible for an agent to make certain of his client's rights in, e.g. boundary walls. He may insert an express conveyance of the sole and exclusive property in the wall, or a mutual right in it, and yet it may be that the seller had no title to make such a grant, the fact being that, e.g. the wall was built beyond his feu partially or even wholly. This is not unknown in practice, and the view is submitted that, except on proof of positive carelessness, the agent would not be liable.

MAINTENANCE OF ROOF

(See p. 160.)

Here again there is a risk of substantially the same kind as that last referred to. The starting-point is the common law obligation on the top flat to bear the whole expense,1 and the special danger is that apparently one cannot rely upon that being modified, and restricted to a share only, even by an express clause to that effect in the title. The clause will clearly be effectual under either of the following circumstances, viz. (1) if it occur in a title common to the whole property, or so far as it is a common title, or (2) if it be created a real burden on the remainder of the property by one who is competent to do so, or so far as that is so done. On the other hand it is clear that if the proprietor of the whole tenement first sells and dispones the lower flats, and provides nothing about the roof in the titles, he cannot when he comes to sell the top flat exempt it from its common law exclusive liability for the roof, and any clause purporting to do so will be wholly ineffectual as against the other owners. But take the converse case: that is to say, the common owner first dispones the top flat with a clause of partial exemption, but with no express clause burdening the remainder of the tenement, and the purchaser is infeft while the seller still stands infeft in the remainder of the tenement. The latter subsequently dispones the lower flats to a third party, and provides nothing regarding the roof. Under these circumstances eminent counsel has advised that the lower proprietor is not liable. Of course there might be a personal claim against the seller.

RESERVATIONS AND RESTRICTIONS 2

The purchaser is entitled to the property a coelo usque ad centrum. One of the most common reservations is that of minerals. These being a part of the land, a purchaser of an estate will not under ordinary circumstances be bound to proceed if, after the contract has been entered

¹ Sanderson's Trs. v. Yule, 1897, 25 R. ² See pp. 208-4. 211.

into, it appear that the seller cannot give a title to the minerals; and even in the case of a villa residence, a reservation of the minerals with power to work them would imply a state of matters inconsistent with the peaceful enjoyment of the purchase, and would entitle the purchaser There is indeed a case which goes further than this, and in which it was held that a purchaser of a villa was not bound to proceed when the title disclosed a reservation of the minerals to the superior, who, however, was prohibited from working them without the vassal's consent 1; including the Lord Ordinary, the judges were equally divided. This question came up in the more recent case of Macdonald,2 where. however, it did not arise in a pure form. The property there was an hotel. Lord M'Laren said: "I desire to reserve my opinion on the question whether a purchaser of a dwelling-house on a feu is entitled to refuse the title tendered on the ground that it does not contain a conveyance of minerals." The other judges appeared to be of opinion that the purchaser "was entitled to have not only the surface of the ground purchased but the minerals also." The Lord President (Robertson) also denied that the mere fact of having taken possession would bar a party from objecting to the title on the ground that minerals were reserved.

As to restrictions, reference may be made to servitudes, infra. If a vacant piece of ground be unconditionally sold, it is clear that the purchaser is not bound to proceed if the title when examined is found to contain unusual restrictions,3 for instance, as to the kind of buildings which may be erected, e.g. a restriction to dwelling-houses only. Indeed. even if it be the case of the purchase of a dwelling-house already erected. questions of this kind may arise, e.g. if the purchase is made with the intention of carrying on a school 5 or a private nursing establishment.6 But it can hardly be the law that the purchaser of a house is entitled to resile because the title contains a provision that it shall be used as a private dwelling-house only; otherwise the right to resile would exist in the majority of house purchases by private bargain. A purchaser of a shop is entitled to resile if the sale of liquor is prohibited.⁷ On the other hand, there is authority for the proposition that the purchaser is not entitled to claim what he knew beforehand the seller could not give.8 The onus is on the seller to prove the purchaser's knowledge.

All these cases show the advantage of having an examination of the titles before making a contract, the advantage, that is, to both parties. This is what necessarily happens in cases of public roup.

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1 Whyte v. Lee, 1879, 6 R. 699.
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² Macdonald v. Newall, 1898, 1 F. 68.

³ Smith v. Soeder, 1895, 23 R. 60.

⁴ Robertson v. Rutherford, 1841, 4 D. 121.

⁵ Ewing v. Hastie, 1878, 5 R. 439.

⁶ Graham v. Shiels, 1901, 8 S. L. T. No. 293.

⁷ M'Connel v. Chassels, 1903, 10 S. L. T. No. 496.

⁸ Lang v. Dumbarton Mags., 29 June 1813, F. C.; Mags. of Airdrie v. Smith, 1850, 12 D. 1222; M'Connel, supra, and see infra, p. 290.

SERVITUDES 1

This is another matter on which it is not possible to be sure of being safe, for neither the titles nor the records may show the existence of any servitude, and yet it may exist. The lie of the ground or some other natural indication may put one on one's enquiry, and the matter may be of local repute. But there is a residuum of unavoidable risk.

A servitude which prevents the purchaser obtaining the full use of his purchase will entitle him to resile, unless he is bound by special conditions of purchase.

LIGHT AND AIR

Obviously in many cases at least a conveyancer can do little in regard to these matters, but he can direct his attention to two points—

- 1. Whether existing rights of light and air are secure. It may be obvious that they are not or may not be. For instance, the buildings may go right up to the boundary, and then the question arises, Are they protected by any valid servitude? If not they may be built up by the next proprietor. If so, and if material, it would be an objection to the title.
- 2. If the seller is also the adjoining proprietor, constitute a valid servitude against him, in express terms recorded, so as to secure what is required.

WATER RIGHTS: LEASEHOLD RIGHTS

The points here are: (1) the competency of the grants, particularly as to water, as to which see p. 316, and (2) the competency of the proposed transmission without the consent of the lessor.

TEINDS AND STIPEND

1. Teinds.—It is commonly laid down that teinds require express mention or otherwise they do not pass, assuming that they have ever been separated by infeftment.² But the contrary has also been stated.³

On the contrary, the Lord Ordinary thinks that the case of a disponer who holds lands with teinds on the same feudal title is the most appropriate and favourable one for holding the teinds to be conveyed by implication. . . . It has always been held that a conveyance of lands without mention of the teinds, when made by a party who has also right to the teinds, is liable to construction, and may on sufficient grounds be construed as importing by implication a conveyance of the lands with the teinds.⁸

Suppose, for example, that the title contains a reference to the joint rental of stock and teinds as descriptive of what is conveyed, it could not be maintained that the teinds were reserved. Again, "it is a main element in creating the presumption (that the teinds are included), if the disponee is burdened with payment of the minister's

¹ See p. 407.

² Bell, Convey. 608.

³ Per Lord Barcaple in Watt's Trs. v. King, 1869, 8 M. 132.

stipend," 1 for that is a burden on the teinds and should be paid by the holder of them.

If the seller cannot give a title to the teinds, the points for consideration are: (1) the amount of the teinds and whether they have been validly valued, and (2) compulsory acquisition at nine years' purchase, deducting stipend. The purchaser is not concerned with unpaid arrears of teinds, these being debita fructuum only, and not debita fundi.

2. Stipend.—In any case the purchaser is concerned with stipend, for either he is getting a title to the teinds or he may do so by compulsory acquisition. The points are: (1) what the allocated stipend is, and whether it is final or whether it is capable of re-adjustment and increase, though here again arrears do not affect the purchaser; (2) when the next augmentation may be, i.e. twenty years after the last one, and how much it may be-i.e. what teind there is of the particular lands not yet allocated for stipend; (3) how the particular lands stand in order of liability either in law or in fact, i.e.: (a) Law.—Teinds to which the landowner has a heritable right are taken only after those not in that position are exhausted; an extreme case would be that the teinds in question were the only ones in the parish to which a heritable right was not held by the landowner; (b) Fact.—Another extreme case would be that the lands in question were the only ones in the parish with free teinds to any material In both of these instances the whole augmentation, or practically the whole, would fall on these lands.

As to obligation of relief of teinds, stipend, etc., refer to *Duff*, p. 89, and note to see that the obligation has been specially transmitted to the seller (including express or implied general service in the case of an heir), and is specially transmitted by the seller to the purchaser.² If the obligation was granted by the superior, an assignation may not be necessary.³

FEU-DUTIES AND CASUALTIES 4

Receipts clearing the property up to the date of entry will be required, subject to any special conditions of purchase.

In cases where the casualty depends on death it appears to lie on the seller to prove that no casualty is due. This, it is thought, follows from the consideration that under the old law the purchaser could have compelled the seller to enter unless the seller could prove affirmatively that the fee was full.

TERCE

For present purposes it is sufficient to recal that to allow of a claim for terce the husband must have been infeft and the wife must not have

Menzies, 810.
 Stewart v. Duke of Montrose, 1863, 1 M.
 1874 Act, Sch. M, Spottiswoode v. Sey (H. L.) 25.

² 1874 Act, Sch. M, Spottiswoode v. Seymer, 1853, 15 D. 458. (H. L.) 25. * See pp. 151, 153, 304.

accepted any conventional provision. It may be regarded as an exception to the rule which requires infeftment that terce is due though the husband may have granted an ex facie absolute disposition on which the disponee was infeft, provided that prior thereto the husband had been infeft.1 But of course debt secured by the ex facie absolute disposition will be a deduction from the property before ascertaining the terce; and observe that if in these cases the husband had never been infeft at all, the terce would be defeated. That might happen either by the husband having assigned an unrecorded conveyance to the lender or by the title having, on the husband's purchase, been taken direct from the seller to the lender. See this distinction emphasised by Lord Kinnear in Ritchie's case. Terce is not due from superiorities. Quære as to real burdens and recorded leases. It is, of course, due from heritable securities in which the husband was infeft.

It appears that, notwithstanding a sale by the husband, and payment of the price to him, and delivery of the disposition by him, all in his lifetime, if, in point of fact, he dies survived by his wife before the purchaser is infeft, the widow will be entitled to claim terce as against the purchaser.² In any case, therefore, in which there has been delay in taking infeftment, it may be thought worth while to make enquiry as to the survivance of the disponer, or, if dead, whether he left a widow.

It is quite sufficient to obtain the widow's concurrence in the disposition or a separate discharge by her without the necessity of her completing any title apart from her husband's infeftment. It will be proper, however, to state that she has received equivalent value either in the form of conventional provisions by the husband or by way of a price paid in some form by the trustees or other representatives for her consent.

COURTESY

This also is limited to the case of the deceased spouse (here, the wife) having been infeft, and it is subject to the further restriction that the husband must be the father of a child who is the wife's heir, or would have been if it had survived. Courtesy is due from superiorities. Prior to 1874 it did not attach to conquest as distinct from heritage. This may have been altered by s. 37 of the 1874 Act, but that section is not happily expressed for the purpose.

GOVERNMENT DUTIES

It would be quite out of place here to go exhaustively into the subject of Government duties. All that is feasible is to touch on the points of most common occurrence.

What Duties?—All death duties may, of course, affect heritable

¹ Bartlett v. Buchanan, 21 Feb. 1811, F. C., and 27 Nov. 1821, F. C.; Ritchie v. Scott, 1888, 16 R. 157, and cases there cited. 1899, 1 F. 728, at p. 736. property, viz.: (1) estate duty, (2) settlement estate duty, (3) succession duty, (4) legacy duty, and (5) account duty.

In cases where duty is chargeable on gifts made within one year¹ of death, it is clear that the titles will not show whether the duty is or was due or not; indeed, there might be a sale by the donee before the death, which yet might thereafter happen within the year. In that case it does not appear that the purchaser could be reached. But whenever the titles point to a question, a certificate should, of course, be obtained from the Inland Revenue.

Again, when a property is held by or for a liferenter and fiar, it is obviously not enough to have evidence that the duty on the immediate interest—the liferent—has been paid; the duty on the fee must also be seen to; it may be commuted.² It will be remembered that though there be no trust, duty may attach wherever there is a liferent or annuity. This will require attention in dealing with a title given by liferenter and fiar, or by an owner with consent of an annuitant.³

Anticipated successions.—Suppose A. is liferenter and B. is fiar, A. discharges his liferent or assigns it to B., either for value or gratuitously. Notwithstanding this the property is deemed to pass on A.'s death if it occur after 31st March 1900, unless the discharge or assignation "was bona fide made or effected twelve months before the death of the deceased [A.], and enjoyment of the property was assumed thereunder immediately upon the "discharge or assignation "and thenceforward retained to the entire exclusion of "A. "and of any benefit to him by contract or otherwise."

Exemptions.—1. Husband and wife pay no duty except estate duty and settlement estate duty. But as to the latter see the Finance Act, 1894, s. 5(1)(a).

- 2. Where the net estate does not exceed £1000 there is no duty beyond estate duty.
- 3. Where estate duty is paid lineal descendants and ascendants pay no legacy, succession, or account duties.
- 4. Where the husband or wife of the legatee is liable in a lower rate of duty than the legatee, the lower rate only is charged. In practice this is allowed though the husband or wife be dead. But it does not apply to the case where the husband or wife of the *testator* is nearer of kin to the legatee than the testator himself is.

When the Claim shifts to the Price.—Under certain circumstances the claim for duty is, on a sale, shifted from the property to the price, so that the purchaser is not concerned with the payment of the duty. This is limited to the case of sales by trustees in terms of a power of

¹ Customs and Inl. Rev. Act, 1889, s. 11 (1).

Finance Act, 1894, s. 12 (estate and settlement estate duties); 16 & 17 Vict. c. 51,

s. 41, 43 Vict. c. 14, s. 11 (legacy and succession duties).

³ Hanson, Death Duties, 4th Ed., 558.

⁴ Finance Act, 1900, s. 11.

sale. In the case of succession duty this is statutory.¹ The statute and the cases seem to contemplate a continuing trust where the proceeds of sale are reinvested in the names of the trustees, but the Department does not read the enactment in this limited sense so long as there is a trust and a power of sale and the property is sold under the power. Estate duty is practically in the same position, because it is so regarded by the Department though there is no express section to shift the duty from the property to the price, unless, indeed, sec. 8 (1) of the Finance Act, 1894, has that effect.²

In the following cases, which are of common occurrence in practice, the claim for the duty will attach to the property, or, at least, the contrary cannot be assumed, viz.: (1) where trustees obtain their power of sale, in some form or other, from the beneficiaries instead of from the truster; (2) this should be held as including a case where the will or settlement contains power of sale, but the consent of a beneficiary is required, not because the instrument makes that condition, but because the beneficiary is entitled to, e.g., a liferent interest in the particular property; (3) where property is destined direct to A. in liferent and to B. in fee, and if they themselves were to constitute a trust for these purposes the same rule should be applied; (4) where the trustees' power of sale arises from the necessity of the case, or is implied and not express, and (5) of course the shifting of duty from the property to the price goes no further than the immediate duty; that is to say, it will not cover duties which had attached to the property before the trust came into operation.

Protection of Purchasers and Lenders.—Statutory provision has been made for this purpose.⁵ But on consideration of the statute it appears that this immunity depends on the Inland Revenue having received notice, unless twelve years have elapsed from the happening of the event which gave rise to an immediate claim to duty.

Official Certificates.—These are useful for two purposes. In the first place a purchaser cannot always receive delivery of the accounts showing payment of duty, and, besides, these certificates afford the proof in a much more convenient form. But in the second and more important place the Department will always state what the claims for duty are, and on payment of these they will certify that all claims for duty have been satisfied, thus giving the purchaser or lender complete immunity. Of course it is necessary that the information given to the Department should be full and correct. It is accordingly recommended that wherever there is room for question the Department should be consulted on full information.

Conditions of Sale.—An agreement to take the title as it stands will not

¹ 16 & 17 Vict. c. 51, s. 42, and, apart from the statute, see cases quoted in Hanson, 558

² Hanson, 195.

Which case is in terms within s. 42 of 16 & 17 Vict. c. 51.

⁴ Hanson, 558. This is expressly charged under s. 15 of 16 & 17 Vict. c. 51 as "transferred interests."

⁵ Customs and Inl. Rev. Act, 1889, s. 12. Finance Act, 1894, s. 8 (2).

⁶ 1894 Act, s. 11 (1).

free the seller from his obligation to pay all Government duties. It is thought that a condition that the purchaser should take the property subject to its "burdens" would not be sufficient either; a heritable bond for £1000 might just as well be said to be covered, which it certainly would not be. Nor would a condition that the purchaser should take the property with its "feu and other duties" be sufficient; that would mean other similar duties, i.e. duties attaching to tenure. It does not appear that doubt is thrown on these points by the case of Davidson referred to on p. 172.

PREFERENCE OF ANCESTOR'S CREDITORS

The only enactment in the Statute 1661, c. 24 with which we are here concerned is that at the close, namely:—

That no right or disposition made by the said appearand heir in so far as may prejudge his predecessor's creditors shall be valid unless it be made and granted a full year after the defunct's death.

This applies to every heir, whether he has made up his title or not, and whether he has taken as heir-at-law or as heir of provision or technically as a disponee. But it does not apply to testamentary trustees. It applies to onerous deeds as well as gratuitous. But apparently it is limited to voluntary 1 deeds, and would not strike at deeds which the heir is under obligation to grant, e.g. discharges, and assignations in lieu of discharges, of heritable securities from which executors are excluded, and discharges of redeemable ground-annuals on redemption by the proprietors.

If, therefore, any voluntary (though onerous) deed is to be taken from any heir within year and day of his ancestor's death, it is necessary to see, not only that the ancestor was solvent, but that his debts have been paid. It may be impossible to obtain accurate information, and the risk is the purchaser's, or lender's, as the case may be.

TIME FOR STATING OBJECTIONS

This is a matter which is usually the subject of express regulation in English contracts of sale and purchase. Here it is different. But it is not to be assumed that a purchaser's right to start objections to the title remains in force up to the very moment of paying the price and accepting a disposition. There is little authority, but the subject received a considerable amount of attention in *Macdonald's* case.² That was certainly a very unfavourable case for the objecting purchaser, for she had paid the price and taken possession. Under these circumstances Lord Kyllachy took this view:—

It is said that until the disposition was adjusted objections to the title were still open and must be held as reserved. I doubt if in the circumstances

1 Bell, Prin. s. 1932.

2 Macdonald v. Newall, 1898, 1 F. 68.

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that was so, but in any case I do not consider that such reservation could extend beyond defects in the title which were capable of being rectified, and of which rectification could be enforced consistently with the contract.

But the case, apart from its specialties, shows the danger of sending a draft disposition for revisal or stating any objections to the title without either stating all objections or making a reservation of objections, or further objections, as the case may be.

EXPENSE OF CLEARING TITLE

It is often a question of great practical importance whether the purchaser is entitled to have his doubts regarding the sufficiency and validity of the title settled by the Court at the expense of the seller. There is no absolute rule on the subject. But it is apparently at present correct to say that even if the Court should decide in favour of the title, the purchaser will obtain expenses against the seller, subject to the following conditions:—(1) that the objection is really serious, for it appears to be an overstatement to say that it is sufficient that the objection is not frivolous; (2) that the purchaser takes up the attitude of a willing purchaser desirous of carrying out the transaction if he can get a good title, and does not claim, on the contrary, that the contract has been cancelled for want of title, and that he is not bound; (3) that he tries the question in the most economical and convenient way under the circumstances of the particular case; and (4) that he rests content with an Outer House judgment on the merits, with expenses.

This matter was considered in the cases noted below, from which the above rules are taken. In view of the importance of the question, the following quotations are given from the opinions.

The first of these cases 1 took the form of a special case. The court by a majority (Lord Deas dissenting) held that the title was such as the purchaser was bound to accept. Notwithstanding the difference of opinion on the merits, no expenses were allowed. Lord President Inglis said:—

The Court are of opinion that no general rule can be laid down that a purchaser who states a plausible objection to the title offered to him is entitled to the expense of clearing his title. If the objection is formidable he may get his expenses, but if the objection, though not frivolous, is not well-founded, it may be proper that he should not get his expenses. In the present case no expenses will be awarded to either party.

The important point here is that though the purchaser convinced one of the judges that his objections were so formidable that he was not bound to proceed, still he did not get his expenses. Looking to the

¹ Dundee Calendering Co. v. Duff, 1869, 8 M, 289.

dicta in the later cases, it is probable that under similar circumstances the same result would not now follow.

In Howard & Wyndham's case 1 the objections originally taken were two, namely, (1) that a certain disposition was granted by a trustee in his own favour, and (2) that there had been too great delay between the service of a schedule of intimation, etc., under a bond and the sale following thereon; and that, at any rate, in view of that delay, there ought to have been six weeks' advertisement of the adjourned sale, and not merely three weeks. The first point was put right, after the case was in Court, by the consent of the trust beneficiaries, and the real expense of the action (which went to proof) was with reference to the second objection; it will be seen, however, that the first objection (which would admittedly have been fatal) was partly founded on by the judges in regard to the disposal of the expenses question. The Lord Ordinary (Wellwood) sustained the title, and gave neither party expenses. The purchaser reclaimed.

THE LORD PRESIDENT (INGLIS): There remains the question of expenses, and that is a question of some difficulty. The objection I have been dealing with is, I think, clearly bad, and I should not have much sympathy with the person who raised such an objection had it not been for the case of Stewart.²
. . . I rather think, therefore, that, according to the ordinary rule of practice, there being one serious objection which was afterwards removed, and the second objection having received some countenance in obiter dicta, the buyer is entitled to take the judgment of the Court, and that at the expense of the seller, as the objection is not frivolous. Agreeably to that rule of practice, I think that the purchaser was entitled to expenses in the Outer House. Holding that opinion, I find it difficult to refuse him his expenses in this reclaiming note, for he has been successful in getting the finding of the Lord Ordinary as to expenses reversed. I think he is entitled to his expenses both in the Outer and in the Inner House.

LORD SHAND: How far a party in such circumstances is entitled to get a judgment from the Inner House as well as from the Lord Ordinary, I am not prepared to say. I have grave doubts whether he is so entitled.

LORD ADAM: Whether it is a sound practice or not, it is an inveterate practice that when the title offered is not clear or marketable, the buyer is entitled to come into Court to have the doubts as to the title settled; and although the result is that the title is found to be good, still, if the objections taken to it are not frivolous, he is entitled to his expenses.

LORD M'LAREN: As to expenses, we have an absolute discretion in cases of this kind in awarding or refusing them. If the title is challenged on frivolous or perfectly unfounded grounds, we may give the seller his expenses. When a really important question is raised we may, on the other hand, give the purchaser his expenses. . . . There may very well be an intermediate class of cases where neither party should get expenses from the other. That was the

¹ Howard & Wyndham v. Richmond's Trs., ² Stewart v. Brown, 1882, 10 R. 192. 1890, 17 R. 990.



view taken by the Lord Ordinary in this case, and there is something to be said for that view. But, looking to the observations of the judges in the case of Stewart. . . .

In Cameron's case 1 the sellers brought an action for implement. The purchaser pleaded that he had rescinded the contract on account of the sellers' refusal to purge the record. The Lord Ordinary (Kyllachy) decided in favour of the sellers, and gave them expenses against the purchaser. The latter reclaimed.

LORD KINNEAR: The purchaser might nevertheless have been entitled to have the question tried at the expense of the seller if these proceedings had been taken for the purpose of clearing the title by a judgment. But the seller over and over again offers to clear the record, and the buyer's only answer is, that the contract is at an end; and therefore it appears to me that the true question raised by this action is not how the title should be cleared, but whether the purchaser was entitled to throw up the contract. I agree with your Lordships that he was not, and he must accordingly pay the expenses of this case.

The purchaser may even be found entitled to his expenses of unsuccessfully objecting to the sufficiency of the means which the seller proposes for rectifying the title.²

Cameron v. Williamson, 1895, 22 R.
 Buchan v. Muirhead's Trs., 1901, 9
 See also Walker v. Galbraith, 1895, S. L. T. No. 15.
 R. 347.

SECTION XII

FEUS

Constitution of the Contract.—See p. 146. But receipts for "feu-duty" may result in the constitution of the contract. In the case cited the first receipt was holograph; it identified the feu; there was possession; and the receipts covered a long period.

Capacity and Powers of Parties.—Reference is made to the chapter on dispositions, p. 292. The following may, however, be specially mentioned:—

TRUSTEES

It is not easy to say whether the Trusts Act, 1867, treats power to sell and power to feu as two separate and distinct powers, or as one power. In sec. 3 the two are treated as distinct; and certainly every will or settlement should confer the powers articulately if such is intended. But at the same time sec. 4 declares with reference to

all powers of sale conferred on trustees by the trust deed or by virtue of this Act... it shall be lawful in such sales to sell subject to or under reservation of a feu-duty or ground-annual at such rate and on such conditions as may be agreed upon.

It accordingly appears that a power to sell will enable trustees to grant feu-rights. But see Lord Trayner in *Bruce v. Stewart.*² Under special circumstances a remit may be dispensed with.³ As to English trustees, see the case cited.⁴

Fiduciary Fiars may obtain from the Court reasonable powers of administration, including power to feu.⁵

HEIRS OF ENTAIL

It is necessary to distinguish (1) feus granted by the heir in possession with such consent, if any, as would be required to enable him to disentail; (2) feus granted by him without any consent; and (3)

¹ Stodart v. Dalzell, 1876, 4 R. 236.

⁴ Pender's Trs., Petrs., 1903, 5 F. 504.

² 1900, 2 F. 948.

⁵ Pottie, Petr., 1902, 4 F. 876.

² Reddie's Trs., Petrs., 1902, 10 S. L. T. No. 286.

feus created under an order for sale. In every case there must be judicial sanction.

1. Feus with Consent.—The enabling sections are: the 1848 Act, s. 4, and the 1882 Act, s. 4. In saying "with consent," all that is meant is, that the consent, if necessary, and if not given voluntarily, must be paid for and dispensed with under the 1875 Act, s. 6, and the 1882 Act, s. 13. The petition must be to the Court of Session. The tutors of a pupil heir, or a minor heir with consent of his curators, though they cannot disentail, may apply for power to feu (1882 Act, s. 11), "provided that the Court shall not grant such application unless they are satisfied that it is for the benefit of the heir by whom or on whose behalf it is made."

Section 4 of the 1848 Act contemplates the charters being granted "at the sight of the Court," and apparently, unless this has been dispensed with, it would require either special judicial sanction to the individual charter or the adjustment by the Court of a form of charter. But this condition will be expressly dispensed with if the deed of consent, if any be required, be so expressed.¹ Observe further that if any consents be required, the authority will be "unconditional, or subject to conditions, etc., according to the tenor of such consents."

2. Feus granted without any Consent.—Special authority has been granted by several enactments.

1840.2 "Sites of places of public Christian worship and schools, and for burying-grounds and play-grounds for such places of public worship and schools respectively, and also for dwelling-houses and gardens for the ministers and schoolmasters." Quarter acre for church; one acre for burying-ground; one-eighth acre for dwelling-house; one acre for school and play-ground; half acre for garden. "Such yearly feu-duty . . . as may be agreed upon, though inadequate and below the just avail or value." No grassum, etc. Next heir, if not consenting, receives notice. If granted to trustees, their successors in office have a completed title without any transference or renewal of the investiture. Subjects not to be diverted or left unused; if so, heir in possession may obtain declarator of forfeiture.

1848.³ Practically superseded by the 1868 Act, except as regards 1853.⁴ the machinery of the continuing petition.

1853. The same Act makes special provision for feus "of any portion of such entailed estate, or any right or interest therein," to any company authorised to acquire same under the Lands Clauses Act. No grassum or duplicand is allowable. Special facilities are given for recovery.⁵ Ground-annuals may be substituted for feu-duties.

1868.6 "Any part of such estate (but reserving the minerals

¹ Christie, Petr., 1888, 15 R. 793; ⁴ 1858 Act, ss. 6-13. Lockhart, Petr., 1901, 8 S. L. T. No. 412. ⁵ 1858 Act, ss. 14-16.

² 8 & 4 Vict. c. 48. ⁶ 1868 Act, 81 & 82 Vict. c. 84, ss. 3-5.

therein and the right of working the same) except the garden, orchards, policies, or enclosures adjacent to or in connection with the manor place, in so far as such garden, orchards, policies, or enclosures are necessary to the amenity of the manor place." No grassum. Notice to next heir. Sheriff appoints man of skill to value and report. report favourable, sheriff may authorise the petitioner and his successors at any time within ten years to feu, with a fixed minimum rate, subject to conditions, "and also subject to a nominal taxed sum of 1d. stg. in lieu of all casualties on the entry of heirs and singular successors." If buildings of annual value of double the feu-duty not erected within five years after the feu, or if not maintained of that value and in good repair, charter void. It is not sufficient that buildings are on the ground at the date of the feu. It appears that it is not competent to stipulate for duplicands at intervals, having regard to the abovequoted provision under the old law. What is paid as duplicand must be assumed to be taken off the feu-duty, so that justice might not be done as between the different heirs. The decree must be produced, and it must be seen that its conditions have been carried into effect.

1882. A feu may be authorised of part of the estate not exceeding two acres . . . for a scientific purpose or other purpose of public utility, and the feu-duty may be "inadequate and below the just value."

Under both the 1840 and the 1868 Acts the petition is to the sheriff, with, in the latter case, express provision for an appeal to the Court of Session. Under the 1882 Act there is also an appeal to the Court, if indeed it is not competent to apply to the Court in the first instance.²

3. Feus under Order for Sale.—See p. 393. The Court, "if more advantageous to the parties, may direct the sale to be for a feu-duty instead of a price to be immediately paid, or partly for a feu-duty and partly for a price," 8

GLEBES

The statute is 29 & 30 Vict. c. 71 (1866). The glebe or any part of it may be feued on application to the Teind Court by the minister, with consent of the presbytery and the heritors. Coterminous proprietors may object (s. 11), and if authority granted, they have right of pre-emption for thirty days (s. 17). The decree fixes a minimum feu-duty (s. 13). Duplicands are allowable (s. 21). Charters are granted by the minister, with consent of the heritors (testified by their clerk) and the presbytery (testified by moderator and clerk) (s. 20). The feu-duties go to the minister, and his widow, heirs, and executors have a right corresponding to ann (which it is

¹ Stevert v. Murdoch, 1882, 9 R. 458; ² s. 6 (2). M'Dovel's Trs. v. M'D., 1902, 10 S. L. T. ³ 1882 Act, s. 22. No. 156.

202 **FEUS**

thought would not be affected by the Apportionment Act, 1870). The expenses of the petition, and of making streets, etc., are declared a real burden upon the glebe. The minister bears the interest on this till the principal is paid from casualties and sums received from feuars towards roads, etc., all which are invested to form a sinking fund for the purpose, the interest thereof being, however, paid to the minister (s. 19). The expense of charters, so far as not paid by the feuars, falls on the minister.

CONDITIONS OF THE FEU

The matters requiring mention under this head are:

- 1. Restraint on alienation without superior's consent.
- 2. Monopolies to superior's agents.
- 3. Prohibition of subinfeudation.
- 4. Clause of pre-emption.
- 5. Clause of redemption.
- 6. Reservations from the subject.
- 7. Building conditions, etc.

1. PROHIBITION OF ALIENATION

Abolished in 1747; the condition was annulled where it had been already made, and prohibited for the future.1

2. MONOPOLIES TO SUPERIOR'S AGENTS

In the same position under the 1874 Act, s. 22.

3. PROHIBITION OF SUBINFEUDATION

This is in quite a different position. If the prohibition was imposed before the 1874 Act, it is effectual still2; but if in any charter dated on or after 1st October 1874, it is invalid (s. 22). An alternative holding was not an infringement of the prohibition.8

4. CLAUSE OF PRE-EMPTION

The usual form is that the vassal must This is a valid clause.4 offer the property to the superior at the price which has been offered by some one else, to whom otherwise the vassal intends to sell. apparently a clause requiring the vassal, before a sale to anyone else, to offer the property to the superior at a sum fixed in the charter or at a price to be fixed by arbitration would be sustained, seeing that both of these elements have been allowed effect in a clause of redemption.5

¹ 20 Geo. II. c. 50, s. 10.

² Campbell v. Dunn, 1828, 6 S. 679.

³ Colquhoun v. Walker, 1867, 5 M. 778.

⁴ Preston v. E. Dundonald's Crs., 1805,

⁸ Ross' L. C.; L. R. 289; Mar v. Ramsay, 1838, 1 D. 116.

⁵ M'Elroy v. Duke of Argyll, 1901, 4 F.

clause of pre-emption applicable to sales by the feuar or his heirs or assignees has been held to apply to singular successors.1 This frequently occurs owing to the clause being directed against the feuar "and his A clause of pre-emption is an awkward and even a dangerous clause from the vassal's point of view. He can make no contract of sale except provisionally on the superior not exercising his power, which must prejudice the sale. If possible, therefore, a waiver should be obtained beforehand from the superior. Further, the clause is apt to be lost sight of; and then, if an absolute contract of sale be made, the seller may be liable in damages to the purchaser. A right of pre-emption is not infringed by a lease for nineteen years with an obligation to renew for the same term ad infin. unless the lessor shall take over the buildings at a valuation.² As to withdrawal of offer made to the person entitled to the pre-emption, see the case noted below, 3

5. CLAUSE OF REDEMPTION

This is a clause under which the vassal is taken bound to sell to the superior on the latter's initiative, whether the vassal be contemplating selling or not. The clause is valid, and an example is found in M'Elroy's case, supra.

6. RESERVATIONS

The chief reservation is minerals, in regard to which the important matters are (1) the extent of the reservation; (2) power to work; (3) liability for surface damage.

Extent.—Care will be taken to see that whatever is chiefly in view is specially mentioned, and that the things specially mentioned are not so mentioned as to detract from the force of the general words As regards the general words "mines and minerals," they "are not definite terms: they are susceptible of limitation or expansion. according to the intention with which they are used"; and to determine that, "regard must be had not only to the words employed to describe the things reserved, but to the relative position of the parties interested and to the substance of the transaction." 4 As to particular phrases. the undernoted cases show expressions which were held insufficient to reserve quarries, black-band ironstone, right to quarry stones for purposes in connection with coal workings,7 subsoil clay.8 The clause ought, of course, to take the form of a reservation of the substances; but a reservation of right to work the minerals has, under certain

¹ Christie v. Jackson, 1898, 6 S. L. T. No. 320.

² Lumsden v. Stewart, 1843, 5 D. 501. ² Smith Ltd. v. Colquhoun's Tr., 1901,

⁴ Lord Watson in Mags. of Glasgow v.

Farie, 1888, 15 R. (H. L.) 94.

⁵ Menzies v. E. Breadalbans, 1822, 1 Sh.

App. 225; Duke of Hamilton v. Bentley, 1841, 8 D. 1121.

⁶ Forth, etc., Co. v. Wilson, 1848, 11 D. 122.

⁷ Harrowar's Trs. v. Erskins, 1827, 5 S. 307.

⁸ Farie, supra.

circumstances, been held to have the same exclusive effect. This, however, might very well vary according to circumstances.

Right to Work.—It appears not to be decided what is the effect of a reservation of the minerals without reserving relative working powers. In that state of matters (which, of course, ought never to be allowed to arise) there will be three questions: (a) whether the superior is entitled to remove the minerals at all; (b) whether he is entitled to remove them to such an extent or in such a manner as to endanger the surface; and (c) whether he is entitled to enter upon the surface of the feu for the purpose of working. It is thought that the first of these questions falls to be answered in the affirmative, and the second and third in the negative. As regards the first, the minerals are the superior's, and why should not he take what is his? But then, as regards the second, even full money compensation is no reason why the vassal, against his will, should lose his property or have it damaged. And as regards the third, even if the superior cannot otherwise obtain access to the minerals, sibi imputet; besides which, he could always obtain access; it is really a matter of expense, and why should the vassal suffer to save the superior? 8

Compensation.—The cases establish three propositions: that damages are due though not expressed; that they are not limited to buildings on the feu when it was given out; and that a contract that there shall be no liability for damage is binding.

7. BUILDING CONDITIONS

These conditions are now matters of great importance, and it is necessary to consider them in two relations, namely, (1) between superior and vassal, and (2) between co-vassals.

As between the superior and the immediate feuar and his heirs the matter is one of contract only, and the conditions will be enforced, subject to the following rules 5:—

- (1) The burden or condition must not be contrary to law or inconsistent with the nature of the property. It must not be contrary to public policy by making land unmarketable or creating a monopoly. It must not be useless or vexatious.
- (2) The superior must have an interest to enforce it. But "prima facie the vassal in consenting to be bound by the restriction concedes the interest of the superior, and therefore the onus is upon the vassal who is pleading a release from his contract to allege and prove that,

Duke of Hamilton v. Dunlop, etc., 1885,
 R. (H. L.) 65.

² Buchanan v. Andrew, 1873, 11 M. (H. L.) 18.

^{*} Smith v. Macgill, 1768, Mor. 15266; Menzies v. E. Breadalbane, 1822, 1 Sh. App. 225.

⁴ Neill's Trs. v. Dixon Ltd., 1880, 7 R. 741. See also as to the extent of the claim, Hallpenny v. Dewar, 1898, 25 R.

⁵ Aberdeen Tailors v. Coutts, 1840, 1 Rob. App. 296.

owing to some change of circumstances, any legitimate interest which the superior may originally have had in maintaining the restriction has ceased to exist."

The real question, however, is between the superior or his successor and a singular successor in the property, in which case two additional elements must concur, namely:

- (1) A real burden must be intended. In the pure case of an obligation to build this will be inferred unless there should be words limiting the obligation to the immediate feuar and his heirs. And so with an obligation to pay a share of maintenance of common pertinents in all time coming. But it is otherwise with an obligation to pay the cost, or a share of the cost, of buildings already erected or works already executed: in these cases there must be words declaring a real burden.² Further, even that will not be sufficient unless a definite sum is specified. An obligation on the vassal and his successors to pay the expense, or a share of the expense, of works to be executed by the superior, e.g. drains or paving, is not binding against a singular successor, even though his title is expressly subject to all the conditions of the charter.³ There ought to be a definite sum stated, and an express declaration of a real burden.
- (2) The condition must enter the record.4 This is in no way limited to money payments. It extends to ordinary conditions as to buildings, e.g. nature, use, height, line of street. Though definite in themselves they will fail to bind a singular successor if they are not made conditions of the feudalised right. In the last case 4 where this plea was sustained reference was made to the distinction between the position of a singular successor and one who has himself made a contract with the superior. It is not enough to say that the singular successor is a party to the continuing contract of feu-farm, and it would appear that this is a case where the superior may be said to be in effect prejudiced by the abolition of renewal of investiture. also suggests the further consideration that this is a matter to be looked to before accepting a writ of clare constat or a charter of novodamus, either of which might contain clauses the acceptance of which by the vassal might easily be held to make a contract between him and the superior to the effect of depriving him of his immunity from the conditions in question.

It is permissible to question whether this requirement of publication on record would apply to any condition which could be brought within the category of any recognised servitude, e.g. altius non tollendi. If it could be classed as a servitude it would enjoy the privilege of

1900, 2 F. 918, and Menzies v. Comrs. of Cal. Canal, 1900, 2 F. 953.

¹ Per Lord Watson in Earl of Zetland v. Hislop, 1882, 9 R. (H. L.) 40. See further observations as to what constitutes an interest, and how far it is competent to go into the matter, in Moyes v. M'Diarmid,

² Coutts, supra.

³ Mags. of Edin. v. Begg, 1883, 11 R. 352.

⁴ Liddall v. Duncan, 1898, 25 R. 1119.

servitudes, namely, that it is effectual though not recorded. No doubt there must be a dominant and servient tenement; but is not that condition fulfilled by the existence of the two fees of superiority and property, even if the superior should not also be the owner of the adjoining ground?

Construction of Conditions.—The principle is the presumption in favour of freedom, and a consequent strict rule of construction against any alleged restriction. This is clearly recognised and well illustrated in Haldane's case.1 In that case a house was disponed with back yard and "stable ground behind," and it was declared that "the coach-house and stables to be erected on the stable ground shall be in strict conformity" to plans signed as relative to the charter, "and not otherwise." Although it was clearly recognised that it was contemplated and intended that coach-houses and stables should be erected, still held (1) "that the vassal was not bound to erect coach-house or stable, because an obligation to build must be unequivocally expressed and cannot be derived from inferences"; (2) that even if he were, he was not bound to use them as such, (3) and under no prohibition against using them for other purposes; (4) that the vassal was not prohibited from erecting on the stable ground buildings other than coach-house and stable; and (5) that these other buildings need not conform to the plans prescribed for stables.

That the superior should make it very plain that no additional buildings beyond those mentioned in the charter are to be allowed, if that be the intention, is clear from the case of Wyllie.² There was there an obligation to erect, within two years, offices conform to a plan to be approved of by the superior; a provision that "no buildings of any other description shall be built on the ground hereby disponed"; and a further provision that the unbuilt-on ground should be used only for gardens, etc. The vassal was held entitled to add a stable after twelve years; and it was indicated that the vassal was at liberty to put up any additional buildings, so long as these were not of a different class from a dwelling-house and offices. The prohibition ought to have been levelled at "buildings and erections of any kind whatever, except only the one house and offices herein specified," instead of at "buildings of any other description."

THE RELATION OF CO-VASSALS

It is obvious that, unless the conditions are enforceable by the vassals inter se, they afford no security to the vassals. If not so enforceable the conditions will be in the absolute power of the superior, who may discharge them for a consideration, or sell the superiority to the vassal who wishes to alter the nature of part of the property; and

¹ Walker's Trs. v. Haldane, 1902, 4 F. ² Wyllie v. Dunnett, 1899, 1 F. 982, 594.

in either of these ways the other vassals will lose the benefit of the restrictions on the faith of which they may have purchased.

The leading case is Hislop, in which Lord Watson delivered the following dicta:—

In order to the constitution of such a jus quasitum it is essential that the conditions to be enforced shall appear in all the feu-rights; that they shall in all cases be similar if not identical; and of such a character that each feuar has an interest in enforcing them.

Dealing with previous cases where the right of mutual enforcement had been allowed, his Lordship said:

All of these appear to me to fall under one or other of two categories, either (1) where the superior feus out his land in separate lots for the erection of houses in streets or squares upon a uniform plan, or (2) where the superior feus out a considerable area with a view to its being subdivided and built upon, without prescribing any definite plan, but imposing certain general restrictions, which the feuar is taken bound to insert in all subfeus or dispositions to be granted by him.

The judgment laid it down that in order to set up a jus quæsitum in the co-feuars, it is not sufficient that they hold of the same superior, unless some mutuality and community of rights and obligations be otherwise established between them, and that this can be done only by (1) express stipulation in their respective contracts with the superior, (2) reasonable implication from some reference in both contracts to a common plan or scheme of building, or (3) mutual agreement between the feuars themselves. Such a right was held to exist in the recent case of Johnston.² There is no mutuality if the superior is entitled to discharge the conditions.⁸

Suppose that the superior has in a feu-charter bound himself to insert similar conditions in all charters of the remainder of a defined area, and that he fails to implement his obligation, and goes and grants charters without such conditions, it follows that he will thereby release the first feuar from any counter obligations in the charter,⁴ and he may be liable in an action of damages at the instance of the first feuar. But will the second charter be valid to the effect of giving the vassal thereunder a title free from the conditions? The answer must be in the affirmative,⁵ except, perhaps, in so far as the conditions in question can be brought within the category of definite servitudes, and assuming that the area to which they are to apply has been sufficiently identified in the first charter.

⁵ Walker, etc. v. Park, 1888, 15 R. 477; Stevenson, supra.



¹ Hislop v. MacRitchis's Trs., 1881, 8 R. (H. L.) 95.

² Johnston v. Walker's Trs., 1897, 24 R. 1061.

² Turner v. Hamilton, 1890, 17 R. 494.

⁴ Stevenson v. Steel Co. of Scot. Ltd., 1896, 23 R. 1079, affd. 1899, 1 F. (H. L.)

On the question of interest to enforce the conditions, it is obvious that the vassal will often have more interest than the superior.¹

Even assuming that the conditions were valid when imposed, there may have been such consent to deviations in the general scheme, either expressly or by acquiescence, as will bar both superior and co-vassals from having the conditions enforced.²

Obligation to Build—who liable?—The following are liable: (1) all surviving proprietors before or during whose ownership the obligation had become or became enforceable according to the terms of the feuright; (2) the representatives of any of them who have died, it being no defence to say that they have not taken up the property or the deceased's share of it; (3) the proprietor at the time when the proceed-The liability is joint and several; against the first and ings are taken. third, it is for implement or damages; against the second, for damages only.8 From this it appears that liability is escaped by finding a disponee or by death, provided either occur before the obligation has become enforceable. But (1) the disponee is liable as above stated if proprietor when the obligation is enforceable; (2) the same as regards the successor on death if accepting; but (3) quære as to time, seeing that a proprietor who, disponing or dying on 14th May, has done nothing towards the erection of a tenement which according to the charter was to be complete on 15th May, has clearly been in default.

TERMS OF OBLIGATION FOR FEU-DUTY

This applies chiefly, though not necessarily exclusively, to feurights in the form of feu-contracts. The point is—shall the original feuar, his estate and representatives, remain liable for the feu-duty after death or alienation? The ordinary rule is that they do not. They are liable for all obligations prestable up to that date, including proportion of feu-duty to that date only, but for nothing further; and they are not liable in an action of damages for breach of contract; that is, on the assumption that the successor is infeft, and notice of change of ownership is given. But the rule is altered if the feuar binds himself, his heirs, executors, and successors, jointly and severally, the result being to bind the feuar's estate and general representatives for ever. This may lead to many irritating and awkward results; and it is for consideration whether, as regards the feu-duty, the obligation should be so expressed; it is quite proper as regards initial operations such as building, enclosing, etc.

Stewart v. Bunten, 1878, 5 R. 1108;
 E. Zetland v. Hislop, 1882, 9 R. (H. L.) 40.

² Calder v. Edin. Merchant Co., 1886,

³ Marshall v. Callander etc. Co., 1895, 22 R. 954, 23 R. (H. L.) 55; Macrae v.

Mackenzie's Trs., 1891, 19 R. 138; Rankine v. Logie Den etc. Co., 1902, 4 F. 1074.

⁴ Aiton v. Russell's Exects., 1889, 16 R. 625.

⁵ See p. 336, infra.

Dundee Comrs. v. Straton, 1884, 11 R. 586.

DUPLICANDS

The only other matter which requires special attention in connection with charters is the stipulation for payment of additional sums at stated intervals. The point is, to make it clear what the additional sum is, i.e. over and above the year's feu-duty. The proper way is to express it as a stated sum without reference to the feu-duty. Thus, if the feu-duty is £5, the clause may run: "the additional sum of £10 at the term of Whitsunday 1920, and at same term in every nineteenth year thereafter, over and above the feu-duty of the year." This will give a total payment of £15 in each such year—what is known as a "duplicand over and above." If, on the other hand, a "simple duplicand" only is desired, the only change is to make the £10 in the above clause £5.

It has been finally settled that such stipulations as "a duplicand over and above the feu-duty of the year," "doubling the feu-duty over and above the feu-duty of the year," "paying a double of the feu-duty over and above the feu-duty of the year," and all similar expressions, entitle the superior to three years' feu-duty altogether on each such occasion. This is on the ground that the superior would be entitled to two years' feu-duty altogether under any of the above clauses though the words "over and above the year's feu-duty" were omitted, that in that way these words would receive no effect, that effect must be given to them, and that the proper effect is to give the superior (1) what he would have got if they had been omitted, i.e. two years' feu-duty, and (2) in addition, "the year's feu-duty over and above," being the exact words of the clause—in all, three years' feu-duty.

It may be useful to print the "tabular view" given in the Zetland case as the result of inquiries then made of conveyancers as to the terms of charters and practice under them. It is as follows:—

NAME OF LANDS.	REDDENDO CLAUSE.
Earl of Zetland's lands at Grangemouth	"And doubling the same (the feu-duty) at the entry of every heir or singular successor to the said piece of ground and buildings erected thereon; upon payment whereof, over and above the feu-duty of the year in which the entry is made, I and my foresaids shall be obliged to enter and receive them as vassals without any other composition whatever."

¹ Earl Zetland v. Carron Co., 1841, 3 D. 1124; Alexander's Trs. v. Muir, etc., 1903, 5 F. 406.

Name of Lands.	Reddendo Clause.
St. Leonard's Grounds, Edinburgh, comprising Clerk Street, Rankeillor Street, Montague Street, and St. Leonard Street	"Doubling the said feu-duty of £ the first year of the entry of each heir or singular successor in name of entry money to the foresaid subjects, and that over and above the feu-duty for the year wherein the entry is made."
Grounds of Orchardfield .	"And doubling the said feu-duty of £ the first year of the entry of each heir or singular successor, in name of entry to the foresaid subjects, and that over and above the feu-duty for the year wherein the entry is made."
Lands of Drumsheugh or Moray Grounds, Edin- burgh.	"And paying as composition, at the entry of each heir and singular successor to the said area or piece of ground hereby disponed, two years' feu-duty, and that over and above the feu-duty for the year in which such entry is made."
Coates Grounds, including Melville Street, Walker Street, Coates Crescent, etc., Edinburgh.	First Set of Charters.—"And also paying the double of the said feu-duty at the entry of each heir or singular successor to the subjects, etc., over and above the feu-duty of the year in which the entry is made." Second Set of Charters.—"And trebling the said feu-duty at the entry of each heir or singular successor to the premises."
Broughton Grounds, comprising Annandale Street, Haddington Place, Hope Crescent, and other streets not yet built upon, Edinburgh.	"Doubling the said feu-duty of £ for the entry of each heir or singular successor to the said subjects, over and above the feuduty due for the year wherein such entry is made."

In each of these cases the uniform practice was to pay three years' feu-duty altogether in each year in which the additional payment fell due. That is—feu-duty, 1; additional payment, 2—in all, 3.

In the Zetland case itself, in which the result was the same, the clause was, "and paying a duplicand of the said feu-duty at the end of every twenty-five years, upon payment of which duplicand over and above the feu-duty of the year in which it falls due," the superior was to be bound to give an entry.

In the recent case of *Cheyne*, the clause ran, after the stipulation for feu-duty, "as also the *further* sum equal to the double of the feuduty" on the entry of heirs and singular successors; but there were no

¹ Cheyne and ors. v. Phillips, 1897, 5 S. L. T. No. 38.

words "over and above." The result was the same: three years' feuduty altogether. But the words "as also" alone, without the word "further" or similar words, are not sufficient. If, however, the view taken in *Alexander*, that a double or duplicand is two feu-duties be sound, then the result might be different if the double were payable, not at stated intervals along with the feu-duty, but on the entry of heirs and singular successors. See *Alexander* as to rectifying past erroneous payments.

SKELETON FORM OF CHARTER

I, A., heritable proprietor of the subjects hereinafter disponed, in consideration of the feu-duty and other prestations after specified, do hereby sell and in feu-farm dispone to B., and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [description]: But always with and under the burdens, conditions, declarations, and others specified in the [refer to prior deed so far as subsisting and applicable: -With entry at the term of To be holden the said subjects of and under me and my heirs and successors in feu-farm fee and heritage for ever: Paying therefor to me and my foresaids the sum of £ yearly in name of feu-duty, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said feu-duty at the term of for the half-year preceding, with a fifth part more of each term's payment of liquidate penalty in case of failure in punctual payment, and with interest at the rate of five per centum per annum on each term's payment from the time the same falls due till paid, and paying the additional sum of £ at the term of and at the same term in every year thereafter over and above the feu-duty of the year, with penalty and interest as provided in the case of the feu-duty: And I assign the writs, but to the effect only of maintaining and defending the right hereby granted: And I assign the rents: And I bind myself to free and relieve the said B. and his foresaids of all feu-duties and casualties payable to my superiors now and in all time coming, and of all public, parochial, and local burdens exigible prior to the said date of entry: And I grant warrandice: And I consent to registration hereof for preservation. -In witness whereof.

CHARTER OF SITE FOR A VILLA

I, A., heritable proprietor of the area of ground hereinafter disponed [or heritable proprietor of the lands of X., of which the area of ground hereinafter disponed forms a part], in consideration of the feu-duty and other prestations after specified,

GRANT

do hereby dispone to B. and his heirs and disponees whomsoever, the said B. and his foresaids being hereinafter referred to as "the feuers" (but excluding assignees before infeftment hereon or registration hereof in the register of

1 Alexander's Trs., supra.

sasines, and declaring that these presents shall be a warrant for infeftment, or may be registered as aforesaid, only for six months from the date hereof) heritably and irredeemably,

DESCRIPTION

All and Whole that area of ground containing or thereabouts imperial measure, and bounded as follows, namely [specify boundaries] as the said area of ground hereby disponed is delineated and coloured on the plan annexed and signed as relative hereto, and which area of ground is part of the lands of X. in the county of Y. [or, and which area of ground is part of the subjects in the county of Y.] particularly described in [specify prior title] dated and recorded in the division of the general register of sasines for the county of Y. on :

SUBSISTING CONDITIONS, IF ANY

But these presents are granted, and the said area of ground is disponed, with and under the burdens, conditions, declarations, and others specified in [refer to prior recorded writ setting out the conditions, if any, of grunter's holding], so far as subsisting and applicable.

FEUING CONDITIONS

And also with and under the burdens, conditions, declarations, and others following, namely:—

1. TO BUILD

First. The feuars shall be bound to erect and complete before the term of , and thereafter to maintain and uphold in all time coming on the said area of ground, a detached villa residence, consisting of two flats and attics, but with no sunk or semi-sunk flat, and in all respects conform to and on the site shown on the plans signed by me and the said B. as relative hereto. The house shall be built of stone from quarry, and shall be covered with blue slates. The house shall be erected at a cost of not less than £

2. ONE DWELLING-HOUSE ONLY

Second. The said house shall be used as one private dwelling-house only, and for no other purpose, and shall never in any way be subdivided or occupied by more than one family. No other buildings or erections of any kind whatever, except the walls and other enclosures, shall ever be erected on the said area of ground; and the same, so far as not occupied as the site of said house, shall be used as ornamental garden ground in front, and as such and as a green for bleaching or drying clothes at the back, and for no other purpose whatever.

3. WALLS, ETC.

Third. The feuars shall enclose the said area of ground in front with a parapet wall and railing similar to those already erected on the feu immediately to the west, and at the back and on the east they shall erect boundary walls similar to the boundary wall already existing on the west, which walls they may erect one-half on the adjoining ground, and they shall be entitled to recover one-half of the cost thereof from the adjoining feuars when the adjoin-

ing areas are feued, but they shall have no claim in respect thereof against me or my successors. And as regards the boundary wall already erected on the west, which has been erected one-half on the area of ground hereby feued, the feuars shall be bound forthwith to repay to the adjoining feuar one-half of the cost thereof. The said enclosures shall be completed by the feuars before the term of

The feuars shall in all time coming maintain the parapet wall and railing in front at their sole expense, and they shall maintain the other enclosures jointly with the adjoining feuars, or at their own sole expense so far and so long as there is no adjoining feuar.

4. ROAD, ETC.

Fourth. Whereas I have formed the roadway opposite to the said area, and have put down surface water channels, the said B. has paid to me, on delivery of these presents, the sum of £, being the share of the expense of said road and channels effeiring to the said area. And if and when the city authorities require the same to be done, the feuars shall be liable to causeway the roadway so far as opposite to the said area, and that jointly with the opposite feuar or feuars, or if or so far as the ground on the opposite side may not then have been feued, then with me or my foresaids, and they shall also be liable to put down the pavement in front of the said area at their own sole expense. And the feuars shall maintain the pavement and water channel on their side of the road in front of the said area at their sole expense, and the roadway jointly as aforesaid, and that all so far and so long as the same may not be taken over and maintained by the city authorities.

5. DRAINS

Fifth. Whereas I have formed a common drain which serves the said area, the feuers shall be entitled and bound to connect the drainage system of the said house therewith to the satisfaction of the burgh engineer, and on delivery of these presents the said B. has paid to me the sum of \pounds , being the proportion of the expense of said common drain effeiring to the said area.

6. FIRE INSURANCE

Sixth. The feurrs shall be bound to keep the said house to be erected on the said area of ground constantly insured against loss by fire with an established insurance company for the full value thereof [in the name of me or my foresaids primo loco], and to produce to me and my foresaids from time to time when required the policies of insurance and the termly receipts for payment of the premiums. And in the event of the said house being destroyed or damaged by fire, the feurrs shall be bound to restore it to the stipulated value as aforesaid within one year after such destruction or damage, and the whole sum to be received from the insurance company shall be expended at the sight of me or my foresaids in re-erecting the said house or repairing the damage done by such fire, and the house shall be re-erected or restored so as to be in all respects consistent with the conditions of this charter.

7. PRODUCTION OF VASSAL'S TITLES

Seventh. The feuers shall be bound to make this charter and the whole title deeds of the said area of ground furthcoming to me and my foresaids for

a reasonable time on demand, but not more frequently than once in five years, and that free of expense against me or my foresaids.

8. SUPERIOR'S POWER TO ALTER PLANS

Eighth. I and my foresaids shall be entitled to make or allow at pleasure such alterations or deviations as I or they may think fit upon any feuing plans of the lands of X. [or, the remainder of my property of which the said area of ground forms part], or roads or drains thereof, or even to depart entirely therefrom; and in the event of my or their doing so, the feuars shall have no right or title to object thereto, and shall have no claim in respect thereof.

IRRITANT AND RESOLUTIVE CLAUSES

Declaring, and it is by acceptance agreed, that if the feuars shall contravene or fail to implement any of the burdens, conditions, declarations, and others herein written, this present feu-right, and all that may have followed thereon, shall in the option of me and my foresaids become void and null, without declarator or other process of law to that effect, any law or practice to the contrary notwithstanding; and the feuars shall forfeit all right and title in and to the said area of ground and house thereon, which shall in that event revert to me and my foresaids in like manner as if these presents had never been granted; and in addition, the feuars shall remain liable to me and my foresaids for payment of the bygone feu-duties and performance of the prestations incumbent on them under these presents prior to the date of such forfeiture: All which burdens, conditions, declarations, and others, and this irritant and resolutive clause, are hereby created real and preferable burdens affecting the said area of ground and the said house to be erected thereon, and are appointed to be set forth at full length in any notarial or other instrument to follow hereon, and to be set forth at full length or validly referred to in terms of law in all rights, transmissions, and investitures thereof, otherwise the same shall be void and null.

[Term of entry and remaining clauses as on p. 211.]

FEU-CHARTER OF SITE FOR TENEMENT

[Previous form, to first feuing condition.]

1. TO BUILD

First. The feuars shall be bound to erect before the term of and thereafter to uphold and maintain in all time coming, on said area of ground on the sites shown on the said plan, and according to detailed plans and elevations to be approved in writing by me or my successors previous to the commencement of building operations, a tenement of main-door and half-flat dwelling-houses four storeys in height, neither more nor less, and containing two houses, neither more nor less, on each flat, and which tenement shall be built wholly of stone (of which the description and the style of dressing are to be subject to the written approval of me or my foresaids as aforesaid), and covered with blue slates, and of a value not under \pounds : Declaring that

the external appearance of the said buildings shall not be altered without the consent in writing of me or my foresaids.

2. DWELLING-HOUSES ONLY; NO OTHER BUILDINGS; COMMON INTEREST TO ENFORCE

Second. The said tenement shall be used for private dwelling-houses only, and for no other purpose whatever. No house shall ever contain fewer than rooms, including kitchen, and no house shall ever be occupied by more than one family at a time. No buildings or erections of any kind whatever other than the said tenement and renewals thereof, and the walls and other enclosures as after mentioned, shall ever be erected on the said area of ground. The ground in front shall be maintained as ornamental garden ground only, and the back ground shall be used only as a green for bleaching and drying clothes. The said ground in front shall be attached in property to the two houses on the ground flat, each of said two houses having attached to it the plot of ground in front thereof, but subject always to the conditions of these presents. The conditions in this second article are intended and are hereby declared to operate in favour of and to be enforceable by not only me and my foresaids, but also each and every proprietor in the tenement.

3. ENCLOSING WALLS, ETC.

Third. Previous to the commencement of building operations, the feuars shall enclose the said area of ground with a temporary fence, and shall, prior to the term of _____, so far as not already done, enclose the same on all sides thereof as follows:—

FRONT

On the west with a dressed stone cope inches high and inches thick, curved on the top, with a uniform iron railing feet high, and corresponding iron gates of a pattern to be approved of in writing by me or my foresaids, and which cope and railing shall be built wholly on the said area of ground, and shall be built and in all time coming maintained wholly at the expense of the feuars, and the railing shall in all time coming be kept free and open so as to admit of the plots of ground in front of the houses being fully seen from the road.

BACK

On the east by a good rubble wall feet high above the surface of the ground (including a rounded hammer-dressed stone coping) and inches thick.

SIDES

And on the north and south (except where these may be enclosed by the gables of the said tenement) as follows, namely: At the divisions between the gardens or plots in front and the front plots on the adjoining ground, with copes and railings corresponding to the front cope and railing; and at the divisions between the back ground and the adjoining back grounds, with uniform iron railings feet high, having main balusters set into large stones. Which boundary wall, gables, copes, railings, and balusters on the three

last-mentioned sides shall be built at the expense of the feuars, one half on the area of ground hereby disponed, and the other half on the adjoining ground; and the feuars shall be entitled to recover from the feuars of the adjoining ground, if and so far as the same may be feued, one-half of the expense of erecting the said last-mentioned boundary wall, gables, copes, railings, and balusters: Declaring, on the other hand, that in the event of any of the said boundary wall, gables, copes, railings, and balusters having been or being erected by the adjoining feuars, the feuars shall be bound, when required, to pay to such adjoining feuars or their assignees one-half of the expense of erecting the same, and to free and relieve me and my foresaids of all claims in connection therewith. Which boundary wall, gables, copes, railings, and balusters shall thereafter be mutual, and shall be maintained by the feuars and the adjoining feuars and their successors in all time coming: Declaring further that the feuars shall under no circumstances have any claim against me or my successors, as superiors, for any part of the cost of erection of the said boundary wall, gables, copes, railings, and balusters, or any of them, or otherwise in connection therewith, and that where the adjoining ground is unfeued, and until it is feued, the said boundary wall, gables, copes, railings, and balusters shall be maintained at the sole expense of the feuars.

[Insert conditions 4, 5, and 6 from the preceding form, with such moditications as may be required.]

7. QUARRYING, ETC.

Seventh. The feuers shall not be entitled to quarry stone, sand, or any other material on the said area of ground, except for the purpose of building thereon.

8. AGRICULTURAL TENANT'S CLAIMS

Eighth. The feuers shall relieve me and my foresaids of all claims which the agricultural tenant of the said area of ground may have for growing crops and unexhausted manure, or on any other account (except only his claim for reduction of rent), and all expenses in connection therewith; and the feuers shall themselves arrange as to obtaining access and entry to the said area of ground.

9. STIPEND

Ninth. The feuers shall relieve me and my foresaids of the proportion applicable to the said area of ground of all minister's stipend and augmentations thereof, the present proportion being hereby fixed at \mathcal{L} [or, at \mathcal{L} per imperial acre] per annum.

[Insert conditions 7 and 8 and irritant and resolutive clauses in preceding form.]

TERM OF ENTRY

With entry at the term of [or, as at the , notwithstanding the date hereof].

TENENDAS

To be holden the said area of ground of and under me and my foresaids in feu-farm fee and heritage for ever.

REDDENDO

Paying therefor to me and my foresaids the following yearly feu-duties, namely: For the year from 19 (prior to which no feu-duty runs) , payable by equal portions at the terms of 19 the sum of £ to , and for each year thereafter in all time coming the sum and of £ , and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said feu-duty of 19 for the half-year preceding, and the next at the term of , and so forth half-yearly thereafter in term's payment thereof at 19 all time coming, with a fifth part more of each term's payment of liquidate penalty in case of failure in punctual payment, and with interest at the rate of five per cent. per annum on each term's payment from the time the same falls due till paid: And paying the additional sum of \mathcal{L} at the term of 19, and at the same term in every year thereafter, over and above the feu-duty of the year, with penalty and interest thereon as provided in the case of the feu-duty.

POWER OF ALLOCATION 1

Declaring that in the event of an application being made to me or my foresaids by the feuars, one or more, proprietors of and infeft in the whole of the said tenement, after the tenement is completed and before the term of [say a period of three or four years], for allocation of a proportion of the said feu-duty and additional payment on each house in the tenement, with pertinents thereof, I or my foresaids shall grant such application, and shall execute a memorandum of allocation accordingly, but that only on the following conditions, namely, (1) that the application is made by all the proprietors in the tenement, and deals with all the houses in the tenement, and that a separate sum is allocated on each separate house and pertinents; (2) that we are satisfied that the sums so proposed to be allocated fairly correspond to the value of the houses respectively in proportion to the total value of the tenement, of which we shall be the sole judges; (3) that the feu-duties and additional payments are augmented according to the following scale, namely, (a) where the allocated feu-duty is under £1, an augmentation of ten per cent.; (b) where the allocated feu-duty is ± 1 but under ± 10 , an augmentation of five per cent.; and (c) where the allocated feu-duty is £10 or upwards, an augmentation of two and a half per cent., with penalty and interest on such augmentation as before stipulated with reference to the original feu-duty, and which augmentations of feu-duty shall run from the term of Whitsunday or Martinmas preceding the date of the memorandum of allocation: Declaring that the figures mentioned in the above scale are before reckoning the augmentation; and (4) that the feuers shall pay the whole expenses of and connected with such memorandum of allocation.

[Assignation of write and remaining clauses as on p. 211.]

FEU-CONTRACT OF SIX LOTS FOR SIX TENEMENTS

It is contracted between A. (who and his heirs and successors, superiors of the subjects after disponed, or any part thereof, are hereinafter referred to as

1 See p. 244.

"the superiors"), on the one part, and B., builder in Edinburgh (who and his heirs and successors, proprietors of the said subjects, or any part thereof, are hereinafter referred to as "the feuars"), on the other part in manner after mentioned; That is to say, the said A., with and under burden of the yearly feu-duties, additional payments, burdens, conditions, and others after mentioned, hereby dispones to the said B. and his heirs and disponees whomsoever (but excluding assignees before infeftment or registration hereof in the register of sasines, and declaring that it shall not be competent after the expiry of sixty days from the last date hereof to expede infeftment hereon, or to record these presents in the register of sasines to the effect of completing a valid feudal title under the same), heritably and irredeemably, All and Whole those six lots of ground on the south side of X. Street, Edinburgh, marked lots numbers 1 to 6 inclusive on the feuing plan prepared by C., architect in Edinburgh, feet or thereby in front of X. Street, and having a and extending feet at the eastern extremity to depth varying from feet at the western extremity, and bounded as follows, namely [state the boundaries], all as shown on a plan or tracing (copied from said feuing plan) which is annexed and signed as relative hereto, which subjects before disponed form part of the lands of Y., belonging to the said A., lying in the county of Edinburgh: But [refer to conditions in superior's title, if necessary], and declaring that these presents are granted with and under the burdens, conditions, stipulations, obligations, and others following, namely:

1. Enclosing

First. The feuars shall be bound, immediately after their entry, to enclose, so far as not already done, the subjects before disponed from the adjoining ground and streets with a sufficient wooden fence, to the satisfaction of the said C. or the superior's architect for the time (hereinafter referred to as "the architect"), and thereafter to maintain the same till the enclosing and division walls are completed as after mentioned.

2. BUILDINGS

Second. The feuars shall erect and in all time coming maintain on each of the said six lots a tenement of dwelling-houses (but, in the feuars' option, with two shops in one case, as after mentioned). The whole buildings shall be erected and maintained in all time coming according to the said feuing plan and in conformity with the elevations prepared by the said C., and signed by the said A. and B. as relative hereto, and the feuars shall be bound to adhere to the said feuing plan and elevations. Before any buildings are begun to be erected on the lots of ground before disponed the interior plans thereof respectively shall be submitted to and approved of by the superiors in writing before the same are lodged in the Dean of Guild Court, and no buildings shall be erected except those the interior plans of which have been so approved, and no alterations thereon shall take place without the previous written approval of the superiors. The architect shall furnish the feuars with working elevations and a set of drawings at the full size for the stone mouldings for each lot, for which the feuars shall pay to the architect the sum of £ for each lot so soon as the said drawings are ready for delivery. The whole of the fronts of the buildings, as well as the ornamental parts, shall be built of stone, or stones from any other quarry which in the opinion of the architect is not inferior in colour or quality, but which quarry, except that above named, shall be approved of by the architect in writing before any stones are used. The whole of the fronts of the buildings shall be polished ashlar, and the chimney-tops above the roofs shall be polished, droved, or broached ashlar. The courses of the ashlar above the base of the foundations shall not be more than inches high, and shall be tusked inches at the least, in order to connect the buildings and preserve uniformity in the height of the courses. The buildings to be erected on the said lots of ground before disponed shall be four storeys in height, neither less nor more, and the roofs are not to be higher than represented on said elevations, and there shall be no storm-windows nor any raised breaks in the roof in imitation of French roofs or otherwise in front of said buildings without the consent in writing of the superiors. The depths of the buildings over walls shall be those delineated on the said feuing plan. The mutual gables shall not be less than two feet in thickness in any part, exclusive of the breakings and offsets. Two shops 1 shall be allowed at the corner of Street, but with that exception the buildings shall be used as private dwelling-houses only and for no other purpose. The said shops may have cellarage accommodation below, but at all other parts the said tenements shall have no sunk areas in front, but shall have plots of grass or shrubbery in front, as shown on said feuing plan, to be enclosed and divided by stone parapets and good iron railings.

3. PAVEMENT, ETC.

Third. The said houses shall have foot-pavements 8 feet wide outside said parapets and railings, but in front of the said two shops the pavement shall extend from the tenements to the cribstone, and outside of these pavements there shall be a droved whinstone crib or cement kerb, with a water-run or sky drain outside of the cribstone.

4. BACK GROUNDS

Fourth. The back grounds of the said lots of ground hereby disponed shall be enclosed with stone and lime walls not less than 7 and not more than 9 feet in height where required by the superiors, but the divisions of said back grounds at other places may be good iron railings to the satisfaction of the architect, and no buildings shall be erected on said back grounds.

5. ROADS, ETC.

Fifth. The feuers shall be at the sole expense of forming, blocking-out, and causewaying X. Street aforesaid to the extent of one-half the breadth thereof, in so far as not already done, opposite to the lots of ground hereby disponed, and of putting down the pavement thereof in front of the said lots.

¹ This may be sufficiently clear, but Lord Young's criticism in *Hill* v. *Millar*, 1900, 2 F. 799, shows the questions which may be raised. There the permission was to have "a shop" on one frontage. Suppose that frontage comes to be divided in ownership, which proprietor may have the shop?



6. Drains

Sixth. The said A. having constructed a common sewer in X. Street, and connected the said common sewer with the main drain, the expense thereof applicable to said lots, being £ , has been repaid to the said A. by the said B. at the delivery hereof. The feuars shall be bound to form, make, and maintain the drains from the respective lots hereby disponed, and houses or buildings to be erected thereon, to the sewer before referred to. The superiors shall form drains through the back grounds of the lots before disponed and adjoining back grounds in so far as they consider necessary, and connect the same with the said main drain or the said or some other sewer, and the expense thereof shall be repaid to them by the feuars and other feuars from the superiors using said drains, according to a statement and allocation thereof to be made out by the architect, whose certificate as to the amount allocated on each lot shall be final and conclusive and exclude all enquiry; and the sums allocated on each of the lots hereby disponed shall be payable by the feuars to the superiors on demand, and with interest at the rate of five per cent. per anuum thereafter until paid; and for the superior's security for payment thereof, each of the said lots hereby disponed is so disponed with and under the real lien and burden in favour of the superiors of a separate sum , which real burden the superiors shall discharge on payment of the share of expense when so allocated, and interest thereon.1

7. MAINTENANCE OF STREETS, ETC.

Seventh. The feuers shall be bound not only to make and construct the said street, causewaying, pavements, parapets and railings, and drains, in manner before mentioned to the satisfaction of the architect, but also to keep the same and the said back drains in good and sufficient repair in all time thereafter, at the sight and to the satisfaction of the authorities of the city of Edinburgh for the time being, as well as of the superiors.

8. GABLES, ETC.

Eighth. The superiors are not to be bound to pay for mutual gables or enclosing walls or division walls or railings, but as regards mutual gables and enclosing walls, the feuars shall have power to take 12 inches for the purpose of each mutual gable and 7 inches for each enclosing wall from the adjoining ground where the same is the property of the superiors, and shall be entitled to claim the expense of building the half of said gables and walls from the feuars of said adjoining ground; and with regard to mutual gables and enclosing walls already built, or that may be built, on lots adjoining the lots before disponed, the feuars shall be bound to pay the half of the entire cost of the same to the parties entitled to payment thereof.

9. TIME FOR COMPLETION

Ninth. The feuers shall be bound to have the tenements on the said respective lots erected, roofed in, and finished, and the plots of ground, parapet walls, railings, road, causeway, street pavements, enclosing and division walls

¹ See Begg's case, p. 205. It would be much better to state an absolute sum, if possible

and railings, and drains, and everything else connected with the respective tenements, completed at or before the time when the respective feu-duties begin to run, that is to say, six months before the first termly payment of feu-duty in each case becomes payable, and that under the liquidate penalty of £10 per week to be paid to the superiors in respect of each tenement in respect of which failure to any extent may occur, and so long as it may continue.

[Insert condition 6 on p. 213, Nos. 7, 8, and 9 on p. 216, and Nos. 7 and 8 and irritant and resolutive clauses on p. 214, or such of them as may be desired, with the necessary alterations and any other modifications.]

With entry to the said lots hereby disponed at the term of holden the said lots and buildings to be erected thereon by the feuars of and under the said A. and his heirs and successors, as immediate lawful superiors thereof, in feu-farm, fee, and heritage for ever, paying therefor yearly, in name of feu-duty, as follows: For lot No. 1 the sum of £ specify each in the same way, and these at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first payment of the feu-duties for lots Nos. 1 and 2 at the term of for the half-year preceding, and the next at following, and so forth half-yearly thereafter in all time the term of coming; beginning the first payment of the feu-duties for lots Nos. 3 and 4 at for the half-year preceding, and the next at the term following, and so forth half-yearly thereafter in all time coming; and beginning the first payment of the feu-duties for lots Nos. 5 and 6 at the for the half-year preceding, and the next at the term of following, and so forth half-yearly thereafter in all time coming. with a fifth part more of each term's payment of each of the said six respective feu-duties before mentioned of liquidate penalty in case of failure in the unctual payment thereof, and interest at the rate of five per centum per annum on each term's feu-duty from the respective terms of payment until the actual payment thereof; as also paying to the superiors the following additional sums, over and above the feu-duties of the years in which the same shall become payable, videlicet, £ for lot No. 1 [specify each in the same manner] and that at the expiration of every twenty-first year from the terms when the feu-duties of the said respective lots begin to run 1 as before mentioned, beginning the first payments of said additional sums as follows, namely: For lots Nos. 1 and 2, at the term of ; for lots Nos. 3 and 4, at the term of for lots Nos. 5 and 6, at the term of , and so forth at the same term in every twenty-first year thereafter, with penalty and interest as in the case of the feu-duties: Declaring that each of the said lots before disponed shall be liable only for the feu-duty and additional payments effeiring thereto.

Power of Allocation 2

Declaring that in the event of an application being made to the superiors by the person or persons proprietors of and infeft in the whole of any one of the said six tenements to be erected as aforesaid, after the same has been erected and completed, and all the provisions of these presents regarding such tenement have been duly fulfilled, but before the term of , for allocation of a proportion of the feu-duty and additional sums payable for such

1 Not begin to be payable.

⁹ See p. 244.



tenement on each house in the tenement, with pertinents thereof, the superiors shall grant [proceed as on p. 217 with the necessary alterations, keeping in view that there may be shops].

FORMAL CLAUSES: OBLIGATIONS

And the said A. assigns the writs, but to the effect only of maintaining and defending the right hereby granted: And the said A. assigns the rents: And the said A. binds himself to free and relieve the said B. and his foresaids of all feu-duties and casualties payable to his the said A.'s superiors, now and in all time coming, and of all public, parochial, and local burdens exigible prior to the said date of entry: And the said A. grants warrandice: For which causes and on the other part (first) the said B. binds himself, and his heirs, executors and representatives whomsoever, to make payment to the superiors of the foresaid sums of feu-duty at the respective terms of payment before mentioned, with penalty and interest as aforesaid, as also to make payment to the superiors of the foresaid sums of composition over and above the feu-duties of the years in which the said compositions are payable, and that at the terms and with penalty and interest as aforesaid; (second) the said B. binds himself, and his heirs, executors, and representatives whomsoever, jointly and severally, without the benefit of discussion, to implement and perform the whole provisions of these presents relative to the erection and completion of the said tenements, road, causeway, street pavements, enclosing and division and parapet walls, railings, and drains; and (third) the said B. binds himself, and his heirs, executors, and representatives whomsoever, to implement, observe, and perform the whole other burdens, conditions, and others, and whole clauses hereinbefore written: And the said A, and B. consent to registration hereof for preservation and execution.—In witness whereof.

The deed will be recorded for preservation and execution, as well as for publication.¹ Two extracts will be obtained. And as to the plans, three copies should be signed, one of a size for the principal deed, and the two others of a size to be attached to the extracts.

BURGAGE FEUS

The only speciality is the register in which the deeds ought to be recorded, as to which see p. 341. Assuming that the opinion there stated is correct, the question still arises, how, it may be long afterwards, is it to be known of any piece of ground that it "was held burgage immediately prior to the commencement of," the 1874 Act? and accordingly the suggestion is made that any burgage feu-charter should make this express by containing a statement—"which subjects hereby disponed were held burgage immediately prior to the commencement of the Conveyancing (Scotland) Act, 1874."

CHARTERS OF NOVODAMUS

These are still competent.

They are the proper mode of altering the reddendo; it is still

1 See p. 42.

useful to remember that an ordinary charter by progress without a novodamus clause was not a competent mode of doing this.

They are appropriate also when titles have been lost, or there is any defect in them. But it is recommended that, under such circumstances, the deed should not contain a declaration by the superior that he is satisfied that the granter is the true owner: the charter should be taken periculo petentis.

The superior cannot be compelled to grant such a charter, and he will not do so if he considers that the circumstances of the application are in any way suspicious or unsatisfactory.

Warrandice will be either from fact and deed or simple only.

The superior will of course see that everything due to him is paid before the charter is delivered.

It is provided by the 1887 Act that it is no objection to the charter that it has not been preceded by resignation. But suppose that the purpose is to create additional feu-duty, or to impose new conditions of feu, then the superior should see (1) that there is a resignation ad remanentiam, which may quite well be in the same document as the novodamus; and (2) that all heritable securities and other burdens are extinguished, and, if necessary, re-created after the novodamus is on record. Otherwise the whole procedure may be rendered nugatory by one of the heritable creditors selling under his power of sale, and of course under the old charter only.

Looking at the matter from the point of view of a purchaser, lender, or anyone else proposing to deal with the proprietor on the faith of a novodamus which has been granted to supply the place of missing titles, much must depend on the circumstances of the particular case. But it cannot be stated absolutely that anything less than prescriptive possession on the novodamus will give a good title.

CHARTER OF NOVODAMUS (TITLES LOST)

I, A., immediate lawful superior of the subjects hereinafter disponed, considering that it is represented to me by B. that he is proprietor of the dominium ntile thereof, but that his titles have been lost or destroyed, and under these circumstances he has requested me to grant this charter of novodamus, which in the terms after written I have agreed to do: Therefore I of new give, dispone, and confirm to the said B., his heirs, etc. [proceed as in an ordinary charter in all respects, except that the warrandice clause should run]: And I grant warrandice against future facts and deeds only, it being declared, and the said B. by acceptance [or signature] hereof agrees, that this charter is granted at his risk, and that he and his foresaids shall be bound to relieve me and my representatives of all liability which may be incurred by the granting thereof.

Stamp, 5s.

Waiver of Irritancy under Feu Charter

I, A., immediate superior of the subjects hereinafter described or referred to, considering that the proprietor of the dominium utile thereof is B., that it appears that in his title thereto, being a disposition granted by X. in his favour, dated and recorded in for that it appears that in deeds and documents of and relating to the said dominium utile, including both property and security writs] there has been an omission to refer to the conditions [etc., etc.], and irritant and resolutive clauses of the charter under which the same are held, viz., a feu charter granted by V. in favour of Z., dated and recorded in , and that in order to remove on objection on that account I have been requested and have agreed to grant these presents: Therefore I hereby waive and discharge my right to irritate the said disposition [or all deeds and documents, including both property and security writs, of or relating to the said subjects bearing date prior to these presents] and all other objections thereto on account of the omission to refer or any defective references to the said conditions [etc., etc.] and irritant and resolutive clauses: But without prejudice to the said feu charter and the said conditions [etc., etc.] and irritant and resolutive clauses in all other respects. -In witness whereof.

This ought to be recorded.

SECTION XIII

INFEFTMENT

THOUGH in the vast majority of cases infeftment by direct registration is the natural method, and no question arises as to its competency, there are, on the other hand, cases in which these questions do arise. The three essential conditions for direct registration are:

- 1. The granter must himself be infeft.
- 2. The party proposing to take infeftment must be a disponee under the deed.
- 3. The deed must be a special, as distinct from a general, disposition.

1. GRANTER

To the first rule there is no proper exception. No doubt trustees in sequestrations, liquidators, tutors, curators bonis, factors and commissioners, and donees of powers, may grant warrants for infeftment though not themselves infeft, but still the condition applies that, to this end, the bankrupt, company, ward, constituent, or donor of the power, as the case may be, must be infeft; and, indeed, it will be observed that some of the persons referred to, e.g. factors and commissioners, could not take infeftment, being merely hands for others, and themselves holding no conveyance and no fee.

2. GRANTEE

Before a real right can be acquired by infeftment it is essential that the person infeft shall be named and identified in the writ (or writ and warrant of registration) by which infeftment is taken, and which is published in the register of sasines. The following cases may be distinguished:—

(1) Disponees Nominatim.—This is the ordinary case of a conveyance to A., who is correctly described in the deed. But assume that there was (as in the case of testamentary conveyances there very well might be) a grant simply to "John Brown," without any designation, would the title be properly completed by recording the deed with a warrant on behalf of the person claiming under it, he being

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designed in the warrant? It is clear that without evidence of identity no third party would be in safety to rely on the title, and the best evidence would be a decree of the Court obtained in foro. But it might be impossible to obtain that, and, besides, these matters are apart from the pure question whether, assuming that the right truly exists, the title has been properly made up by recording de plano. On that question it is thought that the infeftment so taken is clearly valid, but it is suggested that after the designation in the warrant of registration there should be added, "being the disponee named in the foregoing deed." A very common case, again, is a change of designation between the date of the disposition and the date of the infeftment. Thus it could never be suggested that there was any doubt of the validity of an infeftment which, without any reference to evidence or authority, simply set out both designations; and indeed there seems no reason for thinking that it would not be equally effectual though one only of the designations were given, or that it would matter which that was. Then, to go a step further, the deed may contain a wrong designation; it is thought this may be corrected de plano in the warrant. Even in the case of an error in name in the grant, there are cases in which this would be of no importance. Thus, suppose the deed refers to "John Brown" when it ought to be "John James Brown," or even vice versa, there is no doubt that this may be simply put right in the warrant, or that, though the warrant also is wrong, the infeftment is quite effectual. It is convenient here to refer to the case of persons changing their names. A man may call himself anything he pleases, and may change his name as often as he pleases,1 nor have these changes any effect at all on any matter of conveyancing. If a man was called and is infeft as "John Brown," and now chooses to call himself "John Smith," he may grant any deed affecting the property under the latter name, or, for that matter, under the former. It will be convenient that the deed should bear some reference to the change, e.g. John Smith, otherwise (or formerly) known as John Brown: the name which is to be signed will, of course, be put first.

(2) Descriptive Disponees.—These include such cases as conveyances to (a) "the heir of A."; or (b) "the children of the marriage between A. and B."; or (c) "the partners of the firm of A., B., & C. as trustees therefor"; or (d) trustees to be named by the granter or otherwise, or (e) to be appointed by the Court. Notwithstanding Macdougall's case, referred to on p. 231, the view is submitted that all of these may take de plano infeftment on the conveyance, provided they be named and designed in the warrant of registration. The warrants

127 (refused); Johnston, 1899, 2 F. 75 (granted). A notary requires authority to change name, Robertson Durhum, supra.

¹ Therefore authority to change name will be refused unless some special reason can be shown why the authority of the Court should be granted, *Robertson Durham*, 1899, 2 F.

would run in the respective cases as follows, all the parties being of course designed:—

- (a) Register on behalf of B., the heir of A., in the register of the county of
- (b) Register on behalf of C., D., and E., the children of the marriage between A. and B., in the register of the county of .
- (c) Register on behalf of A., B., and C., the partners of the firm of A., B., & C., and the survivors and survivor of them as trustees and trustee for the said firm, in the register of the county of
- (d) Register on behalf of A., B., and C., trustees appointed by X. to act under the above deed [or will], conform to deed of nomination by him, dated , and the survivors and survivor of them as trustees and trustee foresaid, in the register of the county of .
- (e) Register on behalf of A., B., and C., trustees appointed to act under the above deed [or will], conform to decree of the Lords of Council and Session, dated , and extracted , and the survivors and survivor of them as trustees and trustee foresaid, in the register of the county of .

In connection with these last two cases, reference is made to sec. 3 of the Consolidation Act, 1868, which enacts that—

All codicils, deeds of nomination, and other writings annexed to or endorsed on deeds or conveyances, or bearing reference to deeds or conveyances separately granted, and decrees of declarator naming or appointing persons to exercise or enjoy the rights or powers conferred by such deeds or conveyances, shall be deemed and taken, for the purposes of this Act, to be parts of the deeds or conveyances to which they severally relate, and shall have the same effect in all respects as to the persons so named and appointed as if they had been named and appointed in the deeds or conveyances themselves.

Vesting.—In connection with such conveyances as to the heir of A., or to the children of a certain person or marriage, the first thing is to determine who are the favoured persons and at what date they take a vested interest. As no one can have an heir till he himself is dead, a conveyance to the heir of A. vests no beneficial right until A.'s death.¹ This will be so whether A. has (as is the common case) or has not the liferent. The heir of a marriage is ascertained on, but not before, the dissolution of the marriage.² But in this last case the destination may in certain cases be discharged by the heir-apparent (i.e., the prospective heir) of the marriage without a vested interest.³ A conveyance to children, on the other hand, if in unqualified terms, will give a vested beneficial right to each child at birth, subject to partial defeasance in the event of future children of the class coming into existence, so as to allow these also to take an equal share.⁴

¹ Ferguson v. F., 1875, 2 R. 627; Gollan's Trs. v. Booth, 1901, 3 F. 1035.

³ See Bell, Convey. 874.

⁴ Douglas v. Thomson, 1870, 8 M. 874.

² Mauls, Petr., 1876, 3 R. 831.

In all these cases it is assumed that the persons are called as disponees with or without a liferent interposed. If, on the other hand, they are called as substitutes, then they must in all cases survive the institute as a condition of taking anything. The distinction is illustrated by the following contrasted cases:—

To A. in liferent only and the heirs of his marriage with B. in fee.

To A. and the heirs of his marriage with B.

To A. in liferent only and his children in fee.

To A. and B., spouses, in conjunct fee and liferent, for B.'s liferent use only, and to A.'s children in fee.

C., the eldest son of the marriage, takes a vested right on the dissolution of the marriage by his mother's death or by divorce, even though he should not survive his father, for A. is a bare liferenter and C. is a disponee.

The marriage is dissolved by B.'s death, leaving two sons, C. and D. C. subsequently predeceases A. without issue. D. survives A. D. takes the estate as heir of the marriage, and as such nearest heir of provision. The reason is that A. is disponee and fiar; no one can take after him except as an heir or substitute, for which purpose the claimant must survive A.

Each child takes a vested right at birth, subject to partial defeasance, so as to allow of children subsequently born taking a share. Whether they predecease or survive A. is of no importance.

No child who predeceases A. takes anything. The whole will go to those of his children who survive him, subject, it may be, to the condition is sine liberis.

(3) Constructive Disponees, i.e., nominal liferenters who, on account of the absence of restrictive words, are by legal construction held to be fiars, as in some cases of destinations to A. in liferent and his children or heirs in fee. The first thing is to determine whether the "liferent" is merely a liferent or is really a fee. The presence of such words as "allenarly" "only," or "alimentary," is conclusive against a fee, but their absence does not necessarily lead to the opposite conclusion.

It results from the case of Newlands² and a long train of subsequent decisions that any collateral expressions in the deed showing an intention to limit the right of the nominal fiar [nominal liferenter?] to an usufructuary

Livingstone v. Waddell's Trs., 1899, 1 F. 831 (contrs).

Newlands v. Hischildren, 1798, 4 Pat. 43.

¹ Frog's Crs. v. His children, 1735, Mor. 4262. M'Dougall v. M'Dougall, 1902, 9 S. L. T. 866 (parent's claim to fee sustained);

interest, or to set up a trust in favour of the children, are sufficient to exclude the construction of the word "liferent" in the sense of fee.¹

In Livingstone's case the following elements were judicially referred to as supporting the restricted meaning of the word "liferent," viz.: (1) a clause against assignation; (2) the family scheme of which the destination formed part as evidenced in the same deed; (3) the introduction of the "liferenter" as fiar later in the destination; (4) express powers of management given to the liferenter; (5) the use of the word "liferent" to describe the right in another part of the deed "not a clause of destination," where accordingly it must be taken in its ordinary acceptation; (6) the terms of the precept to infeft A. in liferent and his heirs in fee; and (7) "this is a provision in a contract of marriage in favour of the issue of the marriage, and is therefore pactional."

Assuming, however, that the nominal liferenter is truly a fiar, the question here is—How is he to take infeftment in the fee?

The rule is that to complete the right of fee constituted by a conveyance of this kind there must be in form at least an infeftment in the fee. In the case of the liferent in the parent being unqualified, an infeftment in favour of the parent in liferent and her children or her heirs in fee will give an absolute fee to the parent... But then if the parent takes infeftment in liferent only, without any mention either of the children or of the fee, it is settled that no fee is effectually taken from the granter, but remains in him on the old investiture.

From this it would appear to be his Lordship's opinion on the one hand (1) that a sasine or registration on a warrant in favour of the parent "in liferent" (though without any taxative word) will not feudalize his fee, and on the other (2) that the parent's beneficial fee will be feudalized under a sasine or warrant in favour of the parent in liferent and the heir or children in fee; and, further, the dictum may be appealed to as an authority for the proposition (3) that a sasine or warrant on behalf of the parent without reference to either liferent or fee will not feudalize the parent's fee. There is no doubt that the first of these points correctly represents his Lordship's opinion, for though he says "liferent only," it is clear from the circumstances of the case that he means, not that the infeftment has any taxative word, but merely that it is "without any mention" either of the children or of the fee. His Lordship's dictum will probably be considered as conclusive of the question, but at the same time the view is suggested whether its application ought not to be limited to cases in which the parent has only a fiduciary and not a beneficial fee. When the fee is beneficial it appears no extravagance to say that the nominal liferent is construed to be a fee, and if that be so in the grant, why not also in the infeftment? prior cases of Houlditch 4 and Barstow 5 were fiduciary fees only.

⁵ Barstow v. Stewart, 1858, 20 D. 612.



¹ Livingstone, supra, per Lord M'Laren, at p 846.

² Per Lord M'Laren.

³ Per Lord Kinnear, in Livingstone, at p. 852.

⁴ Houlditch v. Spalding, 1847, 9 D. 1204.

Then Lord Kinnear's dictum may also be accepted as making it clear that when under such destinations the parent has in effect a beneficial fee, that fee is feudalised by a sasine or warrant in favour of the parent in liferent and the children or heir in fee. But while that is so, it is not recommended that that form of warrant be adopted, for it is distinctly unhappy in expression. It is suggested that the warrant might run:—

Register on behalf of A. as beneficial fiar, in respect of the destination within contained in favour of the said A. in liferent and his children [or heir] in fee, in the register of the county of

This fulfils Lord Kinnear's conditions by referring to both fee and children, but it makes it quite express that it is the parent who has the fee and that the fee is being feudalised.

Finally, it is with deference suggested that it is not clear that a sasine or warrant in favour of the parent simply, without making any reference to liferent, fee, children, or taxative words would not give infeftment to the parent in the fee. The alternative view is that a general and unlimited infeftment of this sort should include all and every right and interest which the parent takes under the deed. But at the same time, when matters are entire, the warrant will, of course, be framed in the detailed form given above, so as to avoid this question.

(4) Fiduciary Fee.—Taking now the contrary case, assume that the parent is a bare liferenter, the question is, How are the beneficial fiars when ascertained to obtain infeftment? Here the law has invented the fiction of a fiduciary fee in the liferenter for the ultimate beneficial fiars. This fiduciary fee was at one time treated as a reality in a trust capacity, and it was laid down that the proper way to complete a title was by disposition from, or service to, the fiduciary fiar, the service being special or general according as the fiduciary fee had or had not been feudalised.

It now appears, however, that a disposition from the fiduciary fiar would not be a valid way of completing the title; and, further, that while service to the fiduciary fiar, if dead, is competent, it is merely a declaratory service to establish propinquity. Before going into this, further reference may be made to the case of *Maule*, supra.

The destination was to the spouses and the survivor in liferent only, and to the heirs-male, whom failing the heirs-female, of the marriage in fee. The marriage was dissolved by the death of the husband. The Lord President (Inglis) said:

The legal consequence was that the liferenters must sustain a fiduciary fee for the benefit of the expected real fiars when they should be ascertained. It appears to me, therefore, that during the subsistence of the marriage there was such a fiduciary fee in the spouses jointly, but on the dissolution of the

marriage, and in the moment of its dissolution, there was ascertained to be an heir of the marriage, who then became the real fiar, and the estate was vested in her, and the fiduciary fee came to an end. There was no fiduciary fee left in the survivor of the marriage, for the plain reason that the fiduciary fee is created by the necessity of the law, and endures only so long as the necessity.

Now this makes it clear that a conveyance from the surviving spouse would not have given a title, and it seems equally clear that a service to the predeceasing spouse would have carried nothing. But alongside Maule's case must be read that of Macdougall. There was a destination to A. in liferent allenarly and to her children unnamed in fee. A. took infeftment in the liferent only. On her death the children were held entitled to a general service as heirs of provision in general to her under the deed "for the purpose of establishing their propinguity and of obtaining a marketable title." Without quoting the dicta in the case, the following may be deduced from it and Maule taken together: (1) a purchaser from the children would not be bound to proceed without production of a service of this kind, i.e. under a destination like that in Macdougall, for in a case like Maule it is difficult to see to whom the service could be unless both spouses were dead; (2) but there is no warrant for saying that the service must be produced to the notary and set out in the infeftment, though, if obtained at that time, it naturally will be; (3) if the fiduciary fee was feudalised, the service will pro forma be a special service, but it is not a true special service for (per Lord M'Laren) "I do not think there was [in the fiduciary fiar] any substantial right such as could be taken up by special service;" (4) the children must in substance take infestment as disponees, i.e. under the precept contained (now implied) in the disposition which prescribes the destination, and not under the precept implied in the service, e.g. a special service recorded de plano would not give a good title; and (5), as already stated, it appears that a disposition by the fiduciary fiar would not give a title.

But it must not be assumed that the fiduciary fee is therefore useless. It appears that it cannot be used towards feudalising the beneficial fee, but it is most useful in protecting that fee. If and when the beneficial fiar is in existence he will take infeftment, but it is manifest that it is necessary to protect his right before he is in existence. This is best seen in the case of destinations by a husband in his marriage contract. If he conveys an estate direct to himself in liferent only and the heir of the marriage in fee, then, if the right is not somehow protected at once, the fee will be exposed to the husband's creditors, for he then remains undivested fiar under his prior infeftment. Nor will infeftment under the marriage contract in favour of the husband in the liferent only be sufficient to protect the fee, for he

then stil remains undivested quoad the fee.¹ Nor is the case essentially different though the conveyance in the marriage contract is by a third party, only in that case it will be the third party's creditors who may come into competition. The solution in both cases lies in the feudalising of the new fiduciary fee which the law invents in the husband's person for behoof of the heir of the marriage. This infeftment is validly taken by recording the deed with a warrant of registration in such terms as—

Register on behalf of A. in liferent for his liferent use only, and for behoof of the heir of the marriage in fee.

While this secures the end aimed at,2 it has given rise to a doubt whether, notwithstanding Maule's case, it will thereafter be open to the heir of the marriage to take infeftment de plano in the beneficial fee. "Where infeftment (i.e. in the fiduciary fee) has been so taken, the precept is exhausted, and there seems to be no mode of making up the heir's title unless by adopting one of these above mentioned," i.e. service to or conveyance by the fiduciary fiar.3 But it is submitted that this doubt is without foundation. It is common ground that the heir is a dis-It follows that there can be no "exhaustion of the precept" till the heir is infeft. But it is also common ground that he has not been infeft, for his infeftment is the object in view. In this connection it will be observed that the warrant above suggested directs registration on behalf of A. (1) in liferent only, and (2) for behoof of the heir in fee. An alternative form of expression would be on behalf of (1) A. in liferent only, and (2) the heir in fee.4 The latter form certainly looks like an infeftment in the heir's person, but that cannot be, for at the time supposed there is no heir, and there can be no infeftment in a person unborn or unascertained. The true view is that the conveyance contains three branches, namely (1) the liferent, (2) the ultimate beneficial fee, and (3) a temporary fiduciary fee, which, though not expressed in the instrument, the law constructs out of the two other elements. It follows that until all three are feudalised the precept is not exhausted, and therefore it is submitted that the rule of Maule's case applies whether or not the fiduciary fee may have been feudalised. But here, equally as when the fiduciary fee has not been feudalised, Macdougall's case shows that service is competent to prove propinquity and that a purchaser is entitled to require it. As between the alternative forms of warrant in such cases in order to feudalise the fiduciary fee, the first form—in favour of the liferenter for behoof of the heir-was objected to in Barstow's case, but it was held good, and Hope (Ld. J.-Cl.) observed: "I am not sure that this is not the best and most logical and consistent way of executing such a precept."

¹ Houlditch v. Spalding, 1847, 9 D. 1204; Lord Kinnear, in Livingstone, supra, p. 228. ² Barstow v. Stewart, 1858, 20 D. 612.

³ Dr. Mowbray in Hendry's Styles, 155.

⁴ Lord Kinnear, in Livingstone, at p. 852.

It is submitted that this is the better view, for it avoids the apparent nullity of taking infeftment in favour of non-existent persons; it leaves untouched that part of the grant which will afterwards be feudalised when these persons come into existence and take the right; and it expressly recognises that what is meantime being feudalised is something which is not within the four corners of the grant per expressum, but is deduced therefrom by legal construction.

It is assumed that these rules will operate whoever is liferenter under the grant, whether the parent of the fiar or not.¹ But suppose there is no liferenter at all, as would be the case in a direct testamentary conveyance to the heirs of A.? Again, even if there be a liferenter, is he bound to accept the fiduciary fee and to allow it to be feudalised? and might that be done by those interested on behalf of the fiar without his consent or any communication with him? If any such difficulties arise, it is suggested that the remedy will be to apply to the Court for an appointment of a factor, in exercise of the nobile officium if necessary, who could take infeftment so as to protect the fee.

(5) Conditional Disponees.—These are of two classes, usually distinguished as proper and constructive conditional disponees or institutes. In a testamentary conveyance "to A. if I shall die without heirs of my body," A. is a proper conditional disponee; whereas in a similar conveyance "to the heirs of my body, whom failing to A.," A. will be a constructive conditional disponee if the testator leaves no descendants. The difference is, that under the former grant A. is the first fiar called under the deed; if the granter leaves an heir of his body, the heir takes the estate, but not under the deed, which contains no grant in his favour; and in that case A. can never take the estate, even though the heirs of the granter's body should subsequently become extinct, for he is either immediate disponee or nothing. Under the other grant, "to the heirs of my body, whom failing to A.," A. is called only after the heirs of the body; if an heir of the body survive the granter, the heir takes the estate, and takes it under the deed; but even then, if the heirs become extinct and if the destination is not altered, A. will take the estate as substitute heir of provision under the deed. If, however, under the above destination the granter should leave no heir of his body. A, then steps forward in the order of the grant and takes the estate as disponee or institute. A simple instance is a testamentary conveyance to A., whom failing to B. If A. predecease the testator, B. takes the estate as immediate disponee. Similarly, if the grant were to A., whom failing to B., whom failing to C., and if A. and B. both predecease the testator, C. takes the estate as immediate disponee. Put shortly, every substitution implies a conditional institution in the event of the original immediate disponee and prior substitute or substitutes, if any, failing to take a vested right.

¹ Edmond v. E.'s Tr., 1898, 1 F. 154; Lord Low, at p. 159.

At one time very conflicting views were held as to the manner in which, in these cases, the person who takes the estate ought to complete his title; and in the result it came to this, that if he wished to be certain that his title was duly made up, he required to serve as heir both to the granter of the conveyance and also to the person or persons, one or more, standing prior to himself in the destination. But these doubts were finally cleared away, and the whole matter placed firm and clear on principle, in the case of *Hutchison*. Lord President Inglis there delivered two dicta as the judgment of the Court. The one was:

When by a mortis causa undelivered disposition the conveyance is directly to A. nominatim, whom failing to B., and A. predeceases the granter, B. takes as conditional institute, and not as heir either of A. or of the granter.

The other dictum was:

When one, by mortis causa conveyance in the ordinary form, dispones to the heirs of his body, or the heirs-male of his body, whom failing to a person named, the person so named (there being no heirs of his—the granter's—body then existing) is conditional institute; and if no heirs of the body of the granter come into existence, or, existing, predecease him, the condition is purified, and the person named is on the death of the granter, without qualification or condition, disponee, and as such is entitled to use the executory clauses of the disposition for the purpose of feudalising his right as disponee without service or declarator.

The last clause deals directly with the completion of title, and shows that it is sufficient in such cases to record the disposition (assuming that it contains a special conveyance), with a warrant of registration, and that without any reference to evidence of the facts, or even the facts themselves, on which the title depends. At the same time it is recommended that the warrant should run as follows:—

Register on behalf of A. [designed], as disponee and institute under the foregoing deed, the granter having died without heirs of his body, in the register of the county of

Or, again:

Register on behalf of B. [designed], as disponee and institute under the foregoing deed—A., who was therein named as original disponee, having predeceased the granter—in the register of the county of

Assuming that the deed is not a special but a general disposition, there will of course require to be a notarial instrument, but that in no way affects the successor's title as a disponee.

Further, it will be observed that in the second dictum above quoted, the exact expressions used might be supposed to leave some doubt whether it applied if, at the time when the will was made, the

¹ Bell, Convey. 1106.

granter had issue in life who subsequently predeceased him. But it is clear that in that case the law is the same: the will has no operation at all until the granter's death; he can have no *heir* until he is dead: there must be *some* disponee under the grant, and it can be no one but the person called on the failure of heirs of the body.

3. THE PROPERTY

The third condition precedent to infeftment by direct registration, as stated on p. 225, is that the deed shall be a special, as distinct from a general, disposition. This condition stands in a different position from the two others, and it is necessary to prevent any misunderstanding. If the first condition, namely, the infeftment of the granter, be absent, then, in order to infeft the grantee, it is necessary to trace back the title to the last infeftment. If, again, the second condition, namely, that the person seeking infeftment is a disponee, be not present, then the right must be transferred to him by a new title, e.g. a service. But if these conditions be present, and all that is absent is a particular (or sufficient) description in the grant, then all that may be involved is, not that in point of title it is necessary to go either to older titles, or (in any proper sense) to expede new ones, but simply that the full (or a sufficient) description shall be introduced, and that is accomplished by using a notarial instrument instead of direct registration of the deed. In the instrument the granter's infeftment is set out, but not for the sake of going back to the grant contained in it, but simply for the sake of the description and (it may be) burdens. But the only disposition (i.e. grant) which is founded on is that made by the testator, and the legatee's position as a disponee is in no way affected.

Two questions may arise, namely (1) what is such a description as will be sufficient of itself alone? and (2) when the description is not of that nature (or even when it is), there is the question as to the identity of what is referred to in the will with the property described in the granter's infeftment.

The second of these questions is dealt with in its appropriate place under Notarial Instruments, p. 361. But on the first question it must not be too hastily assumed that a notarial instrument is necessary. Thus there can be no doubt that a gift or bequest of "my house, 1 King Street, Edinburgh," would, so far as description goes, warrant direct registration without any notarial instrument, though, if the charter contained an obligation to refer to burdens under pain of nullity, there ought on that separate ground to be an instrument in order to get those burdens, or a sufficient reference to them, into the new infeftment. See also Lord Trayner's opinion in Murray's case 1; and it is possible to go still further and imply the statement that the property described more or less indefinitely is the property of the seller.²

¹ Murray's Tr. v. Wood, 1887, 14 R. 856.
² Matheson v. Gemmell, 1908, 5 F. 448.

As to what constitutes a special disposition the following passage may be quoted from Lord Deas in *Smith*, though he was the minority in that case:—

No particular form of description is necessary to constitute a special disposition. All that is essential is that the subjects shall be described in such a manner as to be capable of identification, and if that is done, it is a matter of no importance whether the description be long or short. The particularity of the description may be of importance in removing disputes, as when the question is about boundaries but the length or minuteness of the description cannot affect the question whether the disposition is a special disposition and a good warrant for infeftment.

In that case the description was in effect as follows:—

All and Whole my whole estate heritable and moveable, including my estate heritable and moveable under my father's will, calculated to be of the value of £2600, which £2600 includes the house properties in Castle Street, Fraserburgh, occupied by A., B, and C.

Held (Lord Deas dissenting) that this was not a special disposition, the ground of judgment, however, being not that the properties were not sufficiently identified, but that they were not conveyed at all, but were mentioned merely to show the then assets of the father's estate.

WHAT REGISTER?

For certain details, see p. 277; and as to burgage holding, see p. 341.

CONTINUITY OF TRUST INFEFTMENT

This is sometimes secured by means of incorporation under Act of Parliament or Royal Charter. But without incorporation the same benefit has been conferred under certain circumstances. The statutory provisions are:

- 1. Consolidation Act, 1868 (s. 26). If the property of any religious or educational body be taken in name of office-bearers, or of "trustees appointed, or to be from time to time appointed, or of any party or parties named in such conveyance or lease, in trust for" the body, and the title (if not leasehold) be feudalised, the result is to give a completed title to their successors in office for the time, "and that without any transmission or renewal of the investiture whatsoever, anything in such conveyance or lease contained to the contrary notwithstanding."
- 2. 1874 Act, s. 45. When, under a trust conveyance of heritable property, the office of trustee is conferred upon "the holder of any place or office, or proprietor of any estate, and his successors therein," and the title has been feudalised, "any person subsequently becoming a trustee by appointment or succession to the place or office

¹ Smith v. Wallacs, 1869, 8 M. 204.

or estate," has "a valid and complete title by infeftment without the necessity of any deed of conveyance or other procedure."

Comparing these two enactments, we see-

- 1. The 1868 Act is limited to religious and educational bodies; the 1874 Act is not.
- 2. The 1874 Act is, as regards the trusteeship, limited to those cases in which the trusteeship is conferred upon "the holder of any place or office, or the proprietor of any estate"; the 1868 Act is not so limited. Thus a title is taken to A., B., and C. as trustees for a specified congregation; they all die; under the 1868 Act their successors in office, "appointed in the manner provided or referred to in such conveyance or lease, or if no mode of appointment be therein set forth or provided, then in terms of the rules or regulations of such congregation"—have a completed title. Of course evidence of the appointment may be required, e.g. an extract from a minute of meeting, duly certified.
- 3. The 1868 Act expressly includes leaseholds. The 1874 Act does not mention leasehold, and its terms are applicable to feudal property only.
- 4. The 1868 Act is to have effect notwithstanding any contrary declaration in the title; the 1874 Act, on the other hand, does not operate unless the title contains an express destination to successors.

Both Acts agree in requiring an initial recording of title as the condition of their operation in the case of feudal property.

Leaseholds have the benefit of the 1868 Act without recording. And see p. 200 as to certain entail feus and leases.

Infertment ex propriis manibus

See sec. 15 of the 1868 Act. The form of warrant of registration is—

Register on behalf of A. [husband] in the register of the county of , and also ex propriis manilus on behalf of B., wife of the said A., in liferent [or as the case may be].

The warrant must be signed by the husband himself, and not by an agent. The expression "in liferent" occurs in the form of warrant, but the statute says nothing about liferent; and the words "or as the case may be," which occur in the schedule, express a power of variation. For instance, it might be "in liferent after his death in the event of her surviving him" (which, indeed, is most probably what would be usually intended), or it might be in security of an annuity of £50 for her lifetime after his death, in the event of her surviving him, and in either case there might be a restriction to viduity.

It is recommended that this form of infeftment should not be adopted. If the simpler form of warrant be adopted, namely, "in liferent," there

will be an immediate question whether the wife's liferent begins at once or is postponed to her husband's death and contingent on her surviving him. Again, even though words should be introduced into the warrant purporting to make the liferent alimentary (as it is most desirable it should be), these will apparently be ineffectual to protect the right, seeing that there is no trust.¹ The object in view can be better carried out either by embodying the right of the wife, or of a trustee for her, in gremio of the deed, or by having a separate deed by the husband in favour of the wife or of a trustee for her.

SURVIVORSHIP INFEFTMENT

When survivorship is expressed or implied between disponees, and it takes effect, no service or other procedure is necessary in order to give the survivor a feudalised title to the whole. Thus if A. and B. be infeft under a disposition to them and the survivor, then if A. die and the survivorship operate in favour of B., he has a completed title to the whole. To this end it is unnecessary that the survivorship be referred to in the warrant of registration, but the better practice is to do so. It is assumed, however, that A. and B. have taken infeftment under one warrant of registration. If, on the contrary, each had taken infeftment under a separate notarial instrument, or even under two warrants of registration, it might be necessary to re-record or to expede a new notarial instrument, setting out in either case the fact of survivorship; but even if this view be correct, it does not of course imply that a service is necessary.

When survivorship is implied as among trustees, as in the ordinary case it is, it operates upon the infeftment whether it be inserted in the conveyance or notarial instrument and in the warrant of registration, or only in one of them, or in neither.³

NON-TRANSMISSIBILITY OF LIFERENT INFEFTMENTS

The peculiarity is that the assignee of a liferent cannot be infeft. This was fully dealt with in a case in which A., who was entitled to the liferent of a landed estate under a will, assigned his right to B. B. then claimed that the trustees should give him a feudal title to the liferent. Lord Curriehill dealt with the claim thus:

He says he is entitled to have a feudal title to the lands themselves. Now I do not think that such a right is possible. I do not think that even if A. had himself been infeft as a liferenter, that right could possibly have been

¹ Murray v. Macfarlane's Trs. 1895, 22 R. 927.

² Brydon's Trs. v. B.'s c. b., 1898, 25 R. 708, per Lord M'Laren. (The session papers show that the survivorship was not in the warrant of registration.) Bisset v. Walker, 1799, Mor., vocs Deathbed, Ap. No. 2.

³ Gordon's Trs. v. Eglinton, 1851, 18 D. 1381; Findlay, etc., Petrs., 1855, 17 D. 1014; Oswald's Trs. v. City of Glasgow Bank, 1879, 6 R 461.

⁴ Ker's Trs. v. Justice, 1868, 6 M. 627; Stair, 2, 6, 7; Ersk., 2, 9, 41.

assigned to his assignees, because in the law of Scotland such a liferent right is intransmissible. It cannot be communicated or conveyed in any way whatever. It is unquestionable law that it cannot be assigned, and no person except the original liferenter can be infeft in the liferent.

Though there are certain expressions in the authorities quoted which appear to go further than the proposition that the assignee cannot be infeft, and to affirm that there can be no assignation, it is quite clear that as a practical question it goes no further than the impossibility of infeftment. Apart from that speciality, the whole benefit of the liferent may be assigned either absolutely or in security, assuming that it is not protected as alimentary. Thus, in the very case from which the above dictum is quoted, the assignee's title received full effect in virtue of the intimation of it to the testamentary trustees; that is to say, the difficulty does not arise except only in those cases in which the liferenter is actually infeft. The following cases therefore are safe:—

- 1. Trust Liferent.—Any transaction, whether by sale or security, relating to a liferent right enjoyed through trustees, whether the estate be heritable or moveable or both. The usual case is that the liferenter is not entitled to require the trustees to give him a direct title.
- 2. Trust continued.—But even if the liferenter could demand a direct title from the trustees, still if he do not make the demand, the difficulty will not arise so long as the trustees hold the title, and it may be arranged that they shall do so just with this object. If the trustees agree, they ought clearly to have an absolute indemnity from the liferenter or his assignees or both. If, on the other hand, the trustees decline to continue to act, it may be possible to arrange for other trustees being appointed really representing the liferenter.

Further it is suggested that the following cases are also safe from the rule, though for quite different reasons.

- 3. Purchases.—An absolute assignation of the liferent right, though granted by a liferenter holding by direct infeftment. The ground of this suggestion is that under the circumstances the assignee must at once intimate to all the tenants, enter into possession, begin to uplift all the rents, and all future leases and missives of let will be granted by him. It accordingly appears that as a practical question the title is safe enough. The assignation will also be recorded. It will of course contain a special description.
- 4. Real burden.—When the right is the liferent of a real burden, for in that case it appears that the recording is not feudal infeftment.
- 5. Leases.—When the right is a liferent of a recorded lease, and for the same reason. It will be remembered that if the creditor enter into possession, he incurs liability to the landlord. As to questions of competition, see p. 355. This liability will in most cases prevent any security over an unrecorded lease, for then it arises at once without other possession.

It thus appears that the difficulty arising from the impossibility of infefting an assignee of a liferent is practically limited to securities over liferents constituted by infeftment. The difference between the case of a security and the case of a purchase is, that in the former case the creditor may not intend or desire to enter into possession. He may no doubt give intimation to all the tenants (though that will often be objectionable), but even so there remains the difficulty of subsequent and successive changes of tenancies. In order to get over this the following are the suggested courses:—

- 1. The creditor may actually enter into possession, let the property, and draw the rents, accounting from time to time to the debtor. The objection to that is, that the creditor will incur all the liabilities attaching to the possessor and manager of heritable property, e.g. to the superior, taxing and rating authorities, the tenants, and the public.
- 2. Without entering into possession an arrangement may be made that the missives of let by the debtor shall, so long as the security subsists, contain such clauses as the following:—

The tenant accepts intimation of the bond and assignation in security for \mathcal{L} granted by the landlord in favour of X., dated and recorded in the division of the general register of sasines for the county of on , but the tenant is to be entitled to pay the rent to the landlord unless and until he shall have received notice to the contrary in writing from the said X.

The creditor can call for production of the missives from time to time in order to satisfy himself that they are satisfactory.

- 3. The security deed may be framed as a grant of an annuity by the debtor to the creditor, to be uplifted by the latter furth of the liferent and the rents and profits thereof, and (without prejudice), an assignation of the liferent itself. It may be that this form is sufficient to evade the very technical rule as to the impossibility of infefting an assignee in the liferent. The annuity is a new right not before in existence, and, as regards that part of the deed, it is in the annuity and not in the liferent that the assignee is infeft. The amount of the annuity will, at least, give a reasonable margin over the annual sum required for the service of the loan, including interest, and life and fire premiums, and instalment of principal if intended.
- 4. In whatever form the deed be prepared, and whatever else may be done in order to complete the security, the deed will, of course, be recorded in the register of sasines quantum valeat. There is at least room for the contention that the liferent being a right of and relating to heritable estate, the recording is equivalent to intimation.¹

¹ Edmond v. Aberdeen Mags., 1858, 3 Macq. 116.

CLAUSE OF DIRECTION

See 1868 Act, s. 12. The form of clause is—

And, I direct to be recorded in the register of sasines the part of this deed from its commencement to the words on the line of the page, and also the part [specify each part in the same way].

Or,

And I direct the whole of this deed to be recorded in the register of sasines with the exception of the part [or parts, as the case may be, specifying as above the part or parts excepted].

Without this clause there is no way of recording part only of the deed, except by expeding a notarial instrument. But, on the other hand, the insertion of the clause does not tie one down to using it; for it is still optional to record the whole deed with an ordinary warrant. Indeed, if the clause is to be used, it must be expressly referred to in the warrant thus:

Register the above deed, in terms of the clause of direction therein contained, on behalf of A. in the register of the county of .

But it is not correct to say that the clause of direction, once inserted, may be ignored. Its insertion secures that there shall not be placed on record less than (1) what is in the clause directed to be recorded, (2) the clause itself, and (3) the testing clause. This results from the following enactments in sec. 12 of the Act:—

- 1. If the clause of direction be not referred to in the warrant, the keeper of the register records the whole deed.
- 2. If the clause be referred to in the warrant, the keeper records (1) the parts directed, (2) the clause of direction, (3) the testing clause, and (4) the warrant of registration.
- 3. If the deed be followed by a notarial instrument, no part or parts of the deed directed to be recorded shall be omitted from the instrument. Care will be required in framing notarial instruments in order to see that this provision is complied with. The question will be what, in each case, is covered by the words "directed to be recorded"? E.g., do they include the clause of direction and testing clause? That will depend on how the clause of direction has been framed. These notarial instruments should be rare. If the disponee take infeftment, this provision would of course have no application to any notarial instrument completing the title of, e.g., his general disponee; but it would be otherwise if the first disponee were uninfeft.

Care is required in the use of clauses of direction. An obvious error is to omit to record some part of the deed which is required to make sense of, or to explain, the part directed to be recorded. Thus there may be references to persons whose designations are in this way

omitted from the record, and other errors of the like nature. But, further, in the case say of securities, care must be taken to omit none of the obligations; and it is suggested that all the clauses which ordinarily occur in a bond should appear on the register, and the same as regards *powers* given to the creditor with reference to the heritable property; for it is only fair that postponed creditors should be able to ascertain from the record the nature and incidents of the prior security.

SECTION XIV

SUBSEQUENT ALTERATIONS OF REDDENDO

THE following are the most common ways in which changes are made in the reddendo:—

- 1. Allocation of feu-duty.
- 2. Allocation of taxed casualty.
- 3. Conversion of grain feu-duty to annual money payment.
- 4. Commutation of carriages and services to money payment.
- 5. Redemption of casualties for a lump sum.
- 6. Commutation of casualties to annual money payment.

Necessary Consents.—The matter of principle to be kept in view is, that a change in the relation between the two estates of superiority and property cannot, except by statutory authority, be made without the consent of the parties interested in both estates. There are some exceptions, and these are mentioned below, but the rule requires the following consents, viz. (1) superior, (2) all parties holding securities over the superiority, (3) vassal, and (4) all parties holding securities or other rights over the property. This is sufficiently obvious; but still, except as regards the superior, it is apt to be forgotten or overlooked.

Creditors on the Superiority.—In order to ascertain these, a search over the superiority estate would be necessary. It appears clear that their consents are not necessary in case of commutation of casualties to an annual money payment, and the same may be assumed as regards commutation of carriages and services, and conversion of grain to money feu-duties.

Vassals.—The point here is, that when part only of the feu is being dealt with, it may be necessary to have the consent not only of the proprietor of that part but of the whole feu. Thus, in dealing with this part of the subject, attention may be confined to the matter of allocation. Suppose two houses erected on one feu, with a common feuduty; if the superior allocates less than half of the feuduty on A.'s house without the consent of B., the owner of the other house, it is obvious that B. will, if possible, contend against the superior that he has been prejudiced and is not liable to pay more than one-half of the feuduty. Even if what is allocated on A.'s house be an equal half, the

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facts may be such as to permit of B. still objecting that one-half is more than he ought to have been left to pay. The practical rule to be deduced is to require if possible that the whole feu-duty shall be allocated at one time, which is important also for the separate reason stated below; or at any rate to see a search over the whole property, and the terms of the deeds granted on the sale of parts. But indeed it is not clear that the superior's allocation can prejudice the non-consenting part owner. The suggestion that it might have that effect implies that, as between A. and B., A. could, either by the terms of the deeds or otherwise, have been compelled to pay more than the sum allocated on his property by the superior. If that be the fact, this liability of A. to B. cannot be discharged by the act of the superior. True, it will prevent B. being placed in the superior's shoes, and will leave him with a mere personal claim, but, as appears below, that is apparently his strict legal position; and if so, then the allocation has not prejudiced him. any rate this operates injustice, and may, besides, involve the superior in much trouble and expense.1

Creditors over, and others interested in, the Property.—Here, again, attention may be confined to the matter of allocation. That those consents are necessary is obvious from the considerations that the allocation cannot be made without the consent of the vassal, and he cannot give that consent if he has parted with part of his interest, e.g., to a creditor. Further, anything else would open the door to great injustice. Take the case of a loan over a small part of a large feu with a heavy cumulo feu-duty. Of course the counsel of perfection is, not to enter into such a transaction without an allocation. But assume that that has been dispensed with. The loan may yet be reasonably safe on the basis of a rateable incidence of the feu-duty over the whole feu. But if the superior, at the request of the debtor-proprietor, but without the consent of the bondholder, may allocate the whole or a large part of the feu-duty on the part of the feu which is charged with the debt, then the whole security for the debt may be swept away. No doubt it is perfectly true that there are many things which an owner may do as against his mortgagee without the latter's consent, but there appears no authority for saying that this is one of them.

ALLOCATION OF FEU-DUTY

This has a double meaning, namely, (1) an allocation as against the superior, and (2) an allocation as among the vassals *inter se*.

1. ALLOCATION AS AGAINST SUPERIOR

Risks.—No Allocation; Vassal's Risk.—It is unnecessary to emphasise the importance of having an allocation from the point of view of any one purchasing or lending on the security of part of the subjects

¹ But see Lord Kincairney in Nelson's Trs. v. Pullan, 1903, 11 S. L. T. No. 164.

contained in the charter. Attention may, however, be directed to two considerations, namely, (1) that even if the remainder of the feuduty be well secured by buildings, there is always the risk of these being burned down, in which case the liability for the cumulo feu-duty, in the absence of an allocation, may become a real and serious matter; and (2) that if, in the absence of an allocation, a part proprietor should have to pay more than his own share of the feu-duty, he is not, apart from stipulation, entitled to an assignation of the superior's remedies for recovery, the result being that he may have to rank as an ordinary creditor on the sequestrated estate of the proprietor of the other part of the property. The judgment to this effect was pronounced in the face of a vigorous protest by Lord Shand, and it is submitted that it is not well founded. It shows the great importance of the clause which was often inserted in writs by progress, to the effect that while the feu-duty stated for the particular part of the property was say £5, that was without prejudice to the superior's remedy against that part for the cumulo feu-duty of say £50; but that if the larger liability should be enforced, the superior should be under obligation to assign to the vassal his rights and remedies for recovery of the feu-duty beyond the vassal's own share.

(2) Allocation; Superior's Risk.—From this point of view the only real risk arises in case of the destruction or partial destruction of the property. Take the case of total destruction. In the absence of an allocation the superior's claims rank first on whatever building is recrected, and on every part of it, and though it should be left incomplete. It is evident that in the same case the position will be very different if there have been allocations on each separate storey. The chief practical consideration is, that satisfactory fire insurance in the superior's name primo loco ought to be a sine qua non of allocation or power of allocation.

Relation of Allocation to Irritancy ob non sol. can.—This is brought into important prominence by the decision of Lord Low in Nelson's Trs. v. Tod.² Several cases may be distinguished:—

- 1. Where all the feu-duty is allocated expressly by the superior, or under powers conferred by him. Here it is clear that as each proprietor is free from proceedings on account of non-payment of the other parts of the total original feu-duty, so each is subject to irritancy for non-payment of his own allocated part only.
- 2. Where there is no allocation binding on the superior. Apparently the result is that the irritancy can be enforced only if the total original feu-duty is unpaid for two years, and that the action is incompetent against a part owner merely because his part feu-duty as apportioned amongst the proprietors inter se is unpaid for that period.

assignation implied under s. 4 of the 1874 Act in the cases to which it applies. 2 1902, 9 S. L. T. No. 309.

¹ Guthrie, etc. v. Smith, 1880, 8 R. 107. See the case of Wemyss, infra, p. 258, which was not quoted in Guthrie: also the statutory

3. Where part is allocated and part not.—As regards the allocated part, the result is as in No. 1. As regards the unallocated part, the result is not so clear. Lord Low was willing to "assume" that the position was the same as in No. 2, with the important exception that payment of the allocated part would not bar the action as regards the unallocated part. It is obvious, however, that there may be a question as to the soundness of this exception.

The decision in *Nelson's* case has even more important results, going apparently the length of holding that an irritancy cannot be brought against a proprietor who is entered only by force of the 1874 Act, but quære?

HOW ALLOCATION CONSTITUTED

(1) Statutory Memorandum by Superior.—Sec. 8 of the 1874 Act provides that the vassal may

either before or after the deed in his favour is recorded . . . obtain a

memorandum endorsed thereon in, or as nearly as may be in, the form of Sched. D. . . ., and the allocation contained in such memorandum shall be binding on all having interest, provided always that such allocation shall not prejudice or affect the rights of heritable creditors who are not parties thereto. The difficulty which is felt on this enactment is, whether the allocation is effectual against singular successors and future creditors in the superiority if it is not recorded. It is thought that the only answer which the terms of the section admit of is in the affirmative. doubt this is opposed to the system of preference by registration, and the result is also to cause some inconvenience. But, in the first place, the words "either before or after the deed in his favour is recorded," though not absolutely inconsistent with the separate recording of a minute of allocation, are such that the use of them is hardly conceivable if the meaning is not that the recording of the allocation is immaterial. In the second place, it appears clear that the "heritable creditors" mentioned in the section must be the existing creditors, for future creditors could not possibly be parties to the allocation; and besides, if it had meant future creditors, it would not have been limited to them, but would have embraced the future holders of absolute titles also, i.e. singular successors in the superiority. It is therefore submitted that the proper view is, that if the allocation is granted after the recording of the vassal's title, and is endorsed thereon, registration of the allocation is not necessary to make it "binding on all having interest," including creditors and singular successors, excepting creditors holding recorded securities at the date of the allocation who do not consent. If, however, the allocation is written on the deed before the deed is recorded, or if the allocation is by a separate deed, and not in the form of an annexed memorandum, it will of course be recorded. And, indeed, it is recommended that

in all cases the vassal should have the allocation recorded whenever and however it is granted. The expense is trifling, and all complication is avoided. In practice the expense is often reduced to a minimum by having one common minute of allocation dealing with all the houses in a tenement or in several tenements. But from the point of view of an intending purchaser, or lender on the security, of the superiority, it must be assumed that there may be allocations which the records do not show.

The memorandum is to be signed by "the superior of the lands, or his commissioner." These last words are probably intended to apply to a commissioner for a proprietor holding wide general powers of management, but the safer construction is to limit them to a commissioner with express power to grant allocations, though no doubt that denies them all effect.

There is a danger in relying upon an agreement to allocate, but without an actual allocation, for the agreement may not be enforceable if there should be any default on the vassal's part regarding the remainder of the feu.¹

- (2) By Vassal under Power in Charter.—Charters frequently contain powers to the vassal to allocate on certain terms. Care must, however, be taken to see that these clauses do not mean that on certain terms the superior will allocate; but the word "allocate" can only mean an allocation which will be effectual against the superior, for otherwise the power would be meaningless, as being unnecessary. The terms of the power must be observed: thus a power to allocate on "selling" will not authorise an allocation in a bond. And there is this further difficulty, that the purchaser of a part of the property may not be able to ascertain that the whole cumulo feu-duty has been duly allocated and exhausted. No doubt the contrary is very unlikely to happen; but still the purchaser may not be able to obtain evidence, in which case his course is to obtain a direct allocation by the superior, even if he has to pay for it himself.
- (3) By Exhaustion.—What is here referred to is the case of say a charter of a piece of ground for the erection of four villas, cumulo feu-duty £40: the superior allocates £10 on each of three of the villas; the result apparently is that from the necessity of the case, and by a process of exhaustion of the remainder of the feu-duty, the fourth villa has, or is in the same position as if it had, an allocated feu-duty of £10. It may be said that, as regards the proprietor of the fourth villa, the three allocations are res inter alios. That is not at all clear in view of the common charter; and besides, however that may be, there can be no doubt that the practical effect is as above stated. The chief importance of it lies in the matter of augmentation of feu-duty as a condition of allocation. That augmentation may be

¹ Mitchell's Trs. v. Galloway's Trs., 1903, 5 F. 612.

lost as regards the fourth villa. There is also the point of irritancy ob non sol. can, as mentioned above. The superior's remedy is to refuse to allocate at all until he is requested to do so altogether.

Superior's Power.—Take the case of trustees or an heir in possession of an entailed estate obtaining power to feu at a certain rate of feu-duty per acre. In the first place, it appears clear that this condition as to rate must be observed in each charter; that is to say, that under a power to feu two acres at or over £20 per acre, it is no reason for feuing the first acre at £15 that the second acre is to be feued at £25, nor even vice versa. But, in the second place, assuming that one of the acres has been validly feued for £20, must the ratio of feu-duty be observed down through any allocation of that feu-duty? Would an allocation of £4 on a quarter acre, part of the feu, be valid? It is known that a valuable opinion has been expressed to that effect, but it is thought to be erroneous.

Augmentation.—It is very common to require an augmentation as a condition of granting an allocation. The reason is, the additional trouble of collection. If the charter contain any clause as to allocation, it will stipulate for the augmentation if intended to be charged. If there is no clause in the charter, it is open to the superior to allocate or not; and if he does, then to make such conditions as he chooses, including augmentation. Sec. 8 of the 1874 Act and relative Sched. D refer to an augmentation. They contain no stipulation as to interest, nor as to the superior's remedies for recovery, both of which matters are dealt with in the case of an annual sum payable in commutation of casualties (sec. 17, Sched. G). But from the nature of the payment, as being an augmentation of the original feu-duty, it is clear that the payment is feu-duty, that interest will run if interest is stipulated in the charter on the original feu-duty, and that the superior has the same remedies for recovery as in the case of the original feu-duty. Briefly, it is the original feu-duty, only increased.

But suppose that, when the proprietor obtains an allocation with an augmentation, his part of the property is burdened with a heritable security, and that the creditor is not a party to the allocation. Can the augmented feu-duty rank as effectual against the security? It is thought that it cannot. No doubt the section states that "the allocation shall be binding on all having interest"; but this is a question not of the allocation but of the augmentation. The section concludes with the enactment already referred to, "that such allocation shall not prejudice or affect the rights of heritable creditors who are not parties thereto"; which, however, it is thought is intended to apply to subsisting securities over the superiority, and not over the property. The ground of the opinion above expressed rather is, simply that the security comes on record prior to the additional feu-duty, and is not affected by

¹ P. 245, supra.

it according to the ordinary rules of priority. It is plain that this would be so as regards any other changes of tenure or conditions which might be effected by a charter of novodamus recorded after the security (see p. 223). No doubt the creditor will usually be very glad to claim the benefit of the allocation, even with the augmentation, and he could not approbate and reprobate the memorandum of allocation. But this may not always be so; thus, if the remainder of the *cumulo* feu-duty is duly allocated on other parts, the creditor may, as explained on p. 247, be in the position of benefiting by an allocation of necessity, without reference to the memorandum.

Total Relief of Part of Subjects.—It is often desired to put the whole feu-duty on certain parts of the property, so as to have the remainder of the property free of feu-duty. It is necessary to keep in mind that the nature of the holding cannot be changed except by a charter of novodamus. Therefore it is not recommended that a nominal sum be placed on the latter property, "payable if asked only." It appears a sufficient and effectual method to augment the original feu-duty to such an extent as is desired, plus (and at any rate to the extent of) a farthing sterling: to allocate the whole augmented feuduty, less the farthing, upon the other parts of the property, and then to allocate the farthing on the part intended to be held free, with a clause (if thought worth while) to the effect that interest is not to run, and that no proceedings for recovery, or in respect of non-payment, are to be taken except after six months' written notice to the proprietor. An alternative form is a discharge of feu-duty as regards the part in question, but that seems hardly appropriate, and is not recommended. If anything more is wished, the method is by a charter or charters of novodamus. In any case the document or documents will be recorded. The casualties may also require to be dealt with. If they are untaxed, they must either be redeemed, or there must be a charter of novodamus, which should expressly declare that no casualties are to be payable.

Stamp.—If there is no augmentation, the stamp is sixpence. If there is an augmentation, it is sixpence for the allocation, and conveyance on sale duty on the capitalised value of the augmentation, according to the amount of augmentation which will become payable within twenty years next after the date of the allocation. But there is an exception in the special case mentioned on next page.

2. ALLOCATION AMONG THE VASSALS inter se

This is not properly an alteration of the *reddendo*, but it is conveniently introduced here.

It is obvious that whenever a proprietor sells a part of the property held by him under a charter, the contract between seller and purchaser as to incidence of the feu-duty ought to be expressed in the disposition. It will be kept in view that if the result of several allocations is that

the property is all conveyed, but the feu-duty not exhausted, serious complications will ensue.

Total Relief of Part.—Instead of a proper allocation, what is intended may be that the seller should relieve the purchaser of the whole feu-duty, or vice versa. In these cases there will be an express obligation of relief, the amount of feu-duty will be specified, the purchaser will sign the deed if he is to be the relieving party, and it seems appropriate that the feu-duty and obligation of relief should be declared real burdens upon the lands conveyed, or the seller's remaining lands (the latter being shortly identified), as the case may be.

Better still, of course, is a deed by the superior (see p. 249).

If no Allocation.—It sometimes happens that a part of a property is disponed but nothing is said as to incidence of feu-duty. If the disposition is silent, it may be a question whether any advertisement, particulars, or missives could be looked at (see p. 302). But the actings of parties might be available and competent to show what their agreement really was. If not, it is thought that in the case of land the incidence would be in proportion to the respective extents. Where that criterion is not available—as in the case of houses in a tenement—it is difficult to see what test could be applied except equality as amongst the houses.

Seller also Superior.—If the seller is also the superior, holding both fees on separate titles, there may be either (1) a memorandum written on the deed and signed by him qua superior, or (2) the clause of apportionment in gremio of the deed may have to be granted by him, "as seller and also as superior." In the latter case the stamp duty is merely the conveyance on sale duty on (1) the price and (2) the augmentation if any; the 6d. agreement stamp is not charged.

ALLOCATION OF TAXED CASUALTY

If the superior is to allocate the feu-duty, he will also expressly allocate any taxed casualty, such as a duplicand. It rather appears, however, that the allocation of feu-duty *implies* an allocation of the duplicand.

As regards allocation among the vassals *inter se*, it is quite clear that if the incidence of the feu-duty is settled, that will also be the rule in regard to duplicands.

It does not appear necessary to refer to any allocation of untaxed casualties. If the feu-duty is allocated by the superior, there can be no question as to allocation or non-allocation of untaxed casualties. The relief is a double of the allocated feu-duty, and the composition is the rental of the part of the property, under the usual deductions, including the allocated feu-duty.

Some further questions regarding casualties and duplicands may be referred to here:

- 1. Unallocated feu-duty; untaxed casualties.—It is clear (1) that a singular successor in part of the feu cannot be required to pay composition for more than his own part, and (2) that the acceptance of this does not infer an allocation of the feu-duty, though that has in practice been contended. But (3) what about an heir's casualty of relief? That is double the feu-duty. But in a question with the superior there is only one feu-duty, viz., the cumulo amount. Can the superior enforce that? and if so, can he ever enforce a casualty against the vassal in any other part of the feu? The usual practice is to take a double of the unallocated feu-duty of the part, and that again, it is thought to be clear, infers no allocation of the feu-duty.
- 2. Unallocated feu-duty; Duplicands on death and on transfer.—This raises substantially the same question—when a duplicand becomes due from a part vassal—and the practice is the same.
- 3. Unallocated feu-duty; Duplicands at fixed periods.—The difference here is that the duplicand for the whole falls due at one time, and the superior can avoid all questions by insisting on receiving the full amount in one cheque.
 - 4. Redemption (see p. 258).

MEMORANDUM OF ALLOCATION ENDORSED, WITHOUT AUGMENTATION

The proportion of the original feu-duty of £20 allocated upon the lands [or subjects, or subjects in the first place, or as the case may be] within disponed is hereby fixed at £10.

A. B., Superior.

THE SAME, WITH AUGMENTATION

The proportion [as above, to the end, and add] with £1 of augmentation, making a total of £11.

A. B., Superior.

MINUTE OF ALLOCATION ON ALL THE HOUSES IN A TENEMENT, WITH AUGMENTATION

I, A., immediate superior of the subjects feued out conform to feu-charter granted by me in favour of X., dated , and recorded in the division of the general register of sasines for the county of Edinburgh on : Considering that on part of the said subjects there has been erected the tenement of houses 1, 2, and 3 Y. Street, Edinburgh, consisting of two maindoor houses 1 and 3 Y. Street, and three flats above entering by 2 Y. Street, each of said three flats containing two houses: Further considering that under the said feu-charter there is payable an annual feu-duty of £26, 10s., with an additional sum of £53 at the term of Whitsunday 1918 and every nineteenth year thereafter over and above the feu-duty of the year, with interest and penalties respectively as therein stipulated: Further considering

that I have been requested to allocate the said feu-duty of £26, 10s., with an augmentation of £1, 10s., making a total feu-duty of £28, and also the additional payments with corresponding augmentation, thus making each cumudo additional payment amount to £56, upon the said respective houses and pertinents in manner after mentioned, and that in consideration of the said augmentations I have agreed to do so: Therefore, in the first place, I declare that the proportion of the original feu-duty and augmentation allocated on the said respective houses and pertinents is hereby fixed as follows, namely:—

${\it Main-doors}$					
1. No. 1 Y. Street, five pounds		$\pounds 5$			
2. No. 3 Y. Street, five pounds	•	5			
Common Stair No. 2 Y. Street					
3. East half, first flat, four pounds .		4			
4. West half, do., four pounds .		4			
5. East half, second flat, three pounds .		3			
6. West half, do., three pounds .	•	3			
7. East half, third flat, two pounds .		2			
8. West half, do., two pounds	•	2			
		£28			

with penalties and interest in each case as stipulated in the said feu-charter: And, in the second place, I declare that the proportion of the said original additional sums and augmentation thereof allocated on the said respective houses and pertinents, is hereby fixed in each case at double the amount of the said respective allocated feu-duties over and above the feu-duty of the year, with penalties and interest as aforesaid.—In witness whereof.

THE SAME, WITH CONSENT BY HERITABLE CREDITOR

I, A., immediate superior [as above, to end, and ald]: And I, B., heritable creditor over the superiority or dominium directum of the said subjects, conform to bond and disposition by the said A. in my favour for the sum of £1000, dated , and recorded in the said division of the general register of sasines on , consent to and confirm these presents.

THE SAME, INTENDED TO RELIEVE PARTS OF THE SUBJECTS

I, A., immediate superior [as on p. 251, to "stipulated"]: Further considering that I have been requested to allocate the said feu-duty of £26, 10s., with an augmentation of £1, 10s. $0\frac{1}{2}$ d., making a total feu-duty of £28, 0s. $0\frac{1}{2}$ d., and also the additional payments, with corresponding augmentation, thus making each cumulo additional payment amount to £56, 0s. 1d., upon the said respective houses and pertinents in manner after mentioned, and that in consideration of the said augmentations I have agreed to do so: Therefore, in the first place, I declare that the proportion of the original feu-duty and

augmentation allocated on the said respective houses and pertinents is hereby fixed as follows:—

Main-doors

	No. 1 Y. Street, one farthing	£0 0	0	0 <u>1</u> 0 <u>1</u>
	Common Stair No. 2 Y. Street			
3.	East half, first flat, six pounds	6	0	0
4.	West half, do., six pounds	6	0	0
5 .	East half, second flat, four pounds ten shillings	4	10	0
6.	West half, do., four pounds ten shillings	4	10	0
7.	East half, third flat, three pounds ten shillings	3	10	0
8.	West half, do., three pounds ten shillings	3	10	0
		£28	0	0 <u>1</u>

with penalties and interest in each case as stipulated in the said feu-charter, except in the case of the feu-duties of one farthing each allocated on the said two main-door houses, on which last-mentioned feu-duties no penalties or interest shall be incurred or run, notwithstanding the terms of the said feu-charter. [Insert allocation of additional sums as on p. 252, and add] and with the like exception as aforesaid in the case of the said two main-door houses: And with reference to the said two main-door houses, it is hereby agreed that no proceedings shall be taken for recovery or in respect of non-payment of the said allocated feu-duties of one farthing each and corresponding additional sums except after six months' written notice to the infeft proprietors thereof respectively.—In witness whereof.

CLAUSE IN DISPOSITION BY WHICH SELLER OF PART RELIEVES THE PURCHASER THEREOF OF FEU-DUTY OF WHOLE SUBJECTS

And whereas the said subjects form part of the subjects in the county of X. as particularly described in the feu-charter by Y. in my favour, dated

, and recorded in the division of the general register of sasines for the county of X. on , under which there is payable a feu-duty of £10 for the cumulo subjects, and the contract between the said B. [the purchaser] and me is that as between him and me and our respective successors, and the subjects hereby disponed and the remainder of the subjects contained in the said feu-charter, he and his successors and the subjects hereby disponed shall be [A.] free from feu-duty, and that the whole of the said feu-duty of £10 shall be allocated upon the remainder of the said cumulo subjects, and shall be paid by me and my successors: Therefore I hereby bind myself and my successors in the remainder of the said cumulo subjects, and my heirs, executors, and representatives whomsoever, to free and relieve the said B. and his successors in the said subjects hereby disponed, and his heirs, executors, and representatives whomsoever, in all time coming, of the whole of the said feu-duty of £10, and penalties and interest effeiring thereto, which whole feu-

duty of £10, with penalties and interest, and the foregoing obligation of relief, are hereby declared real burdens in favour of the said B. and his foresaids upon and affecting the subjects contained in the said feu-charter other than that part thereof hereby disponed.

CLAUSE IN DISPOSITION BY WHICH THE PURCHASER OF PART RELIEVES THE SELLER THEREOF OF FEU-DUTY OF WHOLE SUBJECTS

And whereas [as in preceding form to A., and proceed] burdened with the whole of the said feu-duty of £10, and that the remainder of the said cumulo subjects shall be held free of feu-duty: Therefore the said B., by subscription hereof, binds himself and his successors in the said subjects hereby disponed, and his heirs, executors, and representatives whomsoever, to free and relieve me and my successors in the remainder of the said cumulo subjects, and my heirs, executors, and representatives whomsoever, in all time coming, of the whole of the said feu-duty of £10, and penalties and interest effeiring thereto, which whole feu-duty of £10, with penalties and interest, and the foregoing obligation of relief, are hereby declared real burdens in favour of me and my foresaids upon and affecting the subjects hereby disponed.

CONVERSION OF GRAIN FEU-DUTY

No remarks are necessary under this head, except to call attention to the fact that grain feu-duty may still be stipulated, though probably the practice is unknown.

MINUTE OF AGREEMENT CONVERTING GRAIN FEU-DUTY TO CASH

It is contracted between A., immediate superior of [description, by reference if possible], on the one part, and B., the proprietor of the dominium utile of the said subjects, on the other part, in manner following; That is to say, the grain feu-duty of bolls firlots barley payable for the said subjects under feu-charter granted by X. in favour of Y., dated and [if recorded] recorded in the on , is hereby converted to a money feu-duty of £ .—In witness whereof.

COMMUTATION OF CARRIAGES AND SERVICES

The 1874 Act (s. 20) makes provision on this subject:—

- 1. Where for five years they have in fact been commuted to an annual money payment by agreement, written or not, and express or implied, the practice is made the permanent rule.
- 2. Failing agreement, either party may apply to the sheriff to determine the annual value, and his determination is final.
- 3. If ascertained by agreement, a memorandum is recorded; otherwise the sheriff's decree is recorded.



- 4. The annual sum is deemed to be feu-duty, with all the legal qualities thereof.
 - 5. Entails are no bar to commutation.

Starting Date. — Apart from express agreement in the missives, the feu-duty, or additional feu-duty, in respect of the commutation should run from the date when the contract for commutation was made, whatever may be the date of the formal memorandum.

MEMORANDUM OF COMMUTATION OF CARRIAGES AND SERVICES

It is agreed between A., immediate lawful superior of the lands of X. [or as the case may be], in the county of , as particularly described in the feu-charter granted by Y. in favour of Z., dated , and recorded for, and in the instrument of sasine in favour of the], on the one part, and B., the proprietor of said Z., recorded the dominium utile of the said lands [or subjects], on the other part, that the dominium utile of the said lands [or subjects] shall from and after the term of be liable in payment to the superior thereof of a feu-duty of £ for if there be a feu-duty already payable, of an additional feuduty of £ over and above the existing feu-duty of £ yearly at two terms in the year, Whitsunday and Martinmas [or such other terms as the existing feu-duty, if any, is payable at], beginning the first term's payment at the term of Whitsunday 1904 for the period from the 1st day of February 1904 to that term, with interest at five per cent. per annum on each term's payment from the term at which the same becomes payable till paid. which feu-duty [or additional feu-duty] is constituted in respect of a commutation of all carriages and services incident to the said estate of superiority vested in the said A., exigible in respect of the said estate of property vested in the said B., all which carriages and services are hereby discharged.—In witness whereof.

Note.—It is not uncommon to endorse warrants of registration on behalf of both superior and vassal, but the former is unnecessary.

REDEMPTION OF CASUALTIES FOR LUMP SUM

The provisions on this subject are contained in secs. 15, 16, 18, and 19 of the 1874 Act:—

- 1. Casualties in "any feu created prior to" 1st October 1874 may be redeemed on such terms as superior and vassal may mutually agree on
- 2. Failing agreement, all casualties in prior feus, except those which are fixed as to both (a) "amount . . . in money or in fungibles," and (b) time of payment, may be redeemed by the vassal.
- 3. It is the superior who has the election between a lump sum and an additional feu-duty.



- 4. If the superior elect the lump sum, the terms of redemption are:
- (1) If casualty payable on death only, one and a half times the highest casualty.
- (2) If payable on death and each transfer, two and a half times the highest casualty.
- (3) If the casualty consists of so much for each year since last entry, eighteen times the annual sum.
- 5. Before redemption "otherwise than by agreement," any casualty already due must be paid, including such annual sums as above mentioned from the last date of payment. The words "otherwise than by agreement" are not very clear, but they suggest the prudence of expressly stipulating, in the superior's interest, that arrears shall be paid in addition to the redemption money.
- 6. A discharge is granted and recorded. It must be signed by the superior, or of course by a specially authorised commissioner.
 - 7. The vassal pays the whole expenses.
- 8. Prior heritable creditors in the superiority are not affected unless they consent.
- 9. Entails are no bar; but if a lump sum is taken by the superior, it is consigned; the heir in possession receives the interest, the principal is applied for the benefit of the estate under order of the Court; and the heir in possession is entitled, out of the consigned money, to his expenses of applying to the Court, e.g., for warrant to uplift and apply to permanent improvements. But if the consigned sums do not exceed £100 "during any period of three years," they may be paid to the heir (or his representatives) who was in possession at the date of consignation.
- 10. A mid-superior may exercise the statutory powers of redemption as against his over-superior.

COMMUTATION OF CASUALTIES

The sections of the 1874 Act are 15, 17, 18, and 19. The differences between this method and the discharge for a lump sum are:

- 1. An additional feu-duty is constituted equal to four per cent. on what the lump sum would have been.
- 2. A memorandum is signed by both parties or their agents, and recorded.
- 3. It appears to be clear that, even as against prior creditors in the superiority, the commutation is effectual without their consent.

With reference to redemption of casualties, whether for a lump sum or by way of additional feu-duty, the following points may be noted:—

What Casualties are Redeemable?—All, unless they fulfil the conditions of being fixed and certain as regards (1) sum, if money; (2) amount, if fungibles; and (3) time of payment. An ordinary

1 Campbell, Petr., 1901, 8 S. L. T. No. 286.

untaxed composition sins in both respects, for (1) it is uncertain in amount, fluctuating as it does with the rent, and (2) it is payable on the death of the last entered vassal, which is an uncertain event as to time. A duplicand of the feu-duty, or any other multiple thereof, payable at stated intervals, such as every nineteenth or twenty-first year, fulfils the conditions, and is not redeemable against the will of the superior. But a duplicand or other multiple, or any other taxed composition, payable on the death of the last entered vassal, or on every transfer, is redeemable, for though the amount is certain, the date of payment is not. It is not always clear, however, whether a casualty is or is not redeemable. Thus suppose trustees or a corporation have paid two casualties, the date of the next casualty is certain. If, however, it is an untaxed casualty, the amount is uncertain, and therefore it is clear that the casualty is redeemable. But if, under the same circumstances, the casualty is a duplicand or other fixed sum, the question arises whether it is redeemable under the Act. It will be observed that the next casualty is certain as regards both amount and time of payment, and therefore it may be maintained that it is not redeemable. In this connection it is to be noted that the form of discharge in Sched. F. makes it quite clear that the redemption may be limited to "only some of the casualties." On the other hand, it will be observed that the words of sec. 15 are "all such casualties except those which consist of a fixed amount stipulated and agreed to be paid . . . at fixed periods." It may be contended that the words italicised are not applicable to the circumstances under consideration. That argument, however, would not avail in a case where the charter stipulated (as is not unknown) for a duplicand on the entry of heirs and singular successors, but with clauses in gremio as regards trustees and corporations on lines similar to those of sec. 5 of the Act. Then, after trustees had paid two casualties, it would, it is submitted, be clear that the next casualty would not be redeemable, inasmuch as it would, under the express provisions of the charter itself, be fixed as regards both amount and date. And even in the ordinary case it is submitted that sec. 5 operates as a statutory alteration of the terms of the charter, and that the section is to be read into the reddendo, and that accordingly in that case also the next casualty is not redeemable.

It will be observed that the question is limited to the next casualty only. There can be no doubt that all future casualties (that one only excepted) are redeemable. Nor would the superior be entitled to require that the immediate casualty should be paid before the others were redeemed, for it is not due. The strict course would be to discharge or commute all the casualties except the one, the deed bearing an express exception and reservation, which is quite in terms of Sched. F. But if the view as to the non-redeemability of the next casualty be sound, the result is simply to make the vassal pay an additional casualty; for on

that view he will require to pay as much (one and a half times or two and a half times, as the case may be) in order to redeem the casualties, other than that one, as on the other view would redeem all, that one included; and he will in addition require to pay the excepted casualty when it becomes due.

Redemption as regards Part of Feu.—The owner of part of the feu may redeem the casualties of his own part without reference to the other parts. But the holder of the entire feu is not entitled to redeem or commute the casualties of part.2 This, however, does not hold as to parts which have been sold, though notice of change of ownership has not been given.3 These were cases of untaxed entries. But where the casualty is say a duplicand of the feu-duty, and the feu-duty has not been allocated, it does not appear that partial redemption in this sense is competent, or rather possible. In the case of the untaxed casualty there is no doubt as to the amount: it is simply the rent of the part which belongs to the redeeming vassal.4 But in the case of the duplicand, or in any case where the casualty is fixed with reference not to rental but to feu-duty, and the latter is not allocated, there are no data on which to fix the casualty. The same would apply where the casualty was a fixed sum payable at uncertain intervals, though fixed without reference to feuduty, if also without reference to rental. This was the case in Wemuss,5 which was referred to in the Roperie case. In Wemyss (to quote Lord Selborne in the Roperie case),

the superior was held to be entitled to retain, as against the purchaser of part of the feu, his remedy for the entirety of the feu-duty, and of the duplicand of the feu-duty which was the casualty on the entry of an heir, both those being conventional liabilities of the feuar, and having in themselves no distributable quality according to which they could be apportioned over different parts of the lands. But in the same case no similar claim was either made by the superior or recognised by the Court as to the casualty for the entry of singular successors, which was not taxed.

Interest.—1. If there is an existing feu-duty on which interest is stipulated in the feu-right, like interest will be implied in any missives or preliminary arrangement for commutation, and the superior will be entitled to insist that the interest be expressed in the formal memorandum.

- 2. If there is no existing feu-duty, or at least no stipulation for interest on feu-duty in the feu-right, the superior is not entitled to stipulate for interest.
 - 3. Under no circumstances, no matter what may be the terms of the

⁵ Wemyss v. Thomson, 1836, 14 S. 233.



¹ Edin. Roperie Co. v. Edin. Mags., 4 R. 1032; 6 R. (H. L.) 1.

² Paull v. Aberdeen Mags., 1898, 6 S. L. T. No. 134.

³ City of Aberdeen, etc., Assocn. v. Aberdeen Mags., 1902, 10 S. L. T. No. 168.

⁴ If there were considered to be any possi-

bility of doubt in any particular case as to whether relief or composition was the "highest casualty," there would be a difficulty, seeing that relief has "no distributable quality."

feu-right as to feu-duty and interest, will interest be payable if not expressly stated in the memorandum.

Starting Date.—The feu-duty, or additional feu-duty, in respect of the commutation should run from the date when the vassal intimated his intention to redeem or commute.

When to redeem.—This depends on the terms of the reddendo, and on facts and circumstances.

- 1. If the casualty is untaxed or fixed by reference to rental, redeem before doing anything which will increase the rental, as by, e.g., (a) building, or (b) feuing.
- 2. If fifteen or twenty-five years' immunity from casualty has been secured by the entry of trustees or a corporation under sec. 5 of the 1874 Act, the redemption should certainly be made if that period is about to expire. In that case the redemption money will be two and a half or one and a half times the highest casualty, as the case may be; but if the period be allowed to expire without redeeming, then there will be an additional casualty to be paid. The circumstances discussed on p. 257 introduce a specialty; for if the view there submitted be correct, it will make no difference in the redemption money whether the redemption be before or after the expiry of the twenty-five or fifteen years. This, however, is subject to this qualification, namely, that it may happen that at the expiry of that period the property is still held by the same trustees or corporation, in which case, if the period be allowed to expire without redemption, the same question will arise again regarding the redeemability of the then next casualty.
- 3. Again, if the life on which the next casualty depends is old, the vassal ought to redeem. Of course, whatever the age, the next casualty may become payable at any time by his death, but in the case supposed it must be soon payable. The gain, again, is just one casualty.

MEMORANDUM ON COMMUTATION

It is agreed [as in form on p. 255, to and including the words "in respect of a commutation," and proceed] of all casualties incident to the said estate of superiority vested in the said A., exigible in respect of the said estate of property vested in the said B., all which casualties are hereby discharged.—In witness whereof.

Note. - As on p. 255.

DISCHARGE ON REDEMPTION

I, A., proprietor of the estate of superiority in the lands of X. [or otherwise, as the case may be] in the county of , as particularly described in the feu-charter granted by Y. in favour of Z., dated , and recorded

[or, and in the instrument of sasine in favour of the said Z., recorded], whereof the estate of property belongs to B.: In consideration of

the sum of instantly paid to me by the said B., of which I acknowledge the receipt, hereby discharge in favour of the said B. and his heirs and successors all casualties incident to my said estate of superiority exigible in respect of the said estate of property.—In witness whereof.

MEMORANDUM (1) ALLOCATING GRAIN FEU-DUTY,

- (2) AUGMENTING SAME, (3) CONVERTING TO MONEY,
- (4) COMMUTING CASUALTIES

It is agreed between A., immediate lawful superior of All and Whole [description], which subjects are hereinafter referred to as "the said subjects," and are part of All and Whole the lands of X. as particularly described in [refer to recorded writ], on the one part, and B., the proprietor of the dominium utile of the said subjects, on the other part, as follows, namely:—

First. The proportion of the original feu-duty of 4 bolls 2 firlots barley payable for the whole of said lands of X. hereby allocated upon the said subjects is hereby fixed at 1 boll 3 firlots and 1 peck barley, with 1s. 10½d. stg. of augmentation.

Second. The said grain feu-duty of 1 boll 3 firlots and 1 peck barley is hereby converted into a money feu-duty of £1, 16s. $5\frac{1}{2}$ d., amounting with the said augmentation to £1, 18s. 4d.

Third. The dominium utile of the said subjects shall from and after the term of Whitsunday 1904 be liable in payment to the superior thereof of an additional feu-duty of £3, 0s. 10d. over and above the said feu-duty of £1, 18s. 4d., and that yearly at the term of Whitsunday, beginning the first payment at the term of Whitsunday 1905 for the year preceding, and so forth yearly thereafter in all time coming [with interest at the rate of five per cent. per annum on each term's payment from the time the same becomes due till paid], which additional feu-duty is constituted in respect of a commutation of all casualties incident to the said estate of superiority exigible in respect of the said estate of property in the said subjects, and all which casualties are accordingly hereby discharged: In respect of which allocation, augmentation, conversion, and commutation, the total feu-duty of the said subjects is £4, 19s. 2d., payable yearly at the term of Whitsunday [with interest as aforesaid], beginning the first payment at the term of Whitsunday 1905 for the year preceding.—In witness whereof.

¹ The reference to interest will be omitted if interest is not stipulated on the original feu-duty in the charter.

SECTION XV

CONTRACTS OF GROUND-ANNUAL

As between subfeuing and creating a ground-annual it is to be noted (1) that the ground-annual must be resorted to when there is a valid prohibition against subinfeudation, (2) that even when that is not so, the ground-annual may be preferred just for the reason that it does not create a new feudal estate, and (3) when the existing charter contains obligations of relief of, e.g., public burdens, the adoption of ground-annual-right instead of a subfeu will prevent the raising of difficult questions as to the assignability of the right of relief to a subfeuar.1

The chief practical effect of adopting ground-annual-right in place of subfeu-right is that it is the proprietor of the property, and not the holder of the ground-annual, who is liable in all the obligations of feudal vassal, including the pecuniary obligations of feu-duty and casualties. The holder of the ground-annual becomes a mere preferable creditor, with rights only and no duties, which (in that aspect of it) is a much more satisfactory position for an investor. For example, A. feus to B. for a feu-duty of £5. B. wishes to create an additional annual charge of £15. If he proceeds by subfeuing to C., he must create a subfeu-duty of £20. He, B., and any purchaser of the mid-superiority from him, will then collect from the proprietors of the dominium utile the annual sum of £20, and will have to pay to the over-superior the annual sum of £5, leaving a net annual income of the desired amount, namely, £15. But then there are the following adverse elements: (1) the additional expense involved in collecting more than is really wanted, and in paying over the excess; (2) the disturbing element of the falling due of irregular casualties to the over-superior; and (3) the general responsibilities of a double feudal relation to those above and those below in the feudal chain.

If, on the other hand, in the case supposed, B. proceeds by groundannual, he will dispone the property to C. under burden of payment to him, B., and his assignees in all time coming of a yearly sum of £15. In addition, C. and his successors, as the vassals, and the only vassals,

¹ Aberdeen Trades Widows v. Aberdeen Mags., 1903, 10 S.L.T. No. 451.

will pay to A. and his successors the annual feu-duty of £5. Thus instead of paying a subfeu-duty of £20, they will pay—

Feu £5 Ground-annual . 15 = £20.

They pay the same as before, but they pay it differently, and in two portions instead of one. B. and his assignees, on the other hand, uplift the exact annual sum which they want, neither more nor less—£15, plus any periodical additional sums which may have been stipulated for.

It will of course be understood that this arrangement of the relations and figures in no way improves the real security for the £15. The £5 still remains the first charge. This is sometimes obviated by having the feu-duty allocated upon one part of the property and charging the ground-annual on the remainder, in which case, however, the objections stated above have no application at all, that is to say, whether the new payment be created by subfeu or ground-annual.

So far, indeed, from effecting any improvement in the security, there is supposed to be a risk connected with the titles to ground-annuals which does not exist in the case of feus, namely, that if all reference to the ground-annual be omitted from the titles of the property for forty years, the right will be wholly lost as regards both past and future. But under the modern form of contract of ground-annual that will not be so, unless, in addition to the omission on the part of the proprietors to refer to the burden, there has also been an omission on the part of the holder of the ground-annual to enforce payment.

Certain matters which require attention may be referred to.

Security.—(1) *Title*.—The ground-annual will be expressly declared a real lien and burden on the property. As to augmentation, see *infra*.

(2) Value.—The point is to secure that there shall in all time coming be buildings on the ground, which, after making all reasonable allowances for (a) rates and taxes, (b) insurance, (c) repairs, (d) risk of unlet property, and (e) management, shall be not only sufficient in fact to pay the ground-annual plus feu-duty, if any, but also that the margin of security shall be such as to let the ground-annual command the highest rate in the market. The accepted ratio is that the gross rental should be not less than six times the feu plus ground-annual. There will be an obligation to erect (if not already done) and to maintain, and if necessary to re-erect, buildings capable of yielding the rental required, and there will be irritant and resolutive clauses applicable to any failure in this respect.

Personal Obligations.—This is a matter of much importance in connection with ground-annuals (see p. 156). In the form on p. 270, an attempt is made to make any purchaser personally liable in all

time coming, which, it hardly admits of doubt, is ineffectual. In the same form the original disponee's obligation is such as to bind himself, his estate, and representatives for ever, notwithstanding a re-sale; and at the same time clauses are added with the view of letting him out on a subsequent purchaser undertaking an undoubtedly valid obligation in favour of the holder of the ground-annual, and so on the occasion of every sale. These clauses may be useful, as, on the one hand, it seems reasonable that the proprietor for the time should be liable as a vassal is, and, on the other hand, it is certainly desirable that there should be some means of putting an end to the liability on a bond fide sale.

Active Title.—This is the distinguishing point of the modern ground-annual as compared with older forms. The essential clauses of the deed are (1) disposition of property to purchaser, (2) under reserved real burden of the ground-annual, (3) personal obligation by purchaser for payment of the ground-annual, (4) and, in security thereof, disposition by him to the seller of not only (a) the ground-annual furth of the property, but (b) the property itself, and (5) consent to registration for preservation and execution. Clauses 3 and 4 give the active title by infeftment. Clause 5 authorises summary diligence, but of course only against the original obligant.

Feu-duty.—There is no doubt that, as between the seller and purchaser, the latter must pay all feu-duty in all time coming, and it is undesirable to encumber the document, as is sometimes done, with long clauses on this point. But it is desirable to make non-payment of feu-duty a ground of irritancy.

Irritant and Resolutive Clauses.—The statute 1597, c. 250, applies to feu-duties only, and only in favour of the superior. Therefore any and all clauses of this nature which are desired must be expressed. They will be made applicable to any breach of the conditions of the deed, and, it is recommended, to non-payment of any one year's feuduty.

Other Remedies for Payment.—See Section XXXI. But note that the holder of a ground-annual in the ordinary form—containing, that is, a disposition of the lands in security, and an assignation of rents—is entitled to bring an action of maills and duties, differing in this respect from a superior, and (2) that as regards poinding the ground, the holder of every ground-annual may do so even after the sequestration of the proprietor to the extent of recovering the term's payment current at the date of sequestration and one year's arrears if due at the date of sequestration.

Recording.—There will be two warrants of registration; and if the deed is to be recorded (as is common) in the Books of Council

Somerville v. Johnston, 1899, 1 F. 726.
 Prudential Assurance Co. v. Cheyne, 650.
 1884, 11 R. 871.

and Session, the warrants will run as follows:—(1) a warrant on behalf of the purchaser "for preservation as well as for publication," and (2) a warrant on behalf of the seller "for preservation and execution as well as for publication."

In connection with this matter of recording attention may be called to the risk of confusion arising when the purchaser is at the same time granting securities to third parties for borrowed money. (1) These bonds will require to refer to the ground-annual and other conditions of the contract of ground-annual. This may best be done in the form of Sched, H of the 1874 Act, i.e. a reference to the contract as "recorded of even date with the recording of these presents." If this should be forgotten and the deeds recorded on different dates, there will be trouble with the bondholders. (2) It must be seen that the bonds are recorded after (though on the same day as) the contract of ground-annual. In the ordinary case of a purchaser by simple disposition granting a bond at the same time, it is appropriate that the disposition should go on before the bond, as being the logical order, but the matter is really indifferent. Here, however, it is otherwise. The contract of ground-annual is the debtor's title, but it is more: it is the title and security of the disponer also in respect of the ground-annual. The ground-annual is intended to be the first charge on the purchaser's title (subject to feu-duty, if any); and that being so, it is inconsistent that the bond should be first on record. It is submitted that even if this should happen (as it has in practice), it is clear that the ground-annual is necessarily before the bond in respect of the reserved burden. It is not so clear that it is also preferable in respect of the active title by disposition in security. But apart from all these questions, it is not such a title as the holder of the ground-annual is entitled to insist upon, and so there will be the trouble of obtaining a formal deed of postponement of the bonds to the ground-annual.

Allocation.1—There is this difference between feus and ground-annuals in this respect, that in the latter case there is no statutory machinery and assistance. Being regulated entirely by the ordinary rules of preference by registration, it follows that a purchaser, or lender on the security, of a ground-annual will not be affected by an unrecorded allocation of which he has no knowledge. This is on the assumption that the ground-annual has been constituted in the modern form, so that the creditor is *infeft* on a disposition in security; for if it is in the form of a mere reserved real burden, the case may be different, inasmuch as by sec. 30 of the 1874 Act the law appears to be left in the condition that a restriction of a real burden may be effectual even against third parties without recording 2; and the allocation is in effect just a restriction.

The allocation should be signed by the creditor himself, or some

¹ Cf. p. 213 as to feu rights.

one holding an authority clearly and specially authorising the granting of such writs. This also is in distinction to what will be legally sufficient in the case of a feu.¹

Augmentation.²—If on allocation an augmentation is constituted, two questions arise: (1) legal quality and security, and (2) ranking.

- 1. It is not so clear that an augmentation expressed in the usual way has the legal nature of the original ground-annual. In the case of feus the augmentation is expressly provided for by statute and statutory form, and the conclusion is irresistible that the new money has the same nature and (apart from any question of mid-impediment)⁸ the same security as the old. But here the case is different. Suppose a document were recorded simply stating that though the ground-annual in the original recorded contract was £5, it was now decided to make it £10, would the increase of £5 be a properly secured real burden, and, separately, would it give the creditor the benefit of an active right? This, however, is an extreme, and indeed a different, case; and though the matter is not free from doubt, it is thought that in an ordinary case of a moderate augmentation in consideration of an allocation, the increase would be held to have the quality of the original, having regard to the fairness and reasonableness of the matter, to the fact that in substance all the essentials of a real burden are given on the record, and treating the case of feus under the 1874 Act by way of analogy rather than contrast.
- 2. But, on the other hand, it is thought to be beyond doubt that the additional ground-annual must rank after any security put on record before it is recorded, subject to the operation of the doctrine of approbate and reprobate as referred to on p. 249.

Power of Redemption.—It goes without saying that if there exists a power of redemption, the ground-annual will never sell for more than the figure at which the debtor may redeem. Indeed, it may be less; for a purchaser may find that, after he has gone to considerable expense in purchasing, he loses his investment at once by the proprietor redeeming. If a power of redemption is to be conferred, the following points require attention, namely, (1) redemption price; (2) period of redemption, whether at any time, or only up to a certain date, or only after a certain date; (3) notice; (4) whether a part owner may redeem his part of the payment if allocated; (5) of course all arrears must be paid, and this should include a proportionate part of any periodical additional sum, as from the last date when such a sum fell due, to the date of redemption; and (6) the incidence of the expenses.

Confusion.—If both property and ground-annual stand in the name of the same owner, it is obvious that questions are apt to arise. Except in cases of succession this ought never to be allowed to happen. If it should happen in any case, and if the property comes to be sold, the



^{1 1874} Act. Sch. D.

³ See p. 248.

² Cf. p. 248 as to feu rights.

disposition will narrate that the property is sold free from the ground-annual, the same having been extinguished confusione, and, without prejudice, the deed will contain words of express discharge. If the contrary should be the intention, the only thoroughly satisfactory procedure would be the reconstitution of the ground-annual. But there is authority for the view that the intention will prevail, which implies that there is no ipso facto necessary extinction. That is quite consistent with the other view, that under such circumstances a disposition for onerous causes, with a clause conveying all right, title, and interest, and with absolute warrandice, will imply that the sale is free from the burden if it contain nothing to the contrary.

The chief practical application occurs in connection with the constitution of ground-annuals by way of a contract between the true proprietor and some one who lends his name for the purpose. The ordinary subsequent procedure is that the original proprietor then sells the ground-annual and thereafter obtains a reconveyance of the property from the nominal owner. To avoid all question of confusion, or even the appearance of it, care ought to be taken to see that the reconveyance of the property is not signed until the purchaser of the ground-annual has taken infeftment.

CONTRACT OF GROUND-ANNUAL

This contract of ground-annual, entered into between A., heritable proprietor of the subjects hereinafter disponed, of the one part, and B., of the other part, Witnesseth that in implement of a contract of sale and purchase by public roup, constituted by articles of roup executed by the said A., dated , and minute of enactment and preference thereon in favour of the said B., dated , and in consideration of the sum of £ instantly paid by the said B. to the said A. (of which the said A. hereby acknowledges receipt and discharges the said B.), and of the ground-annual and additional payments hereinafter specified, the said A. has sold and hereby dispones to the said B. and his heirs, but excluding assignees before infeftment, heritably and irredeemably, but with and under the real liens, burdens, conditions, obligations, irritant and resolutive clauses, and others underwritten, All and Whole [description or reference]: But always with and under [refer to subsisting burdens, conditions, etc.]:

CONSTITUTION OF GROUND-ANNUAL

And further declaring that these presents are granted, and the said subjects are hereby disponed, with and under the real liens, burdens, conditions, obligations, irritant and resolutive clauses, and others following, namely, (first) With and under the real lien and burden of a free yearly ground-annual of \mathcal{E} , to be paid to, and uplifted by, the said A. and his heirs and assignees whomsoever, furth of the area of ground before disponed, and whole buildings erected or to be erected thereon, or furth of any part thereof, and first and readiest rents and duties of the same, from and after the term of

¹ Murray v. Parlane's Tr., 1890, 18 R. 287.

, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the same at the term of for the half-year preceding, and the next term's payment at

thereafter, and so forth, continuing in the regular and punctual payment of the said ground-annual at the said two terms in each year in all time thereafter, with interest thereon at the rate of five per centum per annum from the respective terms of payment during the non-payment thereof, and a fifth part further of liquidate penalty in case of and for each term's failure in punctual payment; (second) With and under the real lien and burden of payment to the said A. and his foresaids of the additional sum of £ out of the said subjects and others each (nineteenth) year after the said term of , over and above the ground-annual payable for the year, beginning the first payment of the said additional sum at the term of , and so on at the term of in each (nineteenth) year thereafter in all time coming, with interest and penalty as in the case of the said ground-annual:

Buildings 1

(third) The said B. and his heirs and successors shall be bound to maintain on the said area of ground, and (in the event of demolition or decay of the present buildings) to erect and maintain good and substantial buildings of stone and slated to the satisfaction of the said A. and his foresaids, and used all as dwelling-houses only and for no other purposes, except that there may be shops on the ground floor, and capable of yielding a yearly rental of at least \pounds ; and the said B. and his foresaids shall be bound to keep all such buildings constantly in good repair:

FIRE INSURANCE

(fourth) The said B. and his foresaids shall be bound to keep all buildings erected and to be erected on the said area of ground constantly insured against loss by fire with a responsible insurance company selected by the said A. or his foresaids; and in the event of such buildings being destroyed or damaged by fire, then the sum or sums which may be received under such insurance shall be applied either towards the erection of new buildings in place of those which may be destroyed, or in repairing the injury which such buildings may have sustained, which insurance shall, to the extent of £ and maintained in name of the said A. and his foresaids primo loco in respect of their interest under these presents, and quoad ultra the insurance may be in such names as the said B. and his foresaids may determine; and in the event of the said B. or his foresaids refusing or failing to insure the said buildings as aforesaid, or to pay the premiums of insurance regularly as the same become due, or to produce the insurance policies and premium receipts to the said A. and his foresaids, it shall be in the power of the said A. and his foresaids to insure the buildings in manner and in the respective terms foresaid at the expense of the said B. and his foresaids, and to advance the premiums, all which the said B. and his foresaids shall repay with interest at five per centum per annum:

purpose rather is simply to secure the annual payment.



¹ If desired more elaborate clauses may be adopted from the forms of feu-rights on pp. 214-7. Here the assumption is, that the

CONVENTIONAL IRRITANCY

Declaring that in case the said B. or his foresaids shall at any time allow two years' payments of the said ground-annual to be resting owing at one time, or shall fail to maintain buildings on the ground capable of yielding an annual rental of £ , or to keep such buildings in good repair and insured as aforesaid, or to pay the premium of insurance, or to implement and fulfil any of the other conditions hereof, or to pay the feu-duty for any one year, then and in any of these events, and in the option of the said A. or his foresaids, these presents and all following thereupon shall ipso facto become void and null, and the said area of ground and buildings thereon shall thereupon revert to and become the sole and irredeemable property of the said A. and his foresaids without prejudice [to any servitude rights communicated to third parties as aftermentioned and also without prejudice] to their right [the right of the said A. and his foresaids] to recover payment of whatever sums of money and others may be resting owing to them under these presents at the time, which the said B. and his foresaids shall be bound to pay:

REAL BURDENS

Declaring further that the said yearly ground-annual, additional sums, interest and penalties, and whole other obligations and others before written, and the foregoing irritant and resolutive clauses, shall be and are hereby created and declared real liens and real and preferable burdens upon and affecting the said subjects and others hereby disponed, and real qualities of the right thereto of the said B. and his foresaids; and the same, with the immediately following irritant and resolutive clauses, are hereby appointed to be recorded as part of these presents in the appropriate register of sasines, and also to be inserted or validly referred to in all future conveyances, rights, transmissions, and investitures of and in the said subjects and others or any part thereof; otherwise this disposition and all that may follow thereon, and the said conveyances, rights, transmissions, and investitures, and all following thereon, shall be null and void, and the said area of ground and buildings thereon shall revert and belong to the said A. and his foresaids in the same manner as if these presents had never been granted:

REAL BURDENS AND SERVITUDES 1

Declaring further that the said yearly ground-annual, additional sums, interest and penalties, and whole other conditions, obligations, and others before written, and the foregoing irritant and resolutive clauses, shall each and all, jointly and severally, be and are hereby created and declared real liens and real and preferable burdens and servitudes upon and affecting the said subjects and others hereby disponed, and real qualities of the right thereto of the said B. and his foresaids in favour of the said A. and his foresaids as regards the said yearly ground-annual, additional sums, fire insurance, interest and penalties, and in favour of the said A. and his foresaids and also in favour of the said A. and his successors

standing a sale or redemption of the ground-annual.



¹ This is an alternative to the preceding clause, the object being to keep up building and other restrictions if inserted, notwith-

as proprietors of [specify briefly], and of the said last mentioned subjects themselves as regards all 1 other conditions, obligations, and others before written, and that even though the said money obligations should be discharged or otherwise extinguished, and the said ground-annual, additional sums, interest, penalties, and whole other conditions, obligations, and others before written, and the foregoing irritant and resolutive clauses, and also the immediately following irritant and resolutive clauses, are hereby appointed to be recorded as part of these presents in the appropriate register of sasines, and also to be inserted or validly referred to in all future conveyances, rights, transmissions, and investitures of and in the said subjects and others hereby disponed or any part thereof, otherwise this disposition and all that may follow thereon, and the said conveyances, rights, transmissions, and investitures, and all following thereon, shall be null and void, without prejudice to the servitudes created as aforesaid so far as the benefit thereof shall then have been communicated to third parties, and the said subjects hereby disponed and buildings thereon shall revert and belong to the said A, and his heirs or assignees in the same manner as if these presents had never been granted without prejudice as aforesaid:

FORMAL CLAUSES

With entry at the term of : And the said A. assigns the writs, and has delivered those enumerated in the inventory thereof annexed and signed as relative hereto: And the said A. assigns the rents: And he binds himself to free and relieve the said B. and his foresaids of all feu-duties, casualties, and public burdens: And the said A. grants warrandice:

Personal Obligation

For which causes and on the other part, the said B. binds himself and his heirs, executors, representatives, and successors whomsoever, all jointly and severally, renouncing the benefit of discussion, to pay to the said A. and his foresaids the foresaid free yearly ground-annual of \pounds and periodical additional sums, with interest and penalty as before specified; and also to fulfil and perform all the other prestations and obligations incumbent on the said B. and his foresaids under these presents:

DISPOSITION IN SECURITY

And for further security to the said A. and his foresaids of the said yearly ground-annual, periodical additional sums, interest, and penalties, and of implement of the other prestations and obligations herein contained, and without prejudice to but in corroboration of the rights of the said A. and his foresaids in virtue of the burdens and conditions under which the said subjects and others are hereinbefore disponed to the said B., and of the foregoing personal obligation, the said B. hereby dispones to the said A. and his foresaids not only the foresaid yearly ground-annual of £ and periodical additional sums as aforesaid, to be paid to and uplifted by the said A. and his foresaids furth of the said subjects and others foresaid, and readiest rents and duties thereof, and that at the terms and with interest and penalties as aforesaid, but also All and Whole the said subjects and others hereinbefore described

¹ This may require limitation and adjustment.

themselves, which description is here held as repeated brevitatis causa: And that in real security to the said A. and his foresaids of the said yearly ground-annual, periodical additional sums, interest, and penalties, and of the whole conditions, provisions, obligations, declarations, and others above set forth: And the said B. assigns the writs, and binds himself and his foresaids to make those enumerated in the said inventory forthcoming to the said A. and his successors, the proprietors for the time being of the said ground-annual, on a receipt and obligation for redelivery thereof on the usual terms: And the said B. assigns the rents: And the said B. grants warrandice:

TRANSMISSION AND RELIEF OF PERSONAL OBLIGATION

And with reference to the personal obligations herein contained, it is hereby agreed as follows, namely, (first) that the absolute disponees or assignees of the said B., and all their successors in the said subjects and others on absolute titles for all time coming, if acquiring right as individuals to the said subjects, shall by accepting a conveyance or otherwise acquiring right become personally liable for payment of the foresaid ground-annual and periodical additional sums, as well as the whole other personal obligations incumbent on the said B.; and if acquiring right to the said subjects as trustees for behoof of others or in any other fiduciary capacity, then the funds and estate under their charge shall thereby become liable for payment of said ground-annual and periodical additional sums, and for implement of the said whole other obligations, but always in either case without prejudice to the personal liabilities of the said B. and his successors until the same are respectively discharged as after mentioned; and (second) that in the event of the said B. disponing the said subjects absolutely to a disponee solvent at the time, and such disponee expressly in such conveyance contracting with the said A. or his foresaids, and binding himself and his heirs, executors, representatives, and successors, all jointly and severally, without the benefit of discussion, to implement, from and after his entry to the said subjects, the whole obligations hereby incumbent on the said B., and on such conveyance being approved of by the said A. or his foresaids, and on the same being validly executed by all parties, including such disponee, and recorded, the said B. and his foresaids shall thereafter be free of personal liability under these presents from and after the term of entry of such disponee, but the said B. and his foresaids shall continue personally liable for arrears of ground-annual, additional sums, penalties, and interest, and other prestations incurred by them at or prior to the entry of such disponee; and after such devolution of the personal obligations herein contained upon such disponee, he and his foresaids shall continue personally bound until the said obligations shall be undertaken by and devolved upon a subsequent disponee, in the same manner and subject to the like conditions as above stated with reference to the said B.; and on every such transmission of liability the expense incurred by the said A. or his foresaids shall be paid by the party then selling or disponing, but that only to the extent of £2, 2s.:

REGISTRATION

And the parties hereto consent to the registration hereof for preservation and execution.—In witness whereof.



CLAUSE OF REDEMPTION

And it is hereby agreed that the said B. or his foresaids shall be entitled to redeem the said ground-annual and periodical additional payments at any term of Whitsunday or Martinmas [or at any term of Whitsunday or Martinmas up to and including the term of , but not later (time being of the essence of the contract), or at the term of any term of Whitsunday or Martinmas thereafter, but not before (time being of the essence of the contract), on the following terms and conditions, namely, (1) the redemption price shall be £ ; (2) in addition, the groundannual due at the term of redemption, and all arrears thereof, with interest, shall be paid, and any payments of the said periodical additional sums then due, and all arrears thereof, if any, with interest, including a proportionate part thereof corresponding to the period from the last term at which a periodical additional sum fell due (or from the date of these presents if no periodical additional sum has fallen due) to the term of redemption," shall also be paid, and all other sums then due by the said B. and his foresaids, and all their obligations under these presents shall first be paid and implemented; (3) the said B. or his foresaids shall give three months' notice in writing to the said A. or his foresaids of their intention to exercise the power of redemption; (4) the said B. or his foresaids shall pay the whole expense of the redemption and of the discharge following thereon; [and] (5) the power of redemption shall be exercisable only as regards the whole of the said groundannual, and not under any circumstances as regards any part thereof short of the whole; and (6) the redemption shall not prejudice or affect the other conditions and clauses herein contained, all which shall continue in full force and effect, and the discharge shall be express to this effect.

^a Care must be taken to see that the form of these references to periodical additional sums is not inconsistent with the limited period (if any) of redemption.

ASSIGNATION 1 OF A GROUND-ANNUAL

- I, A., in consideration of the sum of \pounds paid to me by B., do hereby assign and dispone to the said B., and his heirs 2 and assignees whomsoever, the ground-annual of \pounds per annum, and periodical additional sums payable under the contract of ground-annual entered into between me and C., dated , and recorded as after mentioned, the
- ¹ Name.—It is common to call the deed a disposition and assignation; this is no more appropriate than in the case of any transfer of a heritable security, and it is recommended that it be dropped.
- ² Heirs.—It will be remembered that the ground-annual is heritable as regards succession. It is therefore superfluous and unnecessary to exclude executors. A destination to "executors" only would carry the ground-annual to them as heirs of provision. A destination to "heirs and executors" must above all be avoided.



first term's payment receivable by the said B. being that which will become due at the term of for the half-year preceding: And also the real burden for payment thereof reserved and constituted under the said contract of ground-annual over the following subjects, and the said subjects themselves, namely, All and Whole the tenement forming Nos. 1, 2, and 3 James Street, Dundee, with the solum thereof, ground attached, and pertinents, all in the county of Forfar, being the subjects particularly described, and all as specified and described, in the said contract of ground-annual, recorded in the division of the general register of sasines for the county of Forfar, and as in the Books of Council and Session on [X]: Together with the whole obligations and others contained in the said contract of ground-annual so far as in my favour, and the said contract of ground-annual itself: But always with and under the [burdens, etc.] specified in (first) and (second) the said contract of ground-annual dated and recorded as aforesaid.—In witness whereof.

Deduction of title.—If the assigner be not the original creditor, say, To which ground-annual I acquired and have right conform to the following writs, viz. [specify them briefty].

Stamp.—Conveyance on sale.

ASSIGNATIONS OF GROUND-ANNUALS WHICH HAVE BEEN ALLOCATED

1. When the whole Ground-annual is assigned, and no Part of the Property is wholly freed

[As above to end, and proceed.] But declaring that these presents are in all respects subject to the operation and effect of a minute of allocation granted by me, dated , and recorded in the said division of the general register of sasines on , under which the said ground-annual and periodical additional sums were allocated as is shown in the schedule annexed and signed as relative hereto.—In witness whereof.

Schedule referred to in the foreyoing Assignation

Subject.			GROUND- ANNUAL.	Periodical Additional Sum.
Street flat, shop, No. 1.			£ s. 5 0	10
", "No. 3			5 0	10
First flat up, (east house .			3 0	6
Stair No. 2, middle house			3 0	6
(west house			3 0	6
cast house .	•	•	2 10	5
Second flat up, middle house	•		2 10	5
Stair No. 2, west house .			2 10	5
east house			1 10	3
Top flat, No. 2, middle house west house.	•		1 10	3
west house .			1 10	3
			31 0	62

2. WHEN THE WHOLE GROUND-ANNUAL IS ASSIGNED, BUT PART OF THE PROPERTY HAS BEEN WHOLLY FREED

[As on p. 271 to X., and proceed] but excepting always [the part which has been freed, say] the two shops on the street flat, being Nos. 1 and 3 of the said street, Together with the whole obligations and others contained in the said contract of ground-annual so far as in my favour, and the said contract of ground-annual itself: But always [as on p. 272]: But declaring that these presents are in all respects subject to the operation and effect of a minute of allocation granted by me, dated , and recorded in the said division of the general register of sasines on , under which (first) the said two shops were in the result set free from the said ground-annual and periodical additional sums, and (second) the same were allocated upon the remainder of the said tenement, as is shown in the schedule annexed and signed as relative hereto.—In witness whereof.

Schedule.—Annex a schedule on similar lines to that above.

3. When an allocated Part only of the Ground-Annual is

I, A., in consideration of the sum of £ paid to me by B., do hereby assign and dispone to the said B., and his heirs and assignees whomsoever, the ground-annual of £5 per annum, and the additional sum of £10 over and above the ground-annual of the year, payable said additional sum at 1920 and every nineteenth year thereafter, the said the term of ground-annual and additional sums being part of the ground-annual of per annum and periodical additional sums payable under the contract of ground-annual entered into between me and C., dated , and recorded as after mentioned, the first term's payment in respect of the said ground-annual of £5 to be received by the said B. being that which will become due at the for the half-year preceding: And also the real burden for payment thereof reserved and constituted under the said contract of groundannual and minute of allocation after mentioned, over the following part of the subjects embraced in the said contract of ground-annual and the following subject itself, namely, All and Whole the shop No. 1 James Street, Dundee, with common right to solum [and with ground attached] and pertinents, all in the county of Forfar, being part of the subjects particularly described in the said contract of ground-annual recorded in the division of the general register of sasines for the county of Forfar, and as in the Books of Council and Session, : But always with and under the [burdens, etc.] specified in and (second) the said contract of ground-annual dated and (first) recorded as aforesaid, but all only so far as applicable: Together with the whole obligations and others contained in the said contract of ground-annual so far as in my favour, and the said contract of ground-annual itself, but only so far as relating to the said sums hereby assigned, and to the said part of the subjects, which ground-annual of £5 and relative periodical additional sum were allocated on the said part of the subjects conform to minute of allocation , and recorded in the said division of the general by me, dated register of sasines on -In witness whereof.

DISCHARGE OF A GROUND-ANNUAL

I, A., in consideration of the sum of £ now paid to me by B., do hereby discharge for all time coming a ground-annual of $\boldsymbol{\mathcal{L}}$ annum, and periodical additional sums, payable under a contract of groundannual between C. and D., dated , and recorded in the division of the general register of sasines for the county of Forfar, and as in the Books , and all obligations, conditions, restricof Council and Session, on tions, servitudes, real burdens, and whole other clauses contained, reserved, or constituted in the said contract of ground-annual: And I declare to be redeemed and disburdened thereof, and of the infeftment following on the said contract of ground-annual, All and Whole that tenement forming Nos. 1, 2, and 3 James Street, Dundee, with the solum thereof, ground attached, and pertinents, all in the county of Forfar, being the subjects particularly described, and all as specified and described, in said contract of ground-annual dated and recorded as aforesaid: To which ground-annual and others I acquired right conform to assignation by the said C. in my favour, dated , and recorded in the said division of the general register of sasines on .-In witness whereof.

- Notes.—1. Narrative.—If the discharge is granted on the occasion of the exercise, by the proprictor of the property, of a right of redemption of the ground-annual in terms of its constitution, it will be proper to set this out, for (1) it affects the stamp (as below), and (2) if the granters of the discharge are trustees it obviates any question as to their power to grant the deed, seeing that they are bound to do so. The narrative may be very short; thus, after "paid to me by B.," say "in exercise of his right of redemption in terms of the contract of ground-annual after mentioned, and in implement of my co-relative obligation to grant a discharge, do hereby."
- 2. Searches.—The proprietor should of course have the property searches brought up to date, and personal searches against the successive holders of the ground-annual. When the discharge proceeds on a right of redemption inhibitions against the discharger may not be effectual if not notarially intimated to the proprietor [see p. 285], but he is not bound to run any such risk.
- 3. Stamp.—If on redemption in terms of constitution, sixpence per £100 of the sum paid. Otherwise, as a conveyance on sale.

DISCHARGE OF AN ALLOCATED PART OF A GROUND-ANNUAL

I, A., in consideration of the sum of \pounds , now paid to me by B., do hereby discharge for all time coming a ground-annual of \pounds over and above the ground-annual of the year, the same being part of the ground-annual of \pounds and periodical additional sum of \pounds payable under a contract of ground-annual between C. and D., dated , and

recorded , and all obligations, conditions, restrictions, on servitudes and burdens, and whole other clauses contained, reserved, or constituted in the said contract of ground-annual and in the minute of allocation after mentioned, but all only so far as applicable to the said part hereby discharged: And I declare to be redeemed and disburdened thereof, and of the infeftment following on the said contract of ground-annual, All and Whole the shop No. 1 James Street, Dundee, with common right to solum [and with ground attached] and pertinents, all in the county of Forfar, being part of the subjects particularly described in the said contract of ground-annual dated and recorded as aforesaid, which ground-annual of $\boldsymbol{\pounds}$ periodical additional sum of £ were allocated on the said shop, conform to minute of allocation by me, dated , and recorded : To which ground-annual and others I acquired right conform to assignation by the said C. in my favour, dated , and recorded .-In witness whereof.

DISCHARGE OF THE MONEY OBLIGATIONS RESERVING SERVITUDES

I, A., in consideration of the sum of £ now paid to me by B., do hereby discharge for all time coming a ground-annual of £ per annum, and periodical additional sums of £ , payable under a contract of ground-annual between C. and D., dated , and recorded in the division of the general register of sasines for the county of : And I declare to be redeemed and disburdened thereof, and of the infeftment following on the said contract of ground-annual, subject always as after mentioned, All and Whole [as in above forms, but before deduction of title, if any, insert], But declaring that this discharge is limited to the said annual and periodical sums, and fire insurance premiums, interest and penalties, and does not discharge, prejudice, or affect any of the other obligations, or any of the conditions, restrictions, servitudes, or other clauses contained or constituted in the said contract of ground-annual, all which are reserved and shall continue in full force and effect.—In witness whereof,

SECTION XVI

SEARCHES

I. PROPERTY REGISTERS

1. NON-BURGAGE PROPERTY

The registers are:

- 1. The particular register of sasines for the county or district until it ceased to exist under the operation of the Land Registers (Scotland) Act, 1868.
- 2. The general register of sasines until it was separated into divisions under the same Act, i.e. until 31st December 1868.
- 3. The appropriate division of the general register of sasines from and after 31st December 1868.

The following table shows what the particular registers were, and the dates at which they were respectively closed in terms of sec. 8 of the Act. The districts refer to counties unless otherwise expressly stated. When words are within brackets these occurred in the formal name of the register, but they do not require consideration inasmuch as they are at any rate within the county named:—

	CLOSED.							
Aberdeen and Kincardine	Feb. 6, 1869							
Argyll, Dumbarton, Bute, Arran (and								
Tarbert)	Jan. 12, 1871							
Ayr (and Bailiaries of Kyle, Carrick, and								
Cunninghame)	Sept. 30, 1869							
Banff	Feb. 27, 1869							
Berwick (and Bailiary of Lauderdale).	Mar. 17, 1869							
Caithness	Feb. 27, 1869							
Dumfries and Stewartry of Kirkcud-								
bright (and Stewartry of Annandale) .	Sept. 30, 1869							
Edinburgh and Constabularies of Haddington,								
Linlithgow (and Bathgate)	Feb. 6, 1869							
Elgin (Forres) and Nairn	Feb. 27, 1869							
Fife	Jan. 12, 1871							
Forfar	Feb. 27, 1869							
276								

					CLOSED.
Inverness, I	Ross, Suth	ierland, ai	nd Cromarty	•	Feb. 6, 1869
Kinross,	•				Dec. 31, 1871
Lanark (exc	ept Rega	lity of Gla	usgow).		Mar. 17, 1869
Orkney	•		•		Feb. 6, 1869
Perth (exce	pt Stewar	try of Me	nteith)		Jan. 12, 1871
Renfrew and	d Regality	y of Glasg	ow .		Mar. 30, 1871
Roxburgh, 8	Selkirk, a	nd Peeble	8.		Sept. 30, 1869
Shetland	•		•		Feb. 6, 1869
Stirling, C	lackmann	an, and	Stewartry	of	
Menteith	•		•		Jan. 12, 1871
Wigtown	•		•		Sept. 30, 1869
Orkney Perth (excepted Renfrew and Roxburgh, Statished Stirling, Commenteith	pt Stewar d Regalit Selkirk, a lackmann	try of Me y of Glasg nd Peeble	nteith) ow . s .		Feb. 6, 1863 Jan. 12, 1873 Mar. 30, 1873 Sept. 30, 1863 Feb. 6, 1863 Jan. 12, 1873

From 1st January 1869 there was a division of the register for each county, one for the stewartry of Kirkcudbright, and (in terms of sec. 3 of the Act) one for the barony and regality of Glasgow. The complete list (county being implied when the contrary is not stated) was:

Aberdeen.	Elgin.	Orkney.
Argyll.	Fife.	Peebles.
Ayr.	Forfar.	Perth.
Banff.	Glasgow (barony and regality).	Renfrew.
Berwick.	Haddington.	Ross.
Bute and Arran.	Inverness.	Roxburgh.
Caithness.	Kincardine.	Selkirk.
Clackmannan.	Kinross.	Shetland.
Cromarty.	Kirkcudbright (stewartry)	Stirling.
Dumbarton.	Lanark.	Sutherland.
Dumfries.	Linlithgow.	Wigtown.
Edinburgh.	Nairn.	-

The changes which have been made on the above are as follows:--

- 1. Ross and Cromarty.—From 26th August 1889 Ross and Cromarty are one county, by the name of "the county of Ross and Cromarty," and one register only is kept from that date (Local Government (Scotland) Act, 1889, s. 39, 52 & 53 Vict. c. 50). All writs applicable to property in the combined county will be recorded with a warrant directing registration "in the register of the county of Ross and Cromarty." And as regards searches, the division of the register for the old county—Ross or Cromarty—in which the property was situated will be searched down to 26th August 1889, and the combined county thereafter.
- 2. Orkney and Shetland.—From 11th May 1891 it has not been "necessary that separate divisions of the register of sasines be kept for the counties of Orkney and Shetland" (54 Vict. c. 9, s. 1 (2)). But this does not make it necessary to make any change in the form of the warrant of registration. For property in Orkney the warrant will direct registration "in the register of the county of Orkney," and

for property in the county of Shetland it will direct registration "in the register of the county of Shetland." On the other hand, there would be nothing wrong in a warrant which directed registration "in the register of the counties of Orkney and Shetland." The only statutory rule is that contained in sec. 141 of the Consolidation Act, 1868, which directs that the warrant shall specify "the register or registers of the county or counties . . . in which the lands to which such conveyance or deed or writing has reference are situated." It is the register and not the county which is to be specified, and here the register of the county (whether Orkney or Shetland) is the register of the counties of Orkney and Shetland. So much is this so, that no matter how the warrant may run, the certificate of registration must certify that the deed has been recorded "in the division of the general register of sasines applicable to the counties of Orkney and Shetland."

Searches will be in the division for the county — Orkney or Shetland—to 11th May 1891, and in the division for the two counties thereafter.

3. Changes made by Boundary Commissioners.—Numerous changes in the county boundaries were made by the Boundary Commissioners, under the Local Government Act, 1889. These, of course, have effect for land registration, as for other purposes, but as regards land registration their effects were postponed to 15th May 1892 (54 Vict. c. 9, s. 1). For what the changes are, reference is made to Mr. Hay Shennan's book on Boundaries of Counties and Burghs in Scotland.

It is impossible here to give even any general details of the changes, but it may have a certain amount of usefulness to state what counties have had no changes made at all in either county or parish boundaries, and what counties have had no changes in the county boundaries.

1. No changes at all:

Kirkcudbright.

Wigtown.

Orkney.

2. No change in the county boundaries:

Bute and Arran. Shetland. Caithness. Sutherland. Kirkeudbright. Wigtown.

Orkney.

As regards searches, the changes made under the Act may work in several ways:—

1. The subject of search may previously have been in one county, and it may be wholly transferred to another. In that case the division of the register for the old county will be searched down to

15th May 1892, and the division for the new county from 14th May 1892.

- 2. The subject of search may previously have been wholly in one county, and part of it may have been transferred to another. The old county will be searched all through, and the new county from 14th May 1892.
- 3. The subject of search may previously have been partly in each of two counties, and it may have been transferred wholly to one of these. The county which is thus left out will be searched to 15th May 1892, and the other county will as from 14th May 1892 be searched so as to cover the *whole* property.
- 4. The subject of search may previously have been partly in each of two counties, and it may still be left in that condition, though the extent of the respective parts is altered. If the searches exist in a joint form, i.e. over the whole property in both counties, they will be continued as they stand; and if no searches exist, they will be ordered in this form. If, on the other hand, they are divided—separate searches for each county only—the transferred area will require also to be transferred to the search of its new county as from 14th May 1892, or, perhaps better, a combined search may be ordered for the whole property in both registers.

Period of Property Searches.—The rule of professional practice is forty years. An express obligation in general terms to give searches, and the implied obligation, each bind the seller to give a forty years' search. In like manner a lender is entitled to a search for that period. It follows that the solicitor whose duty it is to obtain a search will be liable if he accept a search for a less period if the longer period would have disclosed any defect or burden. provision of sec. 34 of the 1874 Act making twenty years in most cases a sufficient period of prescription has no effect on the period of searching. The reason is that that provision does not shorten the period of the negative prescription, and so a bond recorded thirty-nine years ago will bind the property even though no interest may have been paid. It is true that the same may be said of a bond recorded forty-one years ago if interest has been paid within the last forty years, so that a forty years' search is not conclusive. But there must be some limit; forty years was no doubt chosen because it was the period of both positive and negative prescription under the Act 1617, c. 12, and it is confirmed by inveterate practice. Accordingly, it may be taken as certain that under no circumstances, apart from express stipulation, is a seller bound to furnish a search for more than forty years back from the date of settlement. It is not so clear that a purchaser or lender should not obtain a longer search, if necessary to show the infeftment on which the prescriptive title depends. This will be rarer now since the positive prescription has been reduced, but

it is recommended that the search should be for the forty years or to the foundation infeftment, whichever gives the longer period.

2. BURGAGE PROPERTY 1

Apart from the vexed question of feu-rights, searches in the property register over burgage property are as simple as in the case of non-burgage property. The only property register will in that case be the burgh register. The town clerk may, or may not, make the search; he is not bound to do so.

The difficulties are with reference to feus of burgage property, as to which see p. 341. The specialties are (1) that, though the property was burgage, a feu thereof ought, before 1874, to have been recorded in the county register; but (2) that registration of such feus, and transmissions thereof, in the burgh register is now declared to have been effectual. Two cases may be figured:—

- 1. A title is offered to burgage property without any reference to, or suggestion of, its having been feued. In that case the usual practice is to be satisfied with a search in the burgh register. But it is obvious that this will fail to disclose a properly constituted feu if granted before 1874, for it would have been recorded in the county register. Therefore, strictly, there ought also to be a search in the county register to 2nd October 1874. But it has to be kept in mind that feus by individuals of burgage property were very rare before 1874; and further, as a practical question, there is a certain protection in the badge of possession, especially in small burghs.
- 2. If, however, the title offered rest on a feu of burgage property, it is recommended that both registers be searched, in view of the alternative registration which was competent till 1874, and the different views which have been expressed since. It appears that, as a matter of fact, it is not very uncommon to find different writs in the same progress recorded in different registers.

These doubts suggest that in these cases the exact extent of the search to be given may sometimes require to be made express in the contract (p. 161), and in the obligation for search (p. 289).

Of course it goes without saying that no changes which have been made on the boundaries of royal burghs have any effect on burgage holding or the burgh register.

The personal registers for burgage property are, and always have been, just the ordinary personal registers about to be noticed.

II. PERSONAL REGISTERS

Down to 31st December 1868 the personal registers were:

1. Inhibitions.—(1) The general register of inhibitions, kept at Edinburgh for the whole country.

¹ See p. 340.

- (2) The particular registers of inhibitions, kept throughout the country for the different counties.
- 2. Adjudications.—The register of abbreviates of adjudications, kept at Edinburgh for the whole country.

This state of matters was altered as from 1st January 1869 by the Land Registers Act, 1868, ss. 16 and 17. The changes were: (1) the particular registers of inhibitions were discontinued, and (2) the general registers of inhibitions and adjudications were treated as one register.

INHIBITIONS

It is necessary here to refer to several matters of importance in connection with inhibitions, and the various questions which arise regarding them on examination of searches.

Prescription. — Prior to 1874 inhibitions prescribed in forty years. By sec. 42 of the 1874 Act this was cut down to five years (but see p. 287), with a provision for keeping the inhibition in force by renewal within the five years, and with a limitation as regards inhibitions recorded prior to the Act, which need not be considered here. The five years run "from the date on which such inhibitions shall respectively take effect." On reference to sec. 155 of the 1868 Act, which provides for a preliminary notice, it is clear that, when a notice has been recorded, and the inhibition and execution thereof have subsequently been recorded within twenty-one days, so that the inhibition takes effect from the date of registration of the notice, the five years will run from that date also. That is on the assumption that the notice was a good notice; but looking to the great protection which seems to be given to purchasers in the matter of inhibition, it is quite possible that a purchaser might be held entitled to refuse to proceed if the validity of the title depended on the inhibition having expired at the end of five years from the recording of the notice and not of the inhibition, and still more so that an obligation for clear search might be held not to be implemented in the like case. The law, however, is clear as follows: (1) that if twenty-one clear days elapse between the recording of the notice and the recording of the inhibition, the notice goes for nothing; and (2) that if five years are allowed to elapse after the recording of (a) an effectual notice—i.e. rather a notice which gives retro-active effect to a subsequent inhibition—or (b) an inhibition not preceded by an effectual notice, or (c) an effectual renewal, without in each case a renewal or further renewal, as the case may be, the inhibition goes for nothing.

Effect of Prescription.—When an inhibition prescribes its effect is lost altogether, that is to say, as regards deeds granted before, as well as after, the date when prescription operated. In the case of a judicial challenge founded on the inhibition, i.e. by action of

reduction, (1) register a notice of the action in the register of inhibitions under s. 159 of the 1868 Act, and (2) ob majorem cautelam renew the inhibition if running out.

Effect of Renewal.—It is hardly necessary to point out that a renewal is not a new inhibition. Property acquired between the first recording and the renewal will not be affected. As to renewal after the death of the inhibited person, that appears to be competent in order to keep the inhibition in force as a ground of challenge of any deed which he in his lifetime may have granted; but of course it has no effect against deeds by his successor.

Effect on Acquirenda.—Prior to 1868 an inhibition was not limited in its effect to the heritable estate belonging to the inhibited person at its date: it affected his future estate also. This was altered by sec. 157 of the 1868 Act. All that is affected is the estate as at the date of recording the inhibition, or notice thereof, including, however, any estate then standing destined to the inhibited person, "by a deed of entail, or by a similar indefeasible title," provided he shall thereafter succeed thereto. In determining what is estate at the date in question it obviously is or may be necessary to fix two dates, namely, (1) acquisition, and (2) divestiture. As regards the former, and under reference to what is stated below, it is not safe to take the date of infeftment, nor even the date of the deed; it is apparently necessary to go back to the date of purchase. As regards divestiture it is plain that that cannot be assumed to have taken place until the next owner is infeft.

The exception of indefeasible destinations in sec. 157 of the 1868 Act must be kept in view in dealing with any person who has succeeded under a destination of that kind, or where a person who has so succeeded has possessed the property within the prescriptive period. These cases include (1) an heir of entail in possession; (2) anyone who has succeeded under an entail and has disentailed; (3) anyone who has succeeded under a destination to A. in liferent allenarly and his heirs in fee. In all these cases an inhibition used against the person in question, at any time after the destination came into effect, would be sufficient to strike at any deed by him dealing with his expectancy.

What Estate affected.—The inhibition affects all heritable estate. The nature of the title is immaterial. It does not matter whether the inhibited person is infeft or not. This is of importance in connection with ex facie absolute conveyances (see infra). It is also of much importance in connection with the very common case of a person who buys a property, never takes a title, sells, and the title is taken direct to the new purchaser, with or without the express concurrence of the mid-purchaser on the face of the title. Under these circumstances the mid-purchaser should be searched against. Of course it is obvious that

¹ Dryburgh v. Gordon, 1896, 24 R. 1.

there may be many interests of this kind which never appear on the face of the deeds at all. In that case a purchaser or lender could not possibly be affected unless, it may be, in a case where, in point of fact, he had notice in some other way of the existence of the interest in question.

Ex facie Absolute Dispositions.—The case of Dryburgh, already cited, is of great importance. A. granted a disposition ex facie absolute, but truly in security, in favour of B.; a sale was effected to C.; and the disposition to C. was granted by A. (who was described as "proprietor") and B. B., who was A.'s law agent, had granted an obligation to C. for a clear search. It was found that there were two inhibitions against A. recorded after the recording of the ex facie absolute disposition by A. in favour of B. Held that B. must, under his obligation, clear the record of the inhibitions. It was not expressly decided that the inhibitions were valid, for the inhibitors were not in the action. It was held that, whether good or bad, there was a sufficiently serious question to entitle C. to say that B.'s obligation for a clear record was not implemented. But the Lord Ordinary (Kincairney) was of opinion that the inhibitions were good; and certainly there is a very great deal to say for that view, looking to the way in which the title was given The moral of the case is that, under similar circumstances, the title in favour of the purchaser should be granted by the holder of the ex facie absolute disposition by himself alone. Of course there may sometimes be difficulties in arranging that, but it is the only way to avoid the possibility of the question which arose in Dryburgh's case. Even then, however, it is proper to note that the Lord Ordinary indicated a question as to whether the inhibitions might not have had effect against C.'s disposition. But as to this it is submitted there could be no doubt. A. has given B. a deed which implies a power of sale, just as he could have given him a deed, namely, an ordinary bond and disposition in security, with an express power of sale; and in both cases the power and any exercise of it are good against all deeds granted by, and diligence used against, A. subsequent to the recording of B.'s deed.

In connection with ex facie absolute deeds there are two other questions, namely, (1) whether the disponees should be searched against (see p. 285), and (2) whether the recording of an inhibition against the disponer, without intimation to the disponee, bars the latter from claiming a preference for subsequent advances as against the inhibitor, a question which it is not necessary to consider here (see p. 474).

Future Deeds only struck at.—It goes without saying that inhibition strikes at future deeds only. But what is a future deed? The point is that the date of the deed—which, according to our practice, is the date of signing—cannot be the criterion. There is no deed until delivery, and the date of that will almost always require to be proved from outside sources. Thus a bond by A. to B. is signed on

the 1st of the month, C. records an inhibition against A. on the 2nd, the loan is paid over and the bond delivered and recorded on the 3rd. The bond, though dated before the inhibition, will be struck at; unless indeed it could be established that there was a prior contract and obligation to grant the bond. But alter the facts thus: bond to B. signed on 1st; loan paid and bond delivered same day; C.'s inhibition on 2nd; bond recorded on 3rd. The bond will be safe. But how is a third party to know these facts, e.g. an assignee of the bond, or a purchaser under the power of sale therein contained? It is probable that they would be allowed to take the infeftment as the criterion—that if the inhibition took effect before the recording of the deed, it must be cleared away.

Voluntary Deeds only struck at.—Inhibition does not affect any deed which, at the date of recording the inhibition or notice of it, the person inhibited was under obligation to grant. Suppose A. contracts in March to sell a house to B.; C. uses inhibition against A. in Aprilis A. in May in a position to dispone and give a good title to B. notwithstanding C.'s inhibition? It is not disputed that he is, assuming the contract of sale to have been absolute. But if the transaction is carried out on these lines, the result will be that ex facie of the search the disposition will be bad, as being struck at by the inhibition. validity of the title will depend on matter extraneous to the records. Just for this reason Lord M'Laren has stated a clear opinion to the effect that B. could not be compelled to proceed until the inhibition was discharged.1 If that be so, it is manifest that in the like circumstances any obligation for clear searches would be held to cover the discharging of the inhibition. It is difficult to see any principle in this. The reason given by his Lordship, namely, that missive letters of purchase are apt to be lost sight of after the formal title is granted, would not have the same application to formal articles of roup and minute of enactment thereon. But it would be absurd to say that the degree of formality of the contract, i.e. of the paper in which it was expressed, could affect the result. If, under these circumstances, it is in any case proposed to proceed without obtaining a discharge of the inhibition, it is recommended (1) that special care be taken to see that there really was a final contract before the inhibition; (2) that this and its date be narrated in the title; and (3) that the missives, if not in the form of articles of roup, be registered for preservation. But it appears to be the purchaser's right to refuse to settle unless and until the inhibition is discharged.

Inhibitions against Heritable Creditors.—This subject was considered in *Mackintosh's* case.² There is a special Act of Sederunt ³

Henderson v. Dawson, 1895, 22 R.
 Mackintosh's Trs. v. Davidson & Garden, 1898, 25 R. 554.
 3 19th February 1680.

proceeding on the assumption that inhibition did not affect heritable securities, and providing that in future, if the inhibitor gave notarial intimation of the inhibition to the debtor under the security ("the persones who have right to the reversione of the saids wedsetts or annualrents"), no discharge of the security should thereafter be effectual "unless the redemption proceed by way of action, the inhibitor being always cited thereto, or by suspension of double poindings upon consignation." In Mackintosh's case the inhibited creditor demanded payment of the sum due to him on the heritable security, and the repayment was by way of assignation to a new lender, who in the assignation was stated to have paid the money according to the ordinary form. The assignation was challenged as being struck at by the inhibition. Held that it was not, in respect that intimation had not been given under the Act of Sederunt. It was argued that the recording under sec. 18 of the Court of Session Act, 1868, was equivalent to intimation, but this was rejected. underlying ground is that the creditor is, on payment, under obligation to grant a discharge or (unless he has a valid interest to object) an assignation, and therefore that this lets these deeds out of the class which inhibition affects. Lord Trayner said: "I must say it is new to me to hear it suggested that a debtor ready to pay his creditor (heritably secured) required, before paying him, a search against his creditor in the personal register." Upon this dictum and the case generally there are a few matters which should be kept in view. (1) It does not follow from the decision, and it does not appear to be law, that inhibition will strike at no assignation of a heritable security. e.g. an assignation carried through without any reference to the debtor, of which the strongest example would be a sale of the bond by public roup, which is by no means unknown. (2) The decision certainly does not cover the case of a creditor selling the property under his power of (3) Nor does it appear that it covers securities in the form of ex facie absolute dispositions, though even then it may be open to argument, looking to the forms of securities specially mentioned in the Act of Sederunt, 1680. (4) As to Lord Trayner's dictum, see Adjudication. infra. (5) It will be remembered that it is not only the debtor in the bond who must judge whether a search is, or is not, necessary against the creditors: subsequent creditors and purchasers must also do so, and they may have no means of knowing the nature of the transfers which have taken place; and indeed, for all they know, it is possible that an inhibition might have been intimated to the debtor. At the same time the almost universal practice is not to require searches against creditors. This on the whole appears reasonably safe. But search should be made against creditors (a) selling under power of sale, or (b) holding ex facie absolute dispositions.

Inhibition as affected by Sequestration.—In the case of a

purchase from a trustee in sequestration, the purchaser is not affected by any inhibition used against the bankrupt, though prior to the sequestration.¹

Inhibition personal.—As the inhibition is simply a restraint upon the individual inhibited, it is no bar to any deed by his successor. Therefore no inhibitions need be regarded except those against the actual granter of the deed.

Contents of Inhibition Register.—These are: (1) inhibitions proper, (2) sequestrations,² and (3) reductions.³ Sequestrations and reductions do not fall under the five years' prescription of inhibitions.

Discharge of Inhibition.—This is referred to only in connection with cases such as those already mentioned, in which a seller may be under obligation to have the record cleared of an inhibition which does not really in law affect the particular transaction, but in regard to which it is held that the seller is bound to have this established at his own expense, so as to give an undoubtedly clear record. It does not at all follow that the inhibitor's debt must be paid. If it be the fact that in law the inhibition does not strike at the deed in question, this could be declared in an action in which the inhibitor is called. But this would not meet such a case as *Dryburgh*, supra.

ADJUDICATIONS

The registers of adjudications contain (1) abbreviates of adjudication, and (2) notices of summonses of adjudication.³ A complete right could, and can, be obtained to an adjudication by the recording of an abbreviate in the adjudication register; but in point of fact, under the present system of land rights, the invariable method is by recording the decree, or a notarial instrument upon it, in the sasine register.⁴ The fact that a title may be completed in the former of these methods, and the other fact that heritable securities are adjudgeable, may be thought to render it proper to obtain a search against a heritable creditor on the debt being paid up, even when that takes the form of a discharge, in order that the debtor may know who his creditor is. But the risk is remote and, looking to modern practice, almost fanciful.

PERIODS OF PERSONAL SEARCH: AND PARTIES

Various questions have been raised regarding the periods for which searches should be made in the registers of inhibitions and adjudications. The practical advice is to ascertain who have been interested in the property during the forty years preceding the proposed transaction, and then search against each of them in all the registers from the beginning of the forty years to the infeftment of his successor.

¹ Bankruptcy Act, 1856, ss. 102, 105.

² Id., 8, 48.

³ Consolidation Act, 1868, s. 159.

⁴ Bell, Convey. 1192.

As to the persons to be searched against, the leading point is that the search will not be limited to persons who have been infeft: see p. 282 as to inhibitions. The search will include all who have had an interest in the property, whether they held any title or not. Mention may be specially made of (1) purchasers who have resold without taking any title in their own name (p. 282); (2) heirs who have never been served. But as to heritable creditors, see p. 285. If a married woman is included, it is usual and proper to include her husband. When trustees hold for a firm or company the latter will be included as well as the trustees.

It is not said that a search for the periods above suggested is essential. It will be at once observed that it takes no regard of (a) the shortening of the positive prescription to twenty years, or (b) the shortening of the prescription of inhibitions to five years.

Positive Prescription.—In the first place, it may happen that the prescriptive progress starts with an adjudger's title, and then it is clear that the twenty years' period has no application. But even when twenty years is the prescriptive period (as is of course the common case), it is suggested that adjudications are just like voluntary securities, and do not fall except under the operation of the long negative prescription of forty years. But even if this view be sound, it may reasonably be assumed that infeftment would have followed on the adjudication, which would thus be disclosed by the sasine search.

Prescription of Inhibitions.—If the register of inhibitions contained nothing but inhibitions proper, it is clear that a search for the last five years against all those who have been interested in the property during the actual period of the long positive prescription (twenty or forty years, as the case may be) would show all that could affect any transaction. But then the register contains notices of sequestrations and reductions, so that it appears necessary that the search should be extended against at least all who have been interested during the prescriptive period, and should be against each from a period forty years back, to the infeftment of his successor.

In connection with all these questions, it is to be borne in mind as a practical element that a search in all the registers costs no more than a search in any one of them, and that the introduction of additional names often causes no, and never much, additional expense.

For the same reasons it is hardly worth while to limit a search against anyone in respect of his age, which is a matter regarding which subsequent dealers will have no information. As much as possible the search should be framed so as to be its own proof of its sufficiency. Thus a deceased person will be searched against until, say, his trustees are infeft; and the trustees should be searched against, if possible, from some date which appears on the search, or at least in the titles, as being within the lifetime of the testator.

III. REGISTER OF ENTAILS

Assuming that a prescriptive fee-simple title is produced, and of course assuming possession thereon, it does not appear that there is any necessity to search the register of entails. For any entail prior to the prescriptive period will not affect the prescriptive fee-simple title; and as regards any entail during the prescriptive period, if it has not been feudalised it will not be effectual, even though recorded in the register of entails; and if feudalised, the ordinary sasine search will disclose it.

But as regards dealings with entail titles, it is clear that it is essential to search the entail register if one is dealing with an heir-apparent or other heir not in possession, for then the whole transaction depends on there being a subsisting entail, and a search in the entail register may show a disentail, which will be complete though not recorded in the register of sasines, though no doubt it is usual and proper to record it in that register too. Strictly, the search ought to go back to the date of the entail.

In dealings with an heir of entail in possession it does not seem necessary to search the register of entails; for if he has disentailed, and holds an unfettered instead of a fettered fee, so much the better. True, the previous heir might have been the disentailer, and may have dealt with the estate by an unfeudalised instrument, e.g. a general will. This is extremely improbable; and even if it did happen, it could not affect anyone dealing on the faith of the records with the next heir of entail with a completed title.

OBLIGATIONS FOR SEARCHES

It is plain that there is no duty on any solicitor to give any obligation for search, and there may be many cases in which one will refuse to do so. At the same time the practice is general and almost universal. The obligation ought, however, to cover as short a period as possible, both backwards and forwards. That implies that a search should actually be made, produced, and examined by both sides before settlement. That will clear everything to a recent date, and the obligation will be limited to the continuation period. That is only fair to both sides. It is only safe for the seller's or borrower's agent, and it is not fair always to expect the purchaser's or lender's agent to accept an obligation without any evidence at all, nor is he bound to do so. Further, if desired, information as to the state of the records can be obtained up to the very eve of settlement. Apart altogether from any question as to the sufficiency of an obligation, it is obvious that there may be many questions as to what is, or is not, a clear search.

The following special matters may be noted:-

Limit of Time.—There is no universal practice of limiting any time

within which only the obligation is to operate. There ought to be such a limit—thus, "provided your client's disposition (or bond) is recorded to-day or to-morrow." But it cannot be doubted that there is an implied limit, though it is not so clear what it is. It would be somewhat strict to say that the deed must be recorded on the day of settlement. the other hand it is probable that the time would not be extended beyond the immediately succeeding business day; or if the agent is not in the town where the register is kept, that the deed should on that day be sent off by post for registration. But of course there may often be facts and circumstances which show that a longer period must have been, or was, in contemplation.

Limit of Interest.—For instance, if there are joint sellers separately represented, the obligation given by each agent should be expressly limited to his own client's interest.

What Registers.—A general obligation for a "clear record" means the personal registers as well as the sasine register. If there is any room for doubt, e.g. feus of burgage property (p. 341), the obligation should be explicit. The same applies to searches against creditors. best way is to refer to an adjusted note for continuation of search.

Stamp.—It is not usual to stamp these obligations. But it is clear that they are liable, and action cannot be prosecuted without stamping.1 The stamp charged is sixpence as an agreement.

DELIVERY OF SEARCH

It is clear that a purchaser has no absolute right to delivery of It depends upon circumstances, just as does the delivery of titles. The seller must show a prescriptive title and a full search: delivery is another matter.

AGREEMENT TO DISPENSE WITH SEARCH

It is common enough for a seller to make it a condition that he is not to give a search. If trustees or anyone in a fiduciary position are selling, it is for consideration whether this is an expedient stipulation: at any rate they should arrange that they see the search made by the purchaser, for they will have to distribute the price, and it will not be satisfactory to do that unless and until they know there is no claim. Such a stipulation is really only a matter of price, say about £6, more or The mere fact that the purchaser has agreed with the seller that there is to be no search, and has even paid part of the price (and even, it is thought, the whole price), does not in the least discharge the purchaser's solicitor from his duty to see that a full search is obtained.2 The agreement, if made, is the rule as between seller and purchaser, but it has no bearing on an entirely separate and different relation, namely,

¹ Dryburgh v. Gordon, 1896, 24 R. 1. ² Fearn v. Gordon & Craig, 1893, 20 R.

agent and client. The agent will of course advise his client to have a search; and if the latter will not, his instructions to that effect will be given, or at least recorded, in written correspondence.

ENCUMBRANCES NOT DISCLOSED BY SEARCH

It is usual to give a list of burdens which a search will not disclose, but the only burdens which properly fall under that class are: (1) securities constituted more than forty years ago, and kept up by payment of interest; but in point of fact a forty years' search usually will disclose these, for it is rare indeed that no deed of transmission or other relative document has been recorded during that long period; (2) servitudes; (3) leases; and (4) jedge warrants, constituting securities over property within burgh (not necessarily burgage) for repairs or rebuilding under the authority of the Dean of Guild Court. It is understood that these are little known now.

No doubt there are many other matters which might affect a title. But these all fall under one or other of two heads, namely, (1) matters common to all instruments, whether relating to heritable property or not, e.g. objections grounded on forgery or force and fear; these simply cannot be guarded against, which necessarily implies that a conveyancer incurs no liability in respect of them; (2) matters arising on the titles produced, and of which, therefore, fair notice is given, e.g. casualties, legal rights of spouses, Government duty, claims of ancestor's creditors (see pp. 191-5).

PURCHASER'S PRIVATE KNOWLEDGE

Then there are other matters which a search would not show, but of which, in point of fact, the purchaser or lender is aware, e.g. (1) an alleged prior contract of sale to a third party not yet carried out, (2) an unfeudalised conveyance or security held by a third party.

As regards the first of these, where action had been brought by the alleged first purchaser for implement, in which action he called the second purchaser, it was held that the latter was not bound to proceed with his purchase until the dispute was settled, and further that he was not liable for interest so long as not in possession.²

It is settled that a purchaser is not bound to proceed until burdens of which he knows are cleared off, though they may not have been feudalised.³ And the same would apply to a lender.

But there remains the question of legal preference if the purchaser or lender should proceed in the face of knowledge of existing incomplete rights held by other parties. Lord Corehouse used to say that if you were to refer to the matter of knowledge, then you must take the whole

¹ See Peterkin v. Harvey, 1902, 9 S. L. T. ³ Ralston v. Farquharson, 1830, 8 Sh. No. 370, and authorities there cited. 927.

² Rodger v. Brown, 1859, 21 D. 1022.

knowledge, and that while the second party knew of the prior right, he knew also that it was not effectual. But apparently, in a certain class of cases at least, this stops short too soon, for still further he knows that a fraud is being attempted, and that if he proceeds he is making himself a party to, and taking advantage from, the fraud. On this point Lord Rutherfurd Clark said:

We have in our law cases where title will not prevail against right. An example, though not of common occurrence, is where a person takes a disposition to land and is infeft on it in the knowledge that his author had already granted another disposition of the same subjects. The second disponee has the first and indeed the only feudal title, because the feudal title depends on priority of infeftment. But his title will not avail him against the right of the prior disponee, simply because he took a disposition which he knew his author had no power to grant, or in other words, he knew that it was a fraud on the prior disposition.¹

The opinion may be ventured that this would apply to (1) any deed, whether sale or security, following a prior unfeudalised sale; (2) a sale following an unfeudalised security; but that it would not apply to (3) a security following on another unfeudalised security, assuming at least that there was no undue haste.

But it is not necessary to prove fraud; and even as to knowledge it is enough if the facts were such as to put the purchaser on his enquiry.²

The principle is that a singular successor is entitled to be free from the personal obligations of his predecessor, and to take the subject unaffected by any burden not appearing on the title or on the records. But the singular successor has this right only if he was in ignorance of the existence of any obligations or deeds granted by the seller relative to the subject, and if he was in all respects a bona fide purchaser without notice of any right in any third party or of any circumstances imposing a duty of enquiry.³

The further question arises, whether the agent's knowledge is in this respect the knowledge of the client, as to which Lord Kincairney says,4 that the "proposition, although generally sound, does not apply in all cases. It can be affirmed only when the circumstances are such that an agent is to be presumed in the due and regular discharge of his professional duty to have communicated his prior knowledge to his client. But where the agent has committed a fraud," that presumption does not arise.

National Bank v. Union Bank, 1885,
 R. 380, at p. 394.
 Petrie v. Forsyth, 1874, 2 R. 214;
 Stodart v. Dalzell, 1876, 4 R. 236.
 Lord Gifford in Stodart.
 Anderson v. Dick and others, 1901, 8
 St. L. T. No. 385.

SECTION XVII

DISPOSITION

Pupils

Granter.—If a pupil's heritage is to be sold, it can of course be only by a guardian acting on his behalf. No guardian has any implied power to sell the pupil's heritage. Nor will the Court grant power except in a case of necessity, or such extreme expediency as may reasonably, in the practical conduct of affairs, be deemed a case of necessity. Power may be granted to the father as administrator-in-law.¹ Without quoting a list of authorities, it is sufficient to refer to the undernoted recent cases,² where prior cases will be found cited. Even the authority of the Court is not conclusive, for the sale may afterwards be set aside on the ground that it was unnecessary and ought not to have been sanctioned.³ When a sale is made the tutor or other guardian may dispone without completing any title in his own person, if the pupil's title is complete. If authority is obtained and a sale effected, the price should be earmarked in any future investment of it, so as to preserve the facts in connection with their bearing on questions of succession.

Grantes.—Though in the ordinary case a tutor would not obtain authority to purchase heritage, there may often be cases in which dispositions fall to be granted in favour of pupils, e.g. in implement of a testamentary direction. The pupil will be represented by a guardian, but the disposition will be granted in favour of the pupil, and will be recorded with a warrant on his behalf only.

MINORS

Granter.—The rules are:

1. If a minor has no curator, a disposition granted by himself alone will be good, unless he reduces it within the *quadriennium utile* on the grounds of minority and lesion.

Logan, Petr., 1897, 25 R. 51.
 Logan, supra (granted); Gilligan's (granted).
 Factor v. Fraser, 1898, 25 R. 876 (refused; reversing Lord Ordinary); Smith
 Gardner's c. b.), 1899, 7 S. L. T. No. 253 (granted).
 Vere v. Dale, 1804, Mor. 16389; Auld, Petr., 1856, 18 D. 487.

- 2. If, having a curator, the minor grants the deed with the curator's consent, the result is the same.
- 3. If, having a curator, the minor grants the deed without consent, it is subject to reduction within forty years.
- 4. If there is a curator bonis, he has no power of sale without special power to that effect from the Court. He requires to make up no title in his person apart from his ward's,¹ but he may do so. An ordinary curator is unable to make up any title in his own person, for he holds no title of the nature of a conveyance, his function being consultative and advisory only. "It is a question whether and how far the common law power and rights of a minor having a curator bonis are restrained as compared with those of a minor who has chosen curators for himself." This suggests that when the disponer is a minor to whom a curator bonis has been appointed, the deed should be signed by both minor and curator bonis, the price being paid to the latter. As to whether the curator bonis requires special power to concur, and how he can obtain it, see the case of Perry.³

It goes without saying that no one can be recommended to deal with a minor. Further, it is laid down that no one can be compelled This probably has reference to a minor without curators, which is clearly correct; for, apart from other reasons, how is the other party to ascertain the truth of the representation that there is no curator? But suppose the title offered is by a minor with consent of his curator, is the purchaser bound to proceed? and does it make any difference whether the sale has been by public roup or private bargain? In the former case it is true that the risk of a successful challenge is remote; but on the pure question it is thought that the answer must be that in neither case is the purchaser bound to proceed. An unsuccessful challenge is only less serious than a successful one, and it is a risk which a purchaser cannot fairly be asked to run. But as regards sales by public roup the purchaser will usually be expressly committed to the title in terms of the articles of roup, for which purpose, indeed, all that would be required would be the statement that the sale was by A. with consent of his curator.

Grantee.—If a minor purchases property, he will be able to refuse to carry out the purchase on grounds on which a major could not do so, namely, excessive price or onerous conditions, in short, that he has made a bad bargain. In this respect it will make no difference whether the sale has been by public roup or private bargain, except that in the former case, competition, if any, will be evidence of fairness. Nor will it make any difference that the minor has acted with consent of his curator, except that if the former repudiates the bargain, the latter may

Scott, Petr., 1856, 18 D. 624.
 Per Lord Pearson, in King's Trs. v. 342.
 M'Lay, 1901, 8 S. L. T. No. 325.

possibly find a question raised as to the effect of the form in which he may have given his consent as inferring personal liability on his part to the seller. Assuming the sale to be carried through, the title will run in the minor's name only; but the seller is clearly entitled, and should be advised, to have written evidence of the fact (if it be so) that the minor has acted with the consent of his curator.

MARRIED WOMEN

Granter.—A married woman has no power at common law or by statute to alienate property in general without her husband's consent. But in the following special cases she may do so:—

- 1. Where the jus mariti and right of administration are excluded. There does not appear to be any real doubt as to this. Only the exclusion must be effectual. For instance, if contained in a disposition by a stranger in favour of the wife, following on a purchase by her, it could not be relied on unless the husband signs the deed.
- 2. Property representing investment of earnings of married women to the extent mentioned in sec. 3 of the Married Women's Property Act, 1877.

But in both of these cases the difficulty will be to trace the identity of the property with that from which the jus mariti and right of administration were excluded.

- 3. Property acquired by the wife after she has obtained decree of separation. This appears to be intended to continue even if cohabitation should be resumed, as regards the property acquired during the period of separation, "subject, however, to any agreement in writing made between herself and her husband." 1
- 4. Where the husband's consent is dispensed with by the Court of Session or sheriff in cases where the wife is deserted, or is living apart with her husband's consent.²

Any disposition granted by a married woman with consent of her husband will be judicially ratified by her. The price will be paid to her alone.

Grantee.—It will be advisable to insert a clause excluding the rights of present and any future husband as regards acts both of administration and alienation. But the husband's signature should be obtained. The deed will bear that the price is paid by the wife alone, and out of funds held by her free from the jus mariti and husband's right of administration. But it does not appear to be possible to insert that statement if part of the price is being raised on a bond, the personal obligation in which is granted by the husband.

FIRMS

Granters.—The title standing, as it will no doubt do, in the names of certain persons as trustees, they will grant the title, and it is proper 1 24 & 25 Vict. c. 86, s. 6.

2 Married Women's Property Act, 1881, a. 5.

that the firm and all its partners should also join, so that there may be no doubt as to the power of sale. Attention may be required to the point whether the firm now existing is the same firm as that for which the property is held, and whether they have or have not the real right to the property. It is scarcely necessary to point out that this does not follow merely because the firm-names are identical; but this is a matter which is practically often apt to be overlooked.

Grantees.—The peculiarity is that, though the firm has a separate legal persona, it lacks the capacity to sustain the feudal relation. title will therefore be taken to the partners and the survivors and survivor of them, as trustees and trustee for the firm. Powers to sell, burden, etc., may be expressed, but of course the "trustees" may perform these and all and any other acts with consent of all the partners, i.e. their own consent. Some question might, however, be raised, after the death of one of the partners, as to whether his executor's consent was necessary; and therefore if any powers are expressed, they should be given to the trustees or trustee for the time, with consent of the partners or the survivors or survivor of them. This incapacity of the firm does not extend to leases1; these may be held socio nomine, which would apparently hold good though the lease should be registered under the 1857 Act. It would also appear that the firm might, socio nomine, hold a recorded title to a mere real burden (not a ground-annual in the modern form), as not being a feudal estate; and also might in like manner accept and transmit a title to feudal property as an unfeudalised conveyance on which infeftment might be taken in favour of a disponee. Of course, when the matter is open, all these rights will be taken in the name of trustees; but there may be cases in which matters are not open, and the law would appear to be as stated.

When a partner retires it will be remembered to obtain from him a proper formal conveyance, so as to divest him and avoid in future all questions as to the necessity to obtain his signature.

BURGHS

"The town council shall cause all feus, alienations, or tacks for more than five years of any heritable property of the burgh or vested in the council, so far as forming part of the common good, to proceed by public roup, of which public notice shall be given by advertisement published once weekly for at least three weeks immediately preceding the day of roup in a newspaper or newspapers circulating in the burgh." ²

A certificate by the publisher of the newspaper proves the advertisement.³

³ As to details of the necessary advertisements, see p. 516, and as to execution of the deed, see p. 6.



Dennistoum v. Macfarlane, 1808, Mor.
 App. "Tack," 15.
 63 & 64 Vict. c. 49, s. 98.

UNINCORPORATED BODIES

The difference here is, that there is no legal persona. The conveyance will of course be taken to trustees, and there may be difficulty about their powers. These will solely depend upon the constitution of the body as originally adopted or altered; but it will be convenient, if allowed, to have a statement of them in gremio of the deed. When the conveyance is testamentary it may very likely happen that it is expressed in favour of the body in direct form. If there are testamentary trustees, they will simply convey to the trustees of the legatee body. But if it is a direct bequest without testamentary trustees, the matter is not so simple. Three courses at least are open, namely: (1) to have a judicial factor appointed to execute the testamentary instrument, and he can convey to the trustees of the legatee body; (2) the heir-at-law may complete a title and convey; (3) adjudication.

TRUSTEES

Granters.—Trustees have no general implied power. It is true that in case of necessity, e.g. payment of debts, the law does infer a power. But so far as a purchaser is concerned, he cannot be advised to accept a title based on an implied power. The necessity or implication should be treated as a ground for obtaining power from the Court or from the beneficiaries, or a declarator that the trustees have the power. mere fact that the trustees purchased the property ultra vires does not of itself give them power to sell it; the proper course is to apply for powers.1 Power of sale, however conferred, whether in the instrument constituting the trust, or by the Court, or in a deed of consent by the beneficiaries, infers power to sell by public roup or private bargain though that may not (and therefore it should not) be expressed.² In framing the power of sale the word "sell" should be used as being the most unambiguous expression. But that particular word is not essential, e.g. a power to "realise" will have the same effect. Again, the power may be conferred, as it were, indirectly, e.g. by a direction to the trustees to divide or hold the trust-property or the proceeds 8 of it, and "there are many cases where a power to sell may be implied from the very nature and character of the estate itself," 4 e.g. works connected with an industrial business which the trustees are not empowered to carry on.

There is one matter which requires attention in accepting titles from trustees under a general power of sale, namely, to see that the sale is not inconsistent with any provision contained in the will or other document. Thus specific interests may have been created in the

this case it was held that the question whether the trustees had power of sale could be determined in a special case between the trustees and the beneficiaries.



¹ Lamb's Trs., Petrs., 1901, 9 S. L. T. No. 141.

² Trusts Act, 1867, s. 4.

⁸ Thomson's Trs. v. T., 1897, 25 R. 19.

⁴ Thomson, supra, per Lord Young. In

particular property in favour of a beneficiary. This may be, e.g. (1) a direct conveyance of the special property to a beneficiary in fee superadded to a general conveyance to trustees, as sometimes happens; or (2) a direction to the trustees to convey the special property to a beneficiary in fee; or (3) a direction to the trustees to hold it for a beneficiary in liferent. In all these cases no title can be taken except with the consent of the beneficiary, but it has been held that the beneficiary may validly consent though the liferent be given through trustees and declared alimentary, and the curator bonis to the liferenter may obtain special power to consent to a sale. Trustees holding a pro indiviso share may bring an action of division and sale though they have no power of sale. A purchaser from trustees is not concerned with the application of the price after he pays it to the trustees and obtains their receipt.

Power from the Court.—To enable judicial authority to be obtained the sale must be "expedient for the execution of the trust and not inconsistent with the intention thereof." This is not now limited to gratuitous trustees, and the opinion is expressed that this extension is retrospective. But under special circumstances trustees may be authorised by the Court to sell a property which they are by the trust directed to hold. The Act is limited to Scottish trusts, and therefore English trustees cannot de plano obtain power from the Court of Session to sell heritable property in Scotland; their proper course is to obtain an order from the proper Court in England approving of a sale and empowering them to apply to the Court of Session; the latter Court will then grant power of sale.

Assumed trustees.—If owing to assumption some of the trustees are infeft, or even only one, and the others not, it is of course unnecessary to make up the title of the assumed trustees, provided the disposition be signed by (a) the infeft trustee or trustees, and (b) a quorum of the whole trustees. Whatever may be the rule in securities, 10 it is clear that if A., B. and C. be trustees, A. and B. infeft and C. not, a disposition signed by A. and C. would not do.

Grantes.—Matters requiring special attention are: (1) whether the trustees have power to purchase heritage; (2) destination; and (3) the trust disponees' powers of reselling, burdening, etc. There is no implied power to purchase 11; the Court will in a proper case confer it. 12

- Per Lord Stormonth Darling, in Charlton's Trs., Petrs., 1901, 9 S. L. T. No. 111.
 - ² Cowan's c. b., Petr., 1902, 5 F. 19.
- Craig v. Floming, 1868, 1 M. 612.
 Buchan v. Muirhead's Trs., 1901, 9
 S. L. T. No. 15, where the rule was applied practically in a case of rectification of title.
 - ⁵ Trusts Act, 1867, s. 3.
- ⁶ Trusts Act, 1884, s. 2; Royal Bank, 1898, 20 R. 741.
- ⁷ Scott v. Craig's Reps., 1897, 24 R. 462.
- ⁸ Robison's Tr., Petr., 1898, 6 S. L. T. No. 313 (granted); Fiddes' Trs., Petrs., 1899, 7 S. L. T. No. 97 (granted); Marshall's Trs., Petrs., 1897, 24 R. 478 (refused).
 - ⁹ Allan's Trs., Petrs., 1897, 24 R. 718.
 - 10 P. 598, infra.
 - 11 Buchan, supra.
- ¹² Wardlaw's Trs., Petrs., 1902, 10 S. L. T. No. 229.

title should be taken to the trustees and the survivors and survivor, and these words ought to be repeated in the warrant of registration. Although omitted in both places, it is thought to be clear that they would be implied, but the question ought not to be allowed to arise. A reference to successors in office will be omitted or inserted at pleasure; it may have a certain advantage in the completion of their title; but if inserted in the destination, it will, of course, not be referred to in the warrant of registration unless in the exceptional case dealt with on p. 236, though even there it is unnecessary. In the ordinary case, if survivors be referred to, the destination will run thus:—

To A., B., and C. and their successors in office, and the survivors and survivor of them and of their successors, all as trustees and trustee foresaid, and their and his [their, his, and her] assignees whomsoever.

As to the trustees' powers of selling, burdening, etc., it is not uncommon to insert express powers to these effects in the disposition, as if they were conferred by the seller. It is hardly necessary to say that the seller cannot possibly confer these powers: he is not truster, and his only relation with the trustees is that of seller and purchaser. If, again, the statements be regarded as flowing not from the disponer but from the trust disponees, it is equally clear that trustees cannot acquire powers of sale, etc., by their own assertion that they possess them, or that they desire to do so. The correct view, of course, is that the trustees' powers depend upon the deed of constitution of the trust. If it gives the powers, the trustees will enjoy them without any mention of them in the property title; if not, no assertion will confer them. While all this is so, however, it remains the fact that the presence of these clauses is often found helpful, especially in cases where there is no formal constitution of the trust separate from the property title. Whether the seller should allow them to pass without a qualification to the effect that they are inserted at the desire of the disponees, and that he has no concern or responsibility regarding them, is a different matter.

As to special matters requiring attention in dispositions granted by trustees, not by way of sale, but on their denuding in favour of the beneficiary, see Section XLIX.

TRUSTEES ON SEQUESTRATED ESTATES

Granter.—The trustee has power to realise the estate belonging to the bankrupt wherever situated, and convert the same into money, according to the directions given by the creditors at any meeting; and if no such directions are given, he shall do so with the advice of the commissioners.²

¹ Authorities, see p. 288.

² Bankruptcy Act, 1856, s. 82.

Secs. 112 to 117 inclusive of the Bankruptcy Act have special reference to the sale of the heritable estate.

Sec. 112. If a preferable heritable creditor with a power of sale proceeds to sell under his power, the trustee may concur "in order to fortify the title," which he might not otherwise be entitled to do without consideration.

Sec. 113. If a preferable heritable creditor with a power of sale concur with the trustee in bringing the estate to sale,

the trustee shall sell the same in his own name, and the articles of roup and conveyance to the purchaser shall be executed by the trustee, with consent of such creditor and the commissioners, and the price shall be paid by the purchaser to the parties legally entitled thereto; and in so far as not paid at the time of the delivery of the conveyance, it shall be consigned in the bank in which the money of the sequestrated estate is deposited; which payment or consignation of the price shall free and discharge the estate sold and the purchaser from the security of the consenting creditor whether the debt in such security be satisfied or not, and from all securities postponed to the security of such creditor,

so that in regard to clearing the record the sale has substantially the same effect as if it were a sale by the consenting creditor under his power of sale.

Sec. 114 refers to sale by public roup by the trustee alone, and entitles him in certain cases to prevent a heritable creditor proceeding with a sale under his power, namely, (1) if the creditors have resolved that the trustee shall sell "before an heritable creditor shall have commenced proceedings for sale; or (2) if such proceedings, after being commenced prior to the date of such resolution, have thereafter been unduly delayed."

Sec. 115 is the only authority for sale by *private bargain*. It requires the concurrence of (1) a majority of the creditors in number and value; (2) all the heritable creditors, if any; and (3) the Accountant of Court. With reference to this section the memorandum issued by the Accountant states:

The Accountant in these cases requires the trustee-

- 1. To exhibit the missives of sale, showing the terms and conditions of the proposed sale.
- 2. To exhibit a valuation or other satisfactory evidence of the value of the subjects proposed to be sold.
- 3. To exhibit a minute of commissioners, or other evidence that the commissioners approve of the proposed sale.
- 4. To lodge with the Accountant a list of creditors, with the amount of their claims, showing those who have concurred; and a certificate by the trustee that the list is a complete and correct one, and that the whole creditors holding heritable securities affecting the subjects for sale, and that

a majority in number and value of the ordinary creditors, have concurred in the proposed sale and in the terms and conditions of it.

If the trustee satisfy the Accountant on these heads, the Accountant will pronounce an order granting his concurrence, which may be used as part of the title. The Accountant does not consider it expedient that he should become a party to the disposition to the purchaser.

A number of matters of importance arise upon this section.

- 1. The Accountant requires the missives of sale to be submitted to him before he considers as to giving his concurrence. Therefore it of course follows that the trustee, in order to protect himself, must make the contract provisional on his obtaining all the consents required under the statute, with a proviso that, if he should fail to do so, the sale is to be at an end without any claim on either side.
- 2. Who are "heritable creditors"? The reasonable construction is that it is limited to those heritable creditors whose securities affect the particular property which is proposed to be sold; and it will be observed that this is the view taken by the Accountant. But what is a heritable security, and, particularly, does it include an inhibition? It is thought that the answer must be in the affirmative. It is true that under sec. 102 the trustee may sell despite a prior inhibition; but the same section saves the effect of the inhibition in the ranking, and under sec. 4 "heritable" includes "real," and "security" includes "rights of lien or preference," which the inhibitor has. Further, an inhibition is a security which must be valued and deducted. The inhibitor will on this view be a universal heritable creditor.
- 3. "A majority of the creditors in number and value." On this enactment it will be observed that the Accountant requires the consent of "a majority in number and value of the ordinary creditors." Now, that is not what the statute says; but as it demands more than it is thought the statute does, it introduces no risk from the point of view of the purchaser. The question is, are the heritable creditors over the subject of sale to be included in reckoning the majority, or are they not? It is thought that the answer under the statute is that they are entitled to be included. If so, they will be included for the full amount of their debts, without any deduction for the security (s. 59). As regards other matters in the computation, (1) creditors holding securities over other parts of the bankrupt estate will of course be included, but only for their unsecured balances (s. 59); and (2) "no creditor whose debt is under £20 shall be reckoned in number, but his debt shall be computed in value" (s. 101).

Sec. 116 provides that the trustee shall make up a scheme of ranking and division of the claims of the heritable and other creditors upon the price of the heritable estate sold. The scheme is to be reported to the

1 Mitchell v. Motherwell, 1888, 16 R. 122.

Court, "and the judgment thereon shall be a warrant for payment out of the price against the purchaser." But this does not mean that in every case the purchaser must wait for the Court's judgment on the trustee's scheme before paying the price; the enactment is held to have reference to cases where difficulty and competition occur. Payments made by the purchaser to the trustee in terms of the articles of roup or other contract, though without any judicial warrant, are good enough 1; but of course if there are heritable creditors who do not consent to these payments, they will not be good as against these creditors except under s. 113 as above mentioned.

Sec. 120 provides that "when any estate is sold publicly.... it shall be lawful for any creditor to purchase the same; but the trustee, or commissioners, or adjudger, selling as aforesaid, shall not be entitled to purchase." From which it may be inferred that in the event of a private sale a creditor is not entitled to purchase. A creditor may purchase when the sale is by the trustee with his consent and under such circumstances that in some cases it might be said that he is the true seller, e.g. price less than his secured debt. Quære whether these disabilities are pleadable by third parties, not being the bankrupt or creditors.

Sequestration supersedes any trust deed, but on the point of title a conveyance, or at least the consent of the trustee, should be required, because the trustee cannot be compelled to denude unless and until he is recouped his outlays and relieved of obligations.⁵

TRUSTEES IN Cessio

It is not necessary that the trustee should consult the creditors ⁶ before proceeding to sell heritable property.⁷ He, however, has no title except under a disposition *omnium bonorum* with notarial instrument thereon. The sale requires to be by public roup.

LIQUIDATORS

- 1. Liquidation by the Court.—The official liquidator has power to sell by public roup or private bargain⁸; but he requires the sanction of the Court,⁸ unless the Court has provided specially that he may exercise the power of sale, or generally all his powers, without the sanction or intervention of the Court.⁹
 - 2. Voluntary liquidator has the same power without any sanction.¹⁰
 - 3. Liquidation subject to Supervision by the Court.—In this case the
 - ¹ Callum v. Goldie, 1885, 12 R. 1137.
- ² See Lord M'Laren in Hay v. Rafferty, 1899, 2 F. 302.
- ² Cruickshank v. Williams, 1849, 11 D.
- ⁴ Wishart v. Howatson, 1897, 5 S. L. T. No. 115.
- ⁵ Salaman v. Rosslyn's Trs., 1900, 3 F. 298.
 - 6 Act of Sederunt anent Cessio, 1882, s. 15.
 - ⁷ Clark v. Clarkes, 1890, 17 R. 1064.
 - ⁸ Companies Act, 1862, s. 95.
 - 9 Ibid., s. 96.
 - 10 Ibid., s. 133 (7).

liquidators may, "subject to any restrictions imposed by the Court, exercise all their powers without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily." 1

The liquidator requires to make up no title, assuming that the title of the company has been completed. The deed will run in name of the company (in liquidation) and the liquidator. The only execution is signature by the liquidator and the affixing of the company's seal.²

Sections 112 to 117 and sec. 120 of the Bankruptcy Act, supra, "so far as consistent with the tenor of the" Companies Acts, are now applicable to realisation in liquidations of heritable property affected by securities.

RELATION OF DISPOSITION TO MISSIVES.

This is obviously a matter of great importance, and one which requires to be carefully attended to. Lord Watson has the following dictum:—

When a disposition in implement of sale has been delivered to and accepted by the purchaser, it becomes the sole measure of the contracting parties' rights, and supersedes all previous communings and contracts, however formal 4;

and it makes no difference that the disposition bears reference to a previous contract.⁵

This view was not acquiesced in by Lord President Inglis in a case 6 where the question was the bargain between the parties as to the purchaser's right to rents; and, more recently, it has in some sort been treated as an open question in the House of Lords, where the matter in dispute was the rights of parties in regard to a gable, 7 though in this latter case no real support was given to the contention that on such a question it is competent to go behind the disposition to the missives. In construing a disposition following on a decree arbitral, e.g. under the Railways Clauses Act, it is allowable to refer to the decree arbitral.8

Where "missives" are referred to in this connection, it will be understood that the term includes any and all document or documents in which a contract of sale may be contained, whether formal or informal, e.g. letters, articles of roup and enactment, or minute of sale.

But the rule must not be carried too far:

It is not competent to go behind a deed of conveyance which exhausts the subject matter of the contract, but in the case of a deed which either bears

- ¹ Companies Act, 1862, s. 151.
- ² Ibid., s. 95.
- ³ Companies Act, 1886, s. 3 (3).
- 4 Orr v. Mitchell, 1893, 20 R. (H. L.) 27.
- ⁵ Lee v. Alexander, 1883, 10 R. (H. L.) 91.
- ⁶ Lord Glasgow's Trs. v. Clark, 1889, 16 R. 545.
- ⁷ Baird v. Alexander, 1898, 25 R. (H. L.)
- ⁸ G. N. of Scot. Ry. Co. v. D. of Fife, 1901, 3 F. (H. L.) 2.

to be in *part* performance, or can be shown by comparison to be only a part performance, the contract subsists until performance is complete.¹

The question in this case was as to fittings, and it was held that if fittings were in the missives, the purchaser was none the less entitled to them because they were not also in the disposition. Indeed, Lord Kinnear said that

a sound conveyancer in framing a disposition for carrying out such a sale will not think it necessary to insert a futile conveyance of the moveables, which would carry nothing.

But with deference it is suggested that the words ought to be repeated; they add practically nothing to the length of the deed, and their presence saves the necessity for preserving the missives. decision in Jamieson turned on the fact that the contract related to two separate things, the heritage and the moveable fittings. But there is a middle class of case, viz., a sale of heritage with guarantees or obligations connected with it, e.g. a guarantee of sanitary condition, or an obligation to execute painting and papering, or to uphold plumber work. In the previous edition of this work it was suggested that things of that kind would not be lost because not repeated in the disposition, on the ground that they are not appropriate to be dealt with in a deed of that kind. This is confirmed by Jamieson. Thus if the sale included (1) a house and (2) grates to be supplied for the rooms, it is clear that payment of the price and acceptance of the disposition in common form would not bar enforcement of the contract to deliver the grates. If that be so, would it make any difference that, instead of grates, the articles were wall papers, and could the obligation to deliver them be preserved and the further obligation to put them on the walls be lost? On the other hand it has been held in England that a warranty of sanitary condition contained in the contract was lost because not repeated in the conveyance.2

The practical advice is to study the missives closely with the disposition; to see that the latter contains nothing inconsistent with the missives, and, on the other hand, that it exhausts them; or, if there are any matters not appropriate for treatment in the disposition, then that these are confirmed by separate writing of even date with, or later than, the disposition, and bearing reference to it.

FORMAL CLAUSES

- The formal clauses of an ordinary disposition are as follows:-
- (1) With entry at the term of ; (2) And I assign the writs;
- (3) And I assign the rents; (4) And I bind myself to free and relieve the said disponee and his foresaids of all feu-duties, casualties, and

¹ Jamieson v. Welsh, 1900, 3 F. 176.

² Greswolde-Williams v. Barneby, 1901, 83 Law Times, 708,

public burdens; (5) And I grant warrandice; (6) And I consent to registration hereof for preservation.

Entry.—If no term is specified in the deed, the implied term is the first Whitsunday or Martinmas after the date, or last date, of the deed, unless a contrary intention appears ex facie.¹ But of course the term should be expressed. Otherwise delay in signature might produce most serious results. When the assignation of rents or the obligation of relief of burdens, or both, are specially qualified, it may be desired to let this clause run:

With entry at the term of , but without prejudice to the other clauses herein[after] written.

Writs.—The statutory form goes on to say, "and have delivered the same according to inventory"; but that is not properly a formal clause, and it may not express the fact at all. It is recommended that, whenever possible, a new inventory should be dispensed with. is submitted that the clause of assignation of writs is really useless and unnecessary, which has practically been recognised by statute.2 Assuming that it is retained, and that there is a clause of delivery or a reference in any way to an inventory, it is not correct to say, "and I have delivered the same conform to the annexed inventory," or, "I assign the writs conform to the annexed inventory, and bind myself to make the same forthcoming." Clauses in these terms do not recognise or give effect to the full technical meaning attached to the clause of assignation. The correct forms are: "and I have delivered those enumerated in the annexed inventory," or "I assign the writs, and bind myself to make those enumerated in the annexed inventory forthcoming," etc.

Rents.—See p. 158.

Obligation to relieve of Feu-duties, etc.—This is a clause of considerable importance and one on which many difficult questions have been raised. The first remark is that the form of clause given in the statutory schedules should be adopted only if it correctly expresses the arrangements of parties in the particular case. The conveyancer is not bound to adopt the statutory form, nor, it is submitted, is either party entitled to insist that that form shall be taken without qualification merely because there is no stipulation to the contrary in the missives. But even if the statutory clause be inserted, it appears to be the better opinion that it does not exclude the rule of apportionment of feu-duties, ground-annuals, and public burdens between seller and purchaser in proportion to possession before and after the term of entry. That clause imports—

an obligation to relieve of all feu-duties or other duties and services or casualties payable or prestable to the superior, and of all public, parochial,

¹ 1874 Act, s. 28.

and local burdens due from or on account of the lands conveyed, prior to the date of entry.¹

Now in *E. Glasgow's Trs.* case ² an assignation of rents "due and payable from and after the said term of entry" was held not to import an assignation of all rents de facto payable after the term of entry, it being held that, according to the settled law and practice, the words used left rents to be apportioned according to the term of entry, farm rents going according to the legal terms, and a game rent being apportionable between seller and purchaser according to the extent of the season before and after the purchaser's entry. This would seem to be at least a sufficient analogy for apportioning outgoings even under the statutory clause of relief. There are Sheriff Court judgments or dicta both ways with reference to feu-duty.³

As regards the form of the clause: (1) it is common to insert "ground-annual" when the property is held burgage; that is quite unnecessary unless there is de facto a ground-annual over the property, in which case there is just as much reason for using the words if the property is not burgage as if it is, the truth being that it is not necessary in either case; (2) it is not uncommon to add the words "duplicands," or "sums of money in lieu thereof," i.e. in lieu of casualties, which also appear quite unnecessary, having regard to the terms of the Conveyancing Acts.

- 1. Feu-duties.—If the feu-duty is payable only once a year, and the purchaser's entry is at the other term, the convenient course is to deduct one half-year's feu-duty from the price at settlement, leaving the purchaser then to pay the whole of the year's feu-duty at the next term.
- 2. Casualties.—The purchaser is entitled to require the seller to pay a casualty if one is due.⁴ If that is done prior to settlement, the obligation to relieve of casualties means nothing; but it is thought that even then the purchaser is entitled to have the word "casualties" retained in the clause. If, on the other hand, the contract is that the seller is not to be liable for the casualty, it is not good practice simply to omit the word "casualties": there ought, in addition, to be an express statement that the purchaser is to pay the casualty. As to how the liability stands if the deed be simply silent, contrary opinions have been expressed,⁵ and the point is not decided. If the titles contain any obligation of relief of casualties which might cover the casualty, if any, outstanding, it is necessary that the disponee should have an express assignation of it to enable him to found upon it,⁶

¹ 1868 Act, s. 8.

² E. Glasgow's Trs. v. Clark, 1889, 16 R. 545.

³ M'Cook v. M'Kissek, 1896, 12 S. L. Review, 1896, Sh. Ct. Rep., p. 296 (for the seller, refusing apportionment); Abel v. Bothwell's

Tr., 1874, Jour. of Jur., No. 18, p. 340 (contra).

⁴ Straiton Estate Co. v. Stephens, 1880, 8 R. 299.

⁵ Straiton, supra; Spiers v. Morgan, 1902, 4 F. 1069.

⁶ Spiers, supra.

and that should accordingly be taken if the disponer be able and willing to give it.

Difficult questions may arise as to what is covered by the obligation to relieve of casualties:—

- (1) Is it the same Casualty?—A. is the last entered vassal who paid a casualty; after A.'s death B. sells to C., with the usual obligation to relieve of casualties, but no casualty is paid; B. dies; thereafter C. is called upon to pay a casualty. Is B.'s estate bound to relieve him? Put popularly, the superior has here lost a casualty; for he might have made B. pay one after A.'s death, and then on B.'s death he would have been entitled to another from C. The question is, who is to gain by this loss of the superior—B.'s estate or C.? On the one hand, it is clear that B. was bound to pay a casualty, and did not do so. On the other hand, it is equally clear that, though he had done so (assuming he had taken the receipt in his own (B.'s) name, which he would have been entitled to insist on doing), C. has lost nothing, for even then he, C., would have been liable to pay a casualty all the same. But notwithstanding, it has been held that B.'s estate is liable.
- (2) Increase of Casualty after Date of Obligation.—This may arise in two quite different ways:
- (a) Increase of Rent.—When a casualty is an untaxed composition, it will of course rise with the rent, and that may be increased by buildings erected by the purchaser, which would be a case of the creditor in an obligation increasing the debtor's liability at his own hand. Lord Shand refers to this in the Straiton case, and indicates that the seller's liability might be cut down to what it would have been if the change had not occurred. With deference, this is doubted. The seller always has it in his power to pay the casualty at the date of the sale, and then this question could never arise.
- (b) Relief or Composition.—Take the case of an untaxed holding. The last casualty was paid by A., who is dead; B., his heir, sells to C., with the usual obligation to relieve of casualties, but no casualty is paid; after B.'s death, C. is called upon to pay a casualty. Is B.'s estate liable to relieve him? It will be observed that if B. had paid a casualty, it would have been relief duty only, whereas if his estate has to relieve C. of a casualty now, it will be a composition. All the arguments which are available to B.'s representatives in the other case above figured will apply here, with this important addition, that it may be argued with much force that this cannot be the casualty for which B. undertook liability, inasmuch as that liability was limited to any casualty then due, and no composition was then due. But it is very important to note to pay relief duty for the heir and to get a proper receipt even though the amount be illusory.²

¹ Farquharson v. Cal. Ry. Co., 1899, 2 F. 141; ² Sutherland v. Tait's Trustees, 1902, Cappie v. Chalmers, 1900, 7 S. L. T. No. 305. 5 F. 90.

3. Public, Parochial, and Local Burdens.—See p. 150.

Warrandice.—The ordinary clause means

absolute warrandice as regards the lands and writs and evidents, and warrandice from fact and deed as regards the rents.

One does not very well see the reason for this distinction, unless it be to make it clear that the seller does not warrant the solvency of the tenants, which, however, he would not be held to do in any case. At the same time the presence of this distinction in the statute raises the question whether it is correct to make one of the parties to a deed expressly grant "absolute warrandice" in unqualified terms, which is often done when another party grants warrandice from fact and deed only, and it is wished to mark the distinction very clearly. It is thought that "absolute warrandice" goes no further than the statutory clause.

The important thing to remember is, that in any conveyance of heritage the simple clause, "I (or we) grant warrandice," means absolute warrandice, without regard to whether the deed is onerous or gratuitous, inter vivos or testamentary, or (when there are more than one granter) their relation to the transaction. See p. 324 (footnote).

Consent to Registration for Preservation is entirely useless.

DESCRIPTION AND BOUNDARIES

Generally.—It may be said that there are two entirely different but equally effectual ways of "describing" the subject of a conveyance. These are: (1) an actual description which identifies what is meant, (2) almost any set of words which by prescriptive possession is referred to the property in question, so long as not actually inconsistent with what is claimed, as by a bounding title. Whether the description be by "reference" or not is of course immaterial for the purpose of this distinction. As regards the necessity for the prescriptive period of possession in the second case in order to interpret the description, it is clear that a great deal less may be sufficient in a question between the granter and grantee of the deed and their respective heirs, i.e. if the real evidence of contemporaneous actings be clear. How little may suffice for a description even without any reference is seen by combining the cases of Wood 2 and Matheson,3 the result of which, taken together, or at least of the opinions of Lords Trayner and M'Laren, would appear to be that a disposition of "a property in Princes Street, Edinburgh," might be held sufficient without anything more, and with no reference, assuming it not to be alleged that the disponer had two properties in that street.

Bounding Title.—This is a title in which the property is limited by boundaries, either expressly or in effect. It may be constituted in

¹ Cf. p. 183.
³ Matheson v. Gemmell, 1903, 5 F. 448.
³ Murray's Tr. v. Wood, 1887, 14 R. 856.



many ways, e.g.: (1) express boundaries in the deed; (2) plan referred to as showing the boundaries 1; (3) an exception in A.'s title of the part disponed to B. as that exception is described in a specified deed, which latter deed refers to an annexed plan as delineating B,'s property: A.'s title is "bounded" in relation to B.'s 2; (4) boundaries on three sides and measurement⁸; (5) specification of parish, county, or other area.⁴ The effects are: (1) no corporeal right of property can be acquired beyond the boundary, not even by the fullest possession for the prescriptive period 5 (but see Pertinents, p. 317); but (2) incorporeal rights, e.g. salmon-fishings,6 may be so acquired, and (3) so may servitudes.7

Boundaries.—The following are some of the kinds of boundaries which have been the subject of judicial construction:-

Boundaries.

Sea 8

Construed to mean

Low water mark of ordinary spring tides, but reserving the public use of the foreshore. The boundary follows the sea. 12

Full sea. Sea flood Flood mark

High-water mark of ordinary spring tides. 13 But where a feu was granted bounded by the sea flood, and the granter's own title did not expressly carry him further seawards, it was held that he had given out all he had, and that he could not interject himself between his vassal and the

These words "constitute a bounding charter, the extreme boundary seawards being the low water line of the foreshore." 15

Non-tidal river

Medium filum.16

- 1 N. B. Ry. Co. v. Hawick Mags., 1862, 1 M. 200.
- ² N. B. Ry. Co. v. Hutton, 1896, 23 R.
- 3 Stewart v. Greenock Harbour Trs., 1866.
- 4 Hepburn v D. of Gordon, 1823, 2 S. 459; Gordon v. Grant, 1850, 13 D. 1.
 - ⁵ Bell, Prin. 738, and cases cited.
- ⁶ Earl Zetland v. Tennent's Trs., 1873, 11 M. 469.
- ⁷ Liston v. Galloway, 1835, 14 S. 97; Beaumont v. L. Glenlyon, 1843, 5 D. 1337. ⁸ Boucher v. Crawford, 30 Nov. 1814,
- ⁹ Culross Mags. v. Geddes, 1809, Hume, 554.

- 10 Cameron v. Ainslie, 1848, 10 D. 446.
- 11 Todd v. Clyde Trs., 1840, 2 D. 357; 2 Rob. 333.
- 12 Lockhart v. Mags. of N. Berwick, 1902, 5 F. 136. See this case re sea boundaries generally.
- 13 Berry v. Holden, 1840, 3 D. 205; St. Monance Mags. v. Mackie, 1845, 7 D. 582; Keiller v. Mags. of Dundee, 1886, 14 R.
- 14 Hunter v. Lord Advocate, 1869, 7 M.
- 15 Lord Adv. v. Wemyss, 1899, 2 F. (H. L.) 1, per Lord Watson at p. 11.
- ¹⁶ Gibson v. Bonnington, etc., Co., 1869, 7 M. 394, and cases there cited.

Boundaries.

Construed to mean

Road

If road is boundary between two estates, there is presumption for medium filum.¹ But bounded "by" a private road excludes the road.² It is different in the case of a public road; and this boundary being inserted by the common author (the burgh authorities) in titles of properties on opposite sides of a street, the grants were construed as extending to the medium filum in each case, and the granters, though clearly interested to reserve the solum of the street, were divested of it.³

Canal

Wall

Excludes both canal and towing-path.4

March stones

In absence of natural features, the presumption is for a straight line between the stones.⁵

The inside of the wall, the wall itself and solum thereof being excluded. If the contrary be intended, the expression should be "together with the walls and the solum thereof." But of course it will be remembered that exclusive property will mean the whole burden of maintenance.

Mutual wall .

It is usually laid down that the boundary is the medium filum of the solum, and that each proprietor has a right of property in the wall ad medium filum, and an interest in the other half entitling him to prevent alterations. But an alternative view is that the respective rights of exclusive property are bounded by the respective sides of the wall, and that solum and wall are held pro indiviso. But in either case the practical result is the same: neither proprietor can alter the wall.

Lateral boundary seawards

The rule as regards both foreshore and salmonfishings is, that a line is to be drawn representing the average direction of the coast, and that from the land boundary a perpendicular is to be dropped on that line. The perpendicular and its extension are the boundary seawards.⁸

¹ Wishart v. Wyllie, 1853, 1 Macq. 389; Rankine, Landownership, 108.

² Logie v. Alexander, 1903, 11 S. L. T. No. 70.

³ Mags. of Ayr v. Dobbie, 1898, 25 R.

4 Fleming v. Baird, 1841, 3 D. 1015.

housie v. Minister of Lochlee, 1890, 17 R. 1060.

⁶ Smyth v. Allan, 1813, 5 Patten, 669; Campbell v. Paterson, 1896, 4 S. L. T. No. 126.

⁷ Rankine, Landownership, 542, 556.
 ⁸ M'Taggart v. M'Douall, 1867, 5 M.
 534; Keith v. Smyth, 1884, 12 R. 66.

⁸ Ewing v. Lennox, 1828, 6 S. 417; Dal-

Boundaries,

Construed to mean

A similar rule, but the first line is di Lateral boundary | represent the average direction of the in river estuary | filum of whole channel (both salt an water) at ebb tide.1

Collision between boundaries and plan is really a case flicting boundaries. If in that case measurements also are gi boundaries or plan will be preferred according as the one or the is supported by the measurements.² In a case of collision boundaries and measurements, the rule of contract between se purchaser is that "if the measurement is taxative, or is an of the contract, there is right to resile if there is substantial extent." 8 It is otherwise if the measurement is descriptive In a competition of titles, if the measurement would give a lar than the boundaries, and these are clear, it is difficult to see how ordinary case, more than the boundaries could be claimed.⁵ In verse case, if the boundaries are clear, the measurement will not

The statutory facilities in the matter of description are number, namely, (1) description by reference, and (2) description general name.

DESCRIPTION BY REFERENCE

Statutory Reference.—Originally introduced in 1858, undergone many changes. But as the present law, which is c in sec. 61 of the 1874 Act, is retrospective, it is unnecessary to with any of the prior statutes. The requirements of a statutory i are, that the deed containing the reference shall (1) specify the or (if burgage) the burgh and county; and (2) refer to a prior deed containing a particular description.

Particular Description unnecessary.—The chief point is, that particular description of the property is required. It is true the O, which gives the forms, does contain, by way of example, a nu particular descriptions, and suggests any "other like short descriptions But the section is quite clear, and the schedule is no way contr for the first form given in the schedule is simply "the lands (or and others in the county of," without any attempt whatever a fication apart from the reference. At the same time, while the doubt about the law, it is not satisfactory that it should be in

¹ Laird v. Reid, 1871, 9 M. 699, 1009; Gray v. Flemings, etc., 1885, 12 R. 530; Darling's Trs. v. Cal. Ry., 1902, 11 S. L. T.

² N. B. Ry. v. Moon's Trs., 1879, 6 R. 640.

³ Hepburn v. Campbell, 1781, Mor. 14168; Gray v. Hamilton, 1801, Mor. App. "Sale," No. 2.

⁴ Hannay v. Bargaly's credi Mor. 13334; Brown v. Kyd, 18 700.

⁵ Currie v. Campbell's Trs., 1 237.

⁶ Douglas v. Lyne, 1630, M Lord Young in Currie, supra

ex facie of a deed to gather anything whatever regarding the nature of the property conveyed, beyond the bare fact that, whatever it is, it lies in a certain county. It is accordingly recommended that, whenever possible, a very brief popular description should be introduced before the reference, which will make a very much better deed. Care will be taken that no possibility of doubt is allowed to enter by the terms of this short description. Thus, if the prior deed conveys a house No. 1 King Street, with a statement that the area flat thereof is known as No. 1a, it would not be satisfactory that any subsequent deed should convey "the house No. 1 King Street, in the city and county of Edinburgh, being the subjects particularly described in "the prior deed. In many cases it is desirable and sufficient, after some particular words of description, to say "and other subjects." On the other hand, any particular description which is thus introduced must be kept down to a very few words, otherwise it will be better to have no reference at all.

Specification of County.—It is obvious that a difficulty may arise when the lands are partly in each of two counties. If the deed to which it is proposed to refer contains separate and distinct descriptions of the part in each county, it is all right. But as likely as not that will not be the case, and if the instrument in question contains only one description of one property lying partly in each of two counties, without any separate description of the part in each county, it is thought that a conveyance in a subsequent deed, of

the lands of X., situated partly in the county of Y. and partly in the county of Z., being the subjects particularly described in the notarial instrument in my favour recorded in the division of the general register of sasines for the county of Y., and by memorandum in the division of the said register for the county of Z., on

would not do as a reference in terms of the Act, though the particular description as the lands of X., with the mention of the counties, might, and probably would, be good enough as identification without any aid from reference at all.

Specification of Burgh and County.—A somewhat similar question arises in burgage deeds when the burgh is partly in each of two counties. What is required is the name of the burgh and county in which the lands are situated, so that the other county need not be referred to at all. It is of course understood that the necessity of naming the burgh does not apply to all properties in burghs, or even in royal burghs, but only to property "held by burgage, or by any similar tenure," i.e. booking in Paisley.

What deed may be referred to.—What is required is that the deed to which reference is made shall (1) be a "conveyance, deed, or instrument of or relating thereto," i.e. to the property, (2) contain a particular description, (3) be "prior," i.e. prior to the deed containing the reference, and (4) be recorded in the appropriate register of sasines.

- (1) "Of or relating thereto."—It is thought that on the transmission of a feu, the superiority title might be competently referred to, but it is strongly recommended that this be avoided. On the other hand, on transmission of a bond, not only is there no objection to referring to the description in the bond, but it is the natural thing to do. It is no objection to a reference that the deed referred to turns out to be defective in some respect. It is on record, and all that is required is, to import the descriptive words from it to the new deed.
- (2) "Particularly described."—Of course it is obvious that a mere reference to a deed which itself contains a mere reference, is nothing. But it does not at all follow that there can be no reference to a deed which in turn contains a reference. A reference is, in terms of sec. 61 of the 1874 Act, "equivalent to the full insertion of the particular description contained in such prior . . . deed . . . as if the particular description had been inserted in such subsequent conveyance." The reference will therefore have the effect of importing into the new deed all the particular description (but not any reference description) contained in the old deed. Of course a "particular" description may be a very short description. Thus "the property of Kingshouse, in the county ," or "the house 1 King Street, in the city and county of X.," may obviously be quite sufficient; and if these are contained in the prior deed, the new deed referring thereto will be quite effectual though, in addition, the old deed contained a reference to a still older deed which gave a long detailed description.
- (3) "Prior."—The natural course is that the deed referred to shall be prior in all three following points, namely in (a) the progress of title, (b) date, and (c) date of recording. But it is thought that only the first is essential. Thus, if A. is buying a property and granting a bond over it at the same time, it might quite well happen that the bond contained a reference to "the disposition granted by X. in my favour, , and recorded in the division of the general register dated of sasines for the county of of even date with the recording of these presents"; that the disposition was in fact dated subsequent to the bond; that both deeds were recorded on the same day, but in the wrong order, the bond going on first. It is thought to be clear that such a reference would be quite effectual. After Murray's 1 case it cannot be suggested that the want of the date in the bond would be fatal; nor does there appear to be any objection to the above form of giving the date of recording.
- (4) "Recorded."—That the prior deed shall be recorded is of course absolutely essential. But the Act says nothing about "duly recorded," so that no error in the warrant would have any bearing on the competency of making the prior deed a reference instrument for future deeds, though it might be most serious otherwise. This is right

¹ Murray's Tr. v. Wood, 1887, 14 R. 856.

enough, for all that is wanted is that the particular description shall in fact be on record somewhere.

Mode of Reference.—On an examination of Sched. O, it is not very easy to state what it requires shall be given in the way of identifying the prior deed. Thus, on the terms of the schedule, it would be impossible to suggest that a reference is defective because in the deed containing the reference (1) the parties to the prior deed are not designed, (2) the grantee is not even named, (3) no name at all is given in the case of a notarial instrument or instrument of sasine, (4) the date, if any, in the case of an instrument of sasine is not given; and (5) even a complete mis-statement as to who was the granter may be overlooked.1 What is wanted is to identify the deed; and the view is submitted that whatever de facto does that will be sufficient. One would have been inclined to modify that opinion to the effect that the date of recording was essential, but the contrary was held in Murray's case, supra, where a statement that the prior deed was "dated the 6th and 7th and recorded [in the proper register] on the , all days of November 1882," was held sufficient. Of course, in practice, proper particulars should be given, namely, (a) parties, (b) date or dates, and (c) date of recording. The last may quite well be "recorded in the . . . of even date with the recording of these presents." But the particulars should be kept short. e.a.

the feu-contract entered into between A. and others, the testamentary trustees of B., and C. and others, the marriage-contract trustees of D. and spouse, dated and recorded in on

When Reference should be used.—It goes without saying that an actual identifying description is much better than any reference, and in some cases it will not only not be longer, but will be shorter. Thus in the case of a villa where the enclosing walls are completed, and the law as to walls has already been laid down in the titles, nothing can be better than simply, without any reference at all, to dispone

All and whole that house 10 Sylvan Terrace, in the city and county of Perth, with the solum thereof, ground attached, and pertinents.

But then (1) it may be necessary to refer, at any rate, to a prior writ for burdens and conditions of feu in respect of the titles containing a direction to that effect under pain of nullity, in which case the reference may as well be made to apply to the description also; and (2) the prior titles may, especially in the case of tenements, contain a long enumeration of common rights in *solum*, back-green, passages, stairs, drains, accesses, etc., etc. It would be absurd to repeat all this in every transmission, to save which a reference should be inserted, thus:

All and whole that house entering by the common stair 2 King Street, in the city and county of Edinburgh, being the northmost house on the top flat

1 Matheson v. Geminell, 1903, 5 F. 448.

of the tenement, with all common rights, pertinents, and others, all as particularly described in the disposition granted by A. in my favour, dated

, and recorded in the division, etc.

Common Law Reference.—Apart from the modern conveyancing statutes . . . I see no reason for doubting that a reference to an earlier deed as containing a full description . . . was a perfectly legitimate mode at common law of eking out a generalised or incomplete description In practice it was not infrequent.¹

DESCRIPTION BY GENERAL NAME

This was introduced in 1858. The present enactment is sec. 13 of the 1868 Act. It is to the effect that

where several lands are comprehended in one conveyance in favour of the same person or persons, it shall be competent to insert a clause in the conveyance declaring that the whole lands conveyed and therein particularly described shall be designed and known in future by one general name to be therein specified.

And then, on the conveyance or a notarial instrument containing the particular description and the clause in question being duly recorded, it is made competent in any future deed or instrument to (1) specify the general name, and (2) the county or (if burgage) the burgh and county, and (3) refer to the recorded deed or instrument which contains the particular description and lays down the general name. The effect is the same as if the deed

contained a particular description of each of such several lands exactly as the same is set forth in such recorded conveyance or instrument.

The requirement of the county or burgh and county is contained in the schedule only, namely, Sched. G. It is not expressly stated that the burgh is to be specified, not in all cases of burgh property, but only if held burgage, but it is thought that there can be no doubt that is what is intended. In any case, however, it will hardly be possible to avoid mentioning the burgh, and, besides, this plan of a general name will rarely be used in the case of burgh property.

In terms of the schedule, the deed which contains the reference should expressly narrate that the former deed contains a declaration as to a general name.

For forms of clauses applicable to (1) a disposition which prescribes the general name, and (2) a disposition which refers to a general name already prescribed, see pp. 321-2.

It is suggested that this enactment is useless, for (1) if the "general name" really passes into use, then the employment of it alone in a subsequent deed would be sufficient without any reference to a prior deed;

¹ Matheson v. Gemmell, 1908, 5 F. 448 (Lord M'Laren).

and it is thought that, even though the name may not have passed into popular use, still the fact that it is prescribed in the estate titles would be sufficient to show what it related to, even without any reference, though no doubt there might be difficulty in this case if the name formerly applied to one only of two properties and is directed to be in future applied to both. But however that may be, and whether or not the general name without the reference would always be effectual, it is clear (2) that the converse holds good, and that (under sec. 11 of the 1868 Act, now sec. 61 of the 1874 Act) the reference to the prior recorded deed (along with the specification of the county or burgh and county) will be sufficient without the repetition of the general name.

CORRECT DESCRIPTION UP TO DATE

The only satisfactory description is one which serves the purpose of identification, which is the only reason of its existence. It is not at all necessary, and it is undesirable, that every particular of the property and every collateral right or privilege should be mentioned. But the deed should be so framed that anyone on reading it can tell with substantial accuracy what it is that is conveyed. The description should not be merely copied, but should be tested by an inspection of the property, and if necessary (as it must be from time to time), should be brought up to date. If the alterations are heavy, so that the identity is not apparent, the new should be connected with the old; but on no account, in that case, should the old description be given in any form other than a bare reference; thus:

All and whole [insert modern correct description], which subjects hereby disponed are the subjects otherwise described in the disposition granted by A. in my favour, dated , and recorded .

The view is submitted that a seller is not entitled to object to the deed being expressed so as clearly to cover and identify the property which he has sold, and that he is bound to warrant a description of that nature.

Brevity.—While it is proper that the subject should be identified, it is evident that, after enough has been said to serve that purpose, everything superadded is useless and worse, for it means expense. A gross instance is the conveyance of a house in a tenement proceeding on the principle of describing (1) the house, (2) the tenement, and (3) the whole feu, and perhaps carrying the process even further. The house only is sold, and it alone must be described.

PERTINENTS

Though it is laid down that "a grant of the lands of A. is as extensive as a grant of the lands of A., with parts and pertinents,"

1 Gordon v. Grant, 1850, 18 D. 1, at p. 7.

still it is recommended that "pertinents" should be mentioned. And as to the place where it should occur—(1) if the county is specified in the description of the property, it will be better to insert "pertinents" after the name of the county, and, if wished, words might be added "whether within the said county or not"; but of course if the deed is recorded in the division of the register for the one county only, the right to anything in any other county will not be completed. As to this point generally, see the cases noted. And (2) if the description is or includes a reference to a prior deed, the "pertinents" should certainly come after the reference.

In examining titles the following matters require consideration in connection with pertinents:—

Rights incapable of Alienation.—These are:

- 1. All the regalia majora.
- 2. Certain of the regalia minora, namely, navigable rivers and highways.²

As to the bed of the sea beyond the foreshore, and the minerals below it, see Lord Adv. v. Wemyss.³

3. Water rights. It appears that it is incompetent to communicate these rights to non-riparian owners where third parties are interested to object.⁴ This would apply to (a) the case of the proprietor of an estate with a river frontage attempting to communicate a right to water-supply from the river on a feu or sale of part of the estate not abutting upon the stream, and (b) the case of a proprietor of an estate on the shore of a loch attempting to communicate a right of boating or trout-fishing on the alienation of a part of the estate not abutting on the loch.⁵

Rights which require Express Alienation.—These are:

- 1. Teinds, if ever separated from the stock.⁶ But see p. 190.
- 2. Regalia minora. There is a dictum to this effect in Bell's Principles, 748. But it is thought that it is intended to apply only to contracts, and not to questions of prescriptive right. And even as to contract, it is submitted that it must be taken with qualification, for it is thought to be reasonably clear that a contract of sale of an estate to which is attached a right of salmon-fishing would by implication include that right, so as to entitle the purchaser to a conveyance of it.
 - 3. Moveable effects; fittings (see p. 154).

 Rights which cannot be reserved.—These include:
 - 1. Seat in the parish church.7
 - 2. Water rights. This is the same question as that referred to
- ¹ Gordon, supra; Hepburn v. D. of Gordon, 1823, 2 S. 459.
 - ² Ersk. ii. 6. 17; Bell, Convey. 606.
 ⁷ Stephen
 - 3 1899, 2 F. (H. L.) 1.
 - 4 Rankine, Landownership, 483.

⁵ Patrick v. Napier, 1867, 5 M. 683.

6 See Menzies, 810.

Stephen v. Anderson, 1887, 15 R. 72;
 Ersk, ii, 6. 11.



above, but in its converse application. Thus on the sale of an estate abutting upon but not entirely surrounding a loch, it would appear to be incompetent for the seller, retaining no land fronting the loch, to reserve to himself right of fishing or boating in the loch; and even if the land did wholly surround the loch, while such a reservation might be effectual as between (a) superior and vassal in favour of the former (who would not be divested), and (b) even as between disponer and disponee in favour of the former, it would appear that in the latter case it would not be effectual against a singular successor in the property.

Conditions of Prescriptive Right to Pertinents.—The ordinary rules of prescriptive title apply, and it is necessary to have (a) title, and (b) possession.

TITLE

- 1. Infeftment.—The Act 1617, c. 12, applies, and there must be infeftment as the basis of title.²
- 2. Express Grant.—As already mentioned it is not necessary that the title should expressly contain the words "parts and pertinents."
- 3. Competition with Express Infeftment. Whether the clause of parts and pertinents be present or absent in A.'s title, it is not fatal to his claim that the infeftment of his competitor, B., includes the disputed subject per expressum: possession will determine.³
- 4. Bounding titles (see p. 307). There is a considerable weight of authority to the effect that a bounding charter precludes the acquisition, as part and pertinent, of any corporeal property beyond the bounds.⁴ It may, however, be suggested as a question whether this applies to prevent prescriptive possession of a proper pertinent giving a title thereto, e.g. a cellar or bleaching-green beyond the bounds. See this view stated by Lord M'Laren in a recent case.⁵ It is important to note that in many of the cases the "bounding" words—usually the specification of parish or county—were so placed as to apply expressly to the pertinents as well as to the main property; and it was so in the recent case of Wemyss.⁶

POSSESSION

- 1. Period.—The same as in any other case of prescription (see p. 183).
- 2. Nature.—It is not sufficient that the subject in dispute shall have been possessed with the principal property: it must have been possessed as part thereof or pertinent thereto.

¹ Patrick, supra.

² Dunbar v. Sinclairs, 1714, Mor. 9640, 10817; Brand v. Charteris, 1841, 4 D. 292.

³ K. of Fife's Trs. v. Cuming, 1830, 8 S. 326.

⁴ Gordon v. Grant, 1850, 13 D. 1, and authorities cited at pp. 7, 24.

⁵ Cooper's Trs. v. Stark's Trs., 1898, 25 R. 1160, Lord M'Laren at p. 1169.

⁶ Wemyss v. Lord Adv., 1896, 24 R. 216, rev. 1899, 2 F. (H. L.) 1.

⁷ L. Adv. v. Hunt, 1867, 5 M. (H. L.) 1.

- 3. Discontiguity.—This is not fatal, subject to what has been stated above as to bounding charters.¹
- 4. Degree.—In cases of ambiguous possession the inclination will be (a) in favour of the competitor who is infeft per expressum as against one who claims merely as part and pertinent; and (b) in favour of the competitor who claims in right of contiguous lands, as against one who does not.²

DISPOSITION TO SUB-PURCHASER OR PURCHASER'S NOMINEE

It is common enough for the seller to be requested to grant the disposition in favour of some one other than the person to whom he sold, e.g. a sub-purchaser or some one for whom it is subsequently stated that the purchase was truly made. There are certain matters which require to be considered in this connection.

- 1. Is the Seller bound to grant the disposition to any one except the original purchaser? In most cases it is difficult to imagine any reason he can have for objecting, keeping in view that the original purchaser could always, in any case, dispone in turn at once, or, indeed, assign the disposition. In the case noted the seller was held not bound to dispone to a third party, but there delectus personae was involved in connection with a liquor licence. Other authorities and dicta are noted below.
- 2. Consent of Original Purchaser.—This ought to be expressly given in writing, and the best means of keeping a record is, of course, to have the deed signed by him. The risk and expense which the seller and his agent may incur through a departure from this rule are exemplified in the case of Anderson.⁵ There the superior's agents acted upon the request of the original feuar's agent. Under the circumstances that was held enough after a proof; but it appears clear that it would not always be so.⁵
- 3. The Capacity of the Original Purchaser.—In a case of sub-sale before a title is taken it is clear that there is no ground for holding that the capacity of the original purchaser to enter into a contract of sale and to grant a conveyance can be judged of more leniently than if he were first infeft in ordinary course. Then as to form, e.g. (1) a married woman's husband would require to concur, and (2) in the case of a firm all the partners should sign.
 - 4. Warrandice.—(1) The Original Seller must, of course, grant absolute

¹ Forsyth v. Durie, 1632, Mor. 9629; Glendonwyne v. Gordon, 1716, Mor. 9643; Hunt, supra.

² Ersk. ii. 6. 3.

³ Mitchell v. Brown, Lord Kincairney and 1st Div. 1900 unreported.

⁴ Duff, Feud. Convey. 189; Bell, Convey. 701; Addison, Contracts, 9th Ed., 483;

Chitty, Contracts, 13th Ed., 729; Dart, Vend. and Purch., 6th Ed., 1082, 1132; Campbell v. Steele, etc., 1826, 2 W. and S. 334; Engell v. Fitch, 1869, L. R. 4 Q. B. 659; Shaw v. Foster, 1872, L. R. (H. L.) 321.

⁵ Anderson v. Dick and ors., 1901, 8 S. L. T. No. 385.

warrandice of his title and power to convey, but on the other hand, it is clear that he cannot be compelled, and he ought not, to grant warrandice in the form of the ordinary unqualified clause, for that would seem to warrant to the disponee e.g. the legal capacity of the original purchaser to pass on the property; that he has done so in valid form; and that he has not been inhibited. The clause may run—

And I the said A. grant absolute warrandice of my title to the said subjects, and of my right and power to dispone the same.

Or.

And I the said A. grant warrandice with this qualification, viz., that I do not warrant the right or power of the said B. [the first purchaser] to sell the said subjects, or that he has validly done so, or the validity of his concurrence in these presents.

Or,

And I the said A. grant warrandice but only to the same effect as if I had disponed the said subjects to the said B.

- (2) The Original Purchaser.—If he has re-sold, he also must grant absolute warrandice and without any qualification. But he is clearly interested to see that the original seller grants warrandice.
- (3) The Ultimate Purchaser is clearly entitled to absolute warrandice from the person with whom he has contracted, viz., the original purchaser, and is not bound to be satisfied with the warrandice of the original seller. Yet a fourth form may therefore be suggested:—

And I the said A. [original seller] grant warrandice to the said B. [original purchaser], and I the said B. grant warrandice to the said C. [sub-purchaser].

- 5. Searches.—These will include the original purchaser.2
- 6. Price—Stamp.—In the case of successive sales the stamp-duty is regulated by the price on the last sale, whether it be higher or lower than the first price or any intermediate price. Sometimes the intermediate purchaser wishes to have the first price only mentioned so as not to disclose to the original seller that a profit has been made on the re-sale, but the full facts ought to be briefly stated both in order to comply with s. 5 of the Stamp Act, 1891, and also because otherwise the second purchaser would be doing something very like making himself a party to deceiving the original seller.

DISPOSITION OF A LANDED ESTATE

I, A., heritable proprietor of the lands and others hereinafter disponed, in consideration of the sum of \mathcal{E} instantly paid to me by B. as the price thereof, of which sum I hereby acknowledge the receipt and discharge him,

¹ Mackenzie and others v. Neill, 1899, 37

² See p. 282, and Dryburgh's case there S. L. R. 666.
quoted.

have sold, and do hereby dispone, to the said B., and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole the lands and estate of X., in the county of Y., together with (1) the mansion-house and all other buildings and erections on the said lands; (2) the teinds parsonage and vicarage; (3) the salmon-fishings and all other fishings on the coast ex adverso of the said lands and in the river Z. so far as passing through or bounding the said lands; (4) the pertinents of, and all rights and privileges attached to, the said lands; (5) the fittings and fixtures in the said house and other buildings and upon the said lands, so far as belonging to me; and (6) my whole right, title, and interest, present and future, in and to the said lands and others foresaid: But always with and under the burdens and conditions specified in the instrument of sasine in favour of C., dated the , and recorded in the particular , both days of register of sasines for on the : With entry at the : And I assign the writs, and have delivered those enumerated in the inventory thereof annexed and signed as relative hereto: And I assign the rents, feu-duties, and casualties: And I bind myself to free and relieve the said B. and his foresaids of all feu-duties, casualties, and public burdens: And I grant warrandice, excepting the current leases and all feu-rights 1 of the said lands granted by me or my predecessors or authors, and the said B. and his foresaids shall be bound, as by acceptance hereof he binds himself and them, to satisfy and relieve me of all claims by tenants for meliorations, improvements, taking over stock, stocking and others,2 and all other claims, whether under their leases or otherwise and whenever arisen or arising, without prejudice, nevertheless, to the said B. or his foresaids quarrelling or impugning said leases, feu-rights, and others, on any ground of law not inferring warrandice against me or my foresaids: And I consent to registration hereof for preservation.—In witness whereof.

VARIATIONS IN DESCRIPTION, GIVING FARM NAMES, ETC.

All and Whole the lands and estate of X., in the county of Y., comprehending *inter alia* the farms and possessions known as D., E., F., and G., the policies and gardens, and various lots of ground in the village of . . ., which have been feued out or let on long leases.

WITH RENTAL

All and Whole the lands and estate of X., in the county of Y., comprehending inter alia the subjects detailed in the rental annexed and signed as relative hereto, which is here specially referred to and held as repeated, and which subjects so specified in said rental are hereby disponed to the said B. and his foresaids: Declaring, with reference to said rental and adoption thereof herein, that the same is without prejudice to the general description hereinbefore written, and vice versa, the intention being, and it is hereby declared, that the said B. and his foresaids shall have the full benefit both of the

¹ See Ceres School Board v. M'Farlane, 1895, 23 R. 279 (unrecorded feu-rights).

² Panton v. Mackintosh, 1908, 10 S. L. T. No. 485.

£100

said general description and of the said rental and specification therein contained and adoption thereof herein, the one without prejudice to the other.

		II. Farms		
Farm.		Tenant.	Rent.	
East Haugh .		John Smith .	£400	
West Haugh		Thomas Brown .	200	
Highriggs .		William M'Donald	150	
Lowriggs .		Richard Chalmers	100	
-		James Gray .	75	
	777	. 1791		925

III. Feus in Village of Bankfoot

Subject.				Feuar.		Feu-duty.	
1 8	Seaview Te	rrace		Richard Thomson		£5	
2	,,	•		Andrew Law .		5	
3	,,			Mrs. Carstairs .		3	
4	,,		•	Miss M'Lennan .		3	
							16

IV. Long Lease-duties in said Village

Subject.		Lessee.		Lease-duty.			
Grove Cottage .		William Dewar			£2		
Deanbank Cottage		Thomas Finlay			2		
Alpine Villa .		Mrs. M'Laren			1		
Shop, 75 High Street		Miss Dewar			1		
						6	
					Ē	1047	

CONSOLIDATED FEES

All and Whole the lands and estates of X., in the county of Y., declaring that while I formerly held the same in two fees of superiority and property respectively, the same have now been consolidated in my person, and the full consolidated fee is hereby disponed.

STATUTORY REFERENCE

All and Whole the lands and estate of X., in the county of Y., being the subjects particularly described in the disposition by C. in my favour, dated the , and recorded in the division of the general register of sasines for the county of Y. on the , both days of .

SEVERAL SUBJECTS TO BE KNOWN IN FUTURE BY GENERAL NAME

All and Whole the following subjects in the county of , namely, (first) the lands of W. [insert full detailed description from prior titles]; (second)

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the lands of X. [insert similar description]; and (third) the lands of Y. [insert similar description], which whole lands hereinbefore described in the first, second, and third places shall, it is hereby declared, be designed and known in future by the one general name of the lands of X. (or Z.).

REFERENCE TO STATUTORY GENERAL NAME

All and Whole the lands and estate of X., in the county of Y., as particularly described in the disposition granted by C. in my favour, and bearing date , and recorded in the division of the general register of sasines for the county of Y. on the , and in which the lands hereby conveyed are declared to be designed and known by the said name of X.

DISPOSITION OF A HOUSE IN A TENEMENT, APPORTIONING FEU-DUTY, ETC.

I, A., heritable proprietor of the subjects hereinafter disponed, in considerainstantly paid to me by B. as the price thereof, of which I hereby acknowledge the receipt, have sold and do hereby dispone to the said B., and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole that house entering by the common stair No. 2 King Street, in the city and county of Edinburgh, being the northmost house on the top flat of the tenement Nos. 1, 2, and 3 King Street, erected on part of Lot IV. contained in the feu-charter hereinafter specified; Together with (first) a right in common along with the other proprietors of said tenement to the solum on which the said tenement is erected; (second) a right in common with the other proprietors of said tenement, other than the proprietors of the two maindoor houses on the street and underground flats, to the back green set apart for the houses in the upper flats of said tenement, with the mutual boundary walls thereof to the extent of the half thereof next said back green, which back green shall be used exclusively for drying and bleaching clothes, and for no other purpose whatever; (third) free ish and entry to the subjects hereby disponed, and to the said back green, by the common passage and stair in said tenement, and to the roof and chimney-tops of said tenement by the hatchway leading to the same, for the purpose of cleaning vents and for all other necessary purposes; (fourth) a right in common with the other proprietors to the drains and soil and other pipes of said tenement, and of access thereto when required; (fifth) the whole other rights common and mutual to the proprietors of said tenement, and the whole other parts, privileges, and pertinents effeiring to the said subjects hereby disponed; (sixth) the fittings in the said house; and (seventh) my whole right, title, and interest, present and future, in and to the subjects and others foresaid: But always with and under the real burdens, conditions, restrictions, provisions, stipulations, obligations, and declarations, in so far as unimplemented and applicable, specified in the feu-charter granted by C. in my favour, dated the , and recorded in the division of the general register of sasines for the county of Edinburgh on the : Declaring that the annual feu-duty hereby apportioned to the of

subjects and others hereby disponed is £2 per annum (with an augmentation of five per centum upon allocation by the superior, making then a total feuduty of £2, 2s. for the subjects hereby disponed), payable half-yearly at Whitsunday and Martinmas in equal portions, beginning the first term's payment at the term of for the half-year preceding, with the sum of £4, 4s. of composition (which includes augmentation) at the term of at the expiration of every twenty-one years thereafter, and that over and above the feu-duty of the year in which the said composition shall become payable, with interest of the said feu-duty and composition at five per centum per annum from the terms when the same become payable until actual payment thereof: And also under burden of paying a share corresponding to the proportion which the said augmented feu-duty of £2, 2s. bears to the cumulo feu-duty of £ (plus augmentation) stipulated to be paid under the said feu-charter for Lot IV. therein contained, of the expense of upholding the roof of the said tenement, the chimney-stalks, hatchway, stairs, railings thereof, and passages back and front, and outer-door pavement in front of said tenement, back green, mutual walls of said back green and poles therein, rain-water conductors, and drains, and all other burdens common or mutual to the said tenement: With entry

The above is of course intended to be used on the first separation (in title) of the house from the tenement. Sometimes the following clause is inserted:—

Declaring that when a majority of the proprietors of said tenement consider it desirable to have any mutual repairs executed, they shall have power to order the same to be done, and they and the other proprietors of said tenement, whether consenters or not, shall be bound to pay their respective shares of the expense thereof in the same way as if their consent had been obtained.

ANOTHER FORM, WITH ADDITIONAL CLAUSES

Suppose the feu-duty does not commence to run under the charter until three years after the builder has, in fact, the tenement ready for occupation. In that case he will wish to reap a feu-duty (i.e. a sum equal to the feu-duty) for himself during these three years, for which purpose the following additions will be inserted in the immediately preceding form:—

Narrative; add:

and in consideration of the sums hereinafter stipulated to be paid to me for the three years between Whitsunday 1904 and Whitsunday 1907.

Burdens; after the clauses apportioning feu-duty, casualty, etc., add: and with and under the following additional burden, namely, under the real and preferable burden of payment to me, my executors or assignees, of the annual sum of \pounds , but only for the three years ending Whitsunday 1907, in lieu of feu-duty, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at Martinmas 1904, for the half-year preceding, and the next term's payment

at Whitsunday following, until and including the term of Whitsunday 1907 (when the feu-duty under the said charter begins to run), with interest at the rate of five per centum per annum from the terms at which the same becomes payable until the actual payment thereof, which real burden hereby constituted is hereby appointed to be engrossed in any infeftment to follow hereon, and to be validly referred to in all future deeds and documents of or relating to the said subjects, or any part thereof, under pain of nullity.

The total of these additional payments will be added to the price for the purpose of fixing the stamp duty.

DESCRIPTION, ETC., OF THE SAME HOUSE IN ANY FUTURE DISPOSITION

All and Whole that house entering by the common stair No. 2 King Street, in the city and county of Edinburgh, being the northmost house on the top flat of the tenement, with all common rights, pertinents, and others, all as particularly described in the disposition granted by A. in my favour, dated , and recorded in the division of the general register of sasines for the county of Edinburgh on ; Together with (first) the fittings in the said house, so far as the same belong to me; and (second) my whole right, title, and interest, present and future, in and to the subjects and others foresaid: But always with and under the real burdens, conditions, restrictions, provisions, stipulations, and declarations, in so far as unimplemented and applicable, specified in (first) the feu-charter granted by C. in favour of A., dated , and recorded in the said division of the general register of ; and (second) the said disposition dated and recorded sasines on the as aforesaid.

DISPOSITION BY HUSBAND AND WIFE OF WIFE'S PROPERTY

I, A., wife of B., heritable proprietrix of the subjects hereinafter disponed, with the special advice and consent of my husband, and I, the said B., for myself, my own right and interest, and as taking burden on me for my wife, and we both with joint consent and assent, in consideration of the sum of £1000 instantly paid to me, the said A., by C., as the price thereof, of which sum we hereby acknowledge the receipt, have sold, and do hereby dispone, to the said C. and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole ; Together with the fittings and fixtures in and upon the subjects so far as belonging to us, or either of us, and our whole right, title, and interest, present and future, in and to the said subjects and others: But always with and under [refer to burdens]: With entry at the : And we assign the writs [clause as to delivery]: And we assign the rents: And we, jointly and severally, bind ourselves to free and relieve the said C. and his foresaids of all feu-duties, casualties, and public burdens: And we, jointly and severally, grant warrandice 1: And we consent to registration hereof for preservation.-In witness whereof.

As to effect of clause of warrandice by price, and is not otherwise interested, see one who is not seller, receives no part of the Ramsay v. Cunynghame, 1830, 8 S. 399.

The deed will be ratified as follows:-

At the day of , before me, , J.P. for the county of : Appeared A., wife of B., and, in absence of her husband, ratified and approved of the foregoing disposition in the whole articles and clauses thereof, and declared that she was noways coacted, compelled, or seduced to grant the same, but that she did so of her own free will and motive, and she gave her great oath that she should never quarrel or impugn the same, directly or indirectly, in any manner of way, in time coming as she should answer to God.

To be signed by the married woman and the justice.

DISPOSITION IN FAVOUR OF A MARRIED WOMAN

I, A., in consideration of the sum of \pounds instantly paid to me by B., wife of C., as the price thereof, out of funds belonging to herself free from the *jus mariti* and right of administration of the said C. (as he by his signature hereto admits), and of which sum I hereby acknowledge, etc.

Before the clause of entry insert the following:-

Providing and declaring, and the said C. by his subscription hereto admits and agrees, that the said subjects, and the rents and all other returns therefrom, and the prices and proceeds thereof, are and shall be the sole and separate estate of the said B., free from the jus mariti and right of administration of the said C. or any future husband, and that, notwithstanding her present or any future marriage, she is and shall be entitled to let the said subjects, remove tenants, burden the said subjects, affect the same with debt or securities, sell the said subjects by public roup or private bargain, take all proceedings, judicial or otherwise, with reference thereto, and further and generally, without limitation by reason of anything herein contained or otherwise, to manage, realise, and dispose of the said subjects, and the rents, returns, proceeds, and prices thereof, and that all by herself alone as if she were an unmarried woman, without the consent of the said C. or any future husband.

DISPOSITION BY PRO INDIVISO PROPRIETORS

We, the parties following, namely, (first) A., heritable proprietor to the extent of one-half pro indiviso of the subjects hereinafter disponed, (second) B., heritable proprietor to the extent of one-fourth pro indiviso of the said subjects, and (third) C., heritable proprietor to the extent of the remaining fourth pro indiviso of the said subjects, in consideration of the sum of £1000 instantly paid as the price thereof by D. to us, in the proportions of £500 to me the said A., £250 to me the said B., and £250 to me the said C., of which respective sums we do hereby respectively acknowledge the receipt, and discharge him, have sold, and do hereby dispone, to the said D., and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [description]: Together with the fittings and fixtures in and upon the subjects so far as belonging to us respectively, and our whole respective right, title,

and interest, present and future, in and to the said subjects: But always with and under [refer to burdens]: With entry at the term of And we assign the writs quoad our respective pro indiviso shares of the said subjects, and we have delivered those enumerated in the inventory annexed and signed as relative hereto, except Nos. 5 and 6, 8 and 9, and 12 and 13 of the said inventory, and I, the said A., bind myself and my successors to make the said Nos. 5 and 6 forthcoming to the said D. and his foresaids on all necessary occasions, on the usual receipt and obligation to return the same within a reasonable time and under a suitable penalty, and that so long as the said writs remain in the possession of me or my foresaids, and to take the person to whom the same may ultimately be delivered bound in like manner: And I, the said B., undertake like obligations regarding Nos. 8 and 9 of said inventory: And I, the said C., undertake like obligations regarding Nos. 12 and 13 of said inventory: And we assign the rents quoad our respective pro indiviso shares of the said subjects: And we bind ourselves to free and relieve the said D. and his foresaids of all feu-duties, casualties, and public burdens, but each only so far as regards our own respective pro indiviso shares: And we grant warrandice, but each only so far as regards our own respective pro indiviso shares: And we consent to registration hereof for preservation.—In witness whereof.

As to risks attaching to pro indiviso shares, see p. 416.1

DISPOSITION WITH CONSENT OF A BONDHOLDER

We, the parties following, namely, (first) A., heritable proprietor of the subjects hereinafter disponed, and (second) B., heritable creditor infeft in the said subjects in security of a debt of £500 and interest conform to bond and disposition in security granted by the said A. in my favour, dated the 14th, and recorded in the division of the general register of sasines for the county of Edinburgh on the 15th, both days of May 1890, for all my right and interest under the said bond and disposition in security, and to the effect of disburdening, as I do hereby disburden, the said subjects of the said bond and disposition in security, and of the infeftment following thereon, and we both with joint consent and assent: In consideration of the sum of £1000 instantly paid by C. as the price of the said subjects as follows, namely, £515 paid to me the said B. by our joint direction, and the balance of £485 paid to me the said A., of which respective sums we hereby acknowledge the receipt, and of which price of £1000 so paid as aforesaid, I the said A. hereby discharge the said C., have sold and do hereby dispone.

Stamp is not increased in respect of the release.

DISPOSITION WHERE BOND IS TAKEN OVER?

I, A., heritable proprietor of the subjects hereinafter disponed, considering that I have sold the said subjects to B. at the price of £1000, of which price it is agreed that £500 is to be paid to me in cash, and as regards the other

¹ Livingstone v. Allans, 1900, 3 F. 233. p. 535. Forms for summary diligence are 2 Sec. 47 of the 1874 Act is discussed at on p. 41.



£500 the said B. is to take over the bond and disposition in security for that amount hereinafter specified: And now seeing that the said B. has instantly paid to me the said sum of £500, of which I hereby acknowledge the receipt, Therefore, in consideration thereof, and of the obligation of relief and other clauses hereinafter contained regarding the said bond and disposition in security, I do hereby dispone [as in ordinary form to the warrandice clause]: And I grant warrandice, excepting therefrom the bond and disposition in security for the sum of £500 granted by me in favour of C., dated the , and recorded in the division of the general register of sasines , which sum of £500 it has for the county of on the been agreed is to remain on the security of the said subjects, and the said B. by his subscription hereto 1 agrees and binds himself [or, if more than one disponee, agree and bind themselves jointly and severally] to relieve me of the said debt of £500, and the interest thereof from the said term of entry; and further, the said B. hereby agrees that the personal obligation to pay the said principal sum of £500, interest thereof from the said term of entry, and penalties and fire insurance premiums, all as contained in the said bond and disposition in security, shall transmit against him, and be binding personally upon him, and a burden on his title, without the necessity of any bond of corroboration or other deed or procedure, and that the personal obligation may be enforced against him by summary diligence or otherwise in the same manner as against me, all in terms of the 47th section of the Conveyancing (Scotland) Act, 1874. And I consent to registration hereof for preservation. -In witness whereof.

DISPOSITION WHERE (1) BOND IS TAKEN OVER, (2) BOND OF CORROBORATION GIVEN, AND (3) SELLER'S OBLIGATION DISCHARGED BY THE CREDITOR

After "and further" [preceding form] proceed:

I the said B. without prejudice to the said bond and disposition in security, but in corroboration thereof, hereby bind myself and my heirs, executors and representatives whomsoever, without the necessity of discussing them in their order, to pay to the said C., his executors or assignees whomsoever, the said sum of £500 at the term of within the with a fifth part more of liquidate penalty in case of failure, and the interest of the said principal sum at the rate of per centum per annum from the said term of [entry] to the said term of payment, and half-yearly [as in ordinary bond, including fire insurance if desired]. And I the said B. oblige myself for the expenses of assigning and discharging the said bond and disposition in security and the foregoing bond of corroboration: And in respect of the said bond of corroboration, I the said C. hereby discharge the said A. of the whole obligations contained in the said bond and disposition in security, but declaring that this discharge shall in nowise hurt or prejudice the liability of the said B. for the said obligations or the real security constituted under the said bond and disposition in security or the powers and incidents attached thereto, all which

As to risk of dispensing with the purchaser's signature, see Shiells, 1902, 10 S. L. T. No. 79:

shall remain in as full force and effect as if this discharge had not been granted [deduce title if necessary]. And we all consent to registration for preservation and execution.—In witness whereof.

DISPOSITION CREATING REAL BURDEN FOR PART OF PRICE IN FAVOUR OF SELLER [p. 491]

I, A., heritable proprietor of the subjects hereinafter disponed, considering that I have sold the said subjects to B. at the sum of £1000, of which price it is agreed that £500 is to be paid to me in cash, and that the other £500 is to be constituted a real burden on the said subjects in my favour, and I am to receive the said B.'s personal bond therefor: Therefore, in consideration of the sum of £500 instantly paid to me by the said B., of which I hereby acknowledge the receipt, and of the real burden hereinafter constituted for the further sum of £500, I do hereby dispone to the said B., and his heirs and assignees whomsoever (but always with and under the real burden hereinafter constituted), heritably and irredeemably, All and Whole But declaring always that the said subjects are disponed with and under the real burden, in favour of me and my executors and assignees whomsoever, of the said sum of £500 (being that part of the said price which remains unpaid), with interest thereon at the rate of five per centum per annum from , with a fifth part more of the said principal sum of liquidate penalty in case of failure in punctual payment at the term of all in terms of personal bond granted by the said B. in my favour, dated which burden it is hereby provided shall be engrossed in any infeftment to follow hereon, and shall be validly referred to in all future deeds and documents of or relating to the said subjects or any part thereof, under pain of nullity.

The warrandice clause will run:

And I grant warrandice excepting the said real burden hereinbefore constituted.

DISPOSITION CREATING REAL BURDEN IN FAVOUR OF THIRD PARTY [p. 491]

I, A., heritable proprietor of the subjects hereinafter disponed, considering that I have sold the said subjects to B. at the price of £1000; that towards providing the said price he has arranged to borrow the sum of £500 from C. on the footing of his personal bond being granted therefor and a real burden constituted therefor as hereinafter contained, and that I have now received the said price of £1000, which includes the said sum of £500 so borrowed as aforesaid from the said C., and of which price of £1000 I hereby acknowledge receipt: Therefore I do hereby dispone to the said B., and his heirs and assignees whomsoever (but always with and under the real burden hereinafter constituted), heritably and irredeemably, All and Whole

But declaring always that the said subjects are disponed with and under the real burden in favour of the said C., and his executors and assignees

whomsoever, of the said sum of £500 (being the sum lent by him as aforesaid), with interest thereon at the rate of five per centum per annum from the term of , with a fifth part more of the said principal sum of liquidate penalty in case of failure in punctual payment at the term of , all in terms of personal bond granted by the said B. to the said C., dated , which burden, it is hereby provided, shall be engrossed in any infeftment to follow hereon, and shall be validly referred to in all future deeds and documents of or relating to the said subjects or any part thereof, under pain of nullity.

The warrandice clause will run:

And I grant warrandice excepting the said real burden hereinbefore constituted.

DISPOSITION OF SUPERIORITY

I, A., heritable proprietor of the subjects hereinafter disponed, in considerainstantly paid to me by B. as the price thereof, tion of the sum of £ of which sum I hereby acknowledge the receipt and discharge him, have sold, and do hereby dispone, to the said B., and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [the lands, without any reference to superiority or dominium directum]; Together with the teinds parsonage and vicarage, and my whole right, title, and interest, present and future, in and to the said subjects and others: But always [if necessary] with and under the [burdens, etc.]: With entry at the term of : And I assign the writs, and have delivered those enumerated in the inventory thereof annexed and signed as relative hereto: And I assign the rents, feu-duties, and casualties, and all arrears of casualties: Declaring that the feu-duties hereby assigned include those specified in the list thereof also annexed and signed as relative hereto, but that without prejudice to these presents in all other respects: And I bind myself to free and relieve the said B. and his foresaids of all (if any) feu-duties, casualties, and public burdens: And I grant warrandice, excepting the feu-rights of the said subjects granted [complete as on p. 320].

List of feu-duties referred to in the foregoing disposition :-

Feu. Archibald Street, Edinburgh.			Feuar.	Date of recording Feu-right.	Annual Feu-duty.
No. 1 .			C.	16th May 1880	£10
No. 2 .	•		D.	12th Nov. 1882	15
No. 3 .			E.	16th May 1884	5
No. 4 .		•	F.	12th Nov. 1886	10
					£40

DISPOSITION OF SUPERIORITY, WITH NOMINAL FEU-DUTY AND SUBSTANTIAL CASUALTIES

[As above, to and including "arrears of casualties," and proceed] Declaring that the subjects hereby disponed include (first) the subjects in respect of which I [or C., my predecessor in title] received a casualty of

 \pounds from D. on [date], and it is understood that the next casualty will amount to \pounds or thereabouts in respect of increase by subfeuing; and (second) the subjects in respect of which I received a separate casualty of \pounds from E. on : And I bind myself [complete as in preceding form].

In purchases of superiorities where, as sometimes happens, the casualties are the main element, regard will be had to (1) the terms of the charters, to make certain (a) that the entries of singular successors are untaxed, and (b) that there are no obligations by the superior to the vassal; and (2) the terms of the Conveyancing Act, 1887, s. 1, under which trustees for the heir enter on payment of relief duty.

As to other points, see p. 153.

DISPOSITION RESERVING HALF OF MUTUAL GABLE, ETC. (see p. 156)

[After the dispositive clause, say] But reserving from this disposition the unused half of all mutual gables, walls, and railings, and the right to recover the half of the cost thereof from adjoining feuers, builders, or other users thereof.

If the disponer is owner of the adjoining area, a clause on the subject should still be inserted, but it will be altered as follows:—

Declaring that the [specify the gables and walls in question] shall be mutual gables and walls between my said disponee and his foresaids, on the one part, and myself, as owner of the adjoining area, and my successors therein, on the other part, and that I and my successors shall be entitled to use the same without any payment or giving any consideration therefor.

DISPOSITION FOLLOWING ON ARTICLES OF ROUP

1. WHEN ENACTMENT IN NAME OF PURCHASER

I, A., heritable proprietor of the subjects hereinafter disponed, in implement of the contract of sale of the said subjects, embodied in articles of roup signed by me, dated , and minute of enactment thereon in favour of B., dated , and in consideration of the sum of \mathcal{E} instantly paid to me by the said B. as the price of the said subjects in terms of the said contract, of which sum I hereby acknowledge [as in ordinary style].

2. WHEN ENACTMENT IN NAME OF AGENT

[After "minute of enactment thereon in favour of," proceed] C. (who has since declared that he purchased for behoof of B.), dated , and in consideration of the sum of £ instantly paid to me by the said B. as the price of the said subjects in terms of the said contract of sale, of which sum I hereby acknowledge the receipt and discharge him, have sold, and with consent of the said C. (testified by his signature hereto) do hereby dispone, to the said B. [as in ordinary style].

In point of fact, in all ordinary cases, it is quite unnecessary to make any reference at all to the articles of roup or to any minute of sale. If, however, the sellers can sell only by public roup, there should be a reference to the articles, but it should be in a very brief form, as above. More important, in that case, is to preserve the articles and enactment among the titles. And, from the seller's point of view, a reference to the articles will not have the effect of importing their conditions into the disposition. Everything which it is desired so to import should be repeated ad longum in the disposition.

DISPOSITION BY HERITABLE CREDITOR UNDER HIS BOND

I, A., considering that in virtue of the power of sale contained in the bond and disposition in security for the sum of \pounds granted by B. in my , and recorded in the division of the general register of favour, dated sasines for the county of on , and after intimation, requisition, and protest, and advertisement, I exposed the subjects hereinafter disponed to public roup and sale in terms of articles of roup dated preferred to the purchase at the price of £ : And now seeing that the , of which I hereby said C. has instantly paid to me the said sum of £ acknowledge the receipt and discharge him: Therefore I do hereby sell and dispone to the said C., and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [property], together with all right, title, and interest, present and future, of the said B. and myself in or to the said subjects: but always with and under [conditions of title, if necessary]: With entry at : And I assign the writs, and have delivered those enumerated in the inventory thereof annexed and signed as relative hereto [insert such special arrangements, if any, regarding custody of bond, etc., as may be required]: And I assign the rents: And I bind myself and the said B. to free and relieve the said C. and his foresaids of all feu-duties and public burdens, but not of casualties 1 or sums of money in lieu thereof, of all which the said C, and his foresaids shall be bound to free and relieve me and the said B.: And I grant warrandice from my own facts and deeds only, and bind the said B. in absolute warrandice: And I consent to registration hereof for preservation.—In witness whereof.

For Articles of Roup, see p. 175; and for various requirements, see p. 513.

Assignation of Bond in Fortification of Title

If desired, an assignation may be inserted after the warrandice clause, as follows:—

And further I assign and dispone to and in favour of the said C., and his heirs (excluding executors) and assignees whomsoever, the said bond and disposition in security, but that only to the extent of the said price of \pounds , with interest thereon from the said term of $[term\ of\ entry]$; and also All and Whole the said subjects hereinbefore disponed, but always with and under the [conditions, etc.] before referred to: But declaring $[as\ on\ p.\ 556]$: And I 1 See p. 305.

warrant the foregoing assignation from my own facts and deeds only: And I consent to registration hereof for preservation.—In witness whereof.

DISPOSITION BY PARI PASSU CREDITOR UNDER 1894 ACT (see p. 522)

I, A., considering that in virtue of the power of sale contained in the bond and disposition in security for the sum of £ granted by B. in , and recorded in the division of the general my favour, dated register of sasines for the county of on , and in virtue also of sec. 11 of the Heritable Securities (Scotland) Act, 1894, and of an interlocutor pronounced by the sheriff of , dated at \mathbf{on} the petition presented by me under the said section against C. as the holder granted by the said B. of a bond and disposition in security for £ in his favour, dated , and recorded in the said division of the general , which last mentioned bond and disposition in register of sasines on security ranks pari passu with that held by me as aforesaid, and after intimation, requisition, and protest, and advertisement, I exposed the subjects hereinafter disponed to public roup [proceed as on p. 331].

Copies of petition and interlocutor will be put up with the titles.

DISPOSITION BY HERITABLE CREDITOR TO HIMSELF UNDER THE 1894 ACT (see p. 524)

I, A., considering that in virtue of the power of sale contained in the bond and disposition in security for the sum of £ granted by B. in my favour, dated , and recorded in the division of the general register of sasines for the county of on , and after intimation, requisition, and protest, and advertisement in terms of law, I exposed the subjects hereinafter disponed to public roup at the upset price of £ , in terms of articles of roup executed on the day of : That no person offered the said upset price,1 and the by me, dated sale was adjourned: That I presented a petition to the sheriff of , in terms of sec. 8 of the Heritable Securities (Scotland) Act, 1894: That the sheriff, by interlocutor 2 dated , appointed the subjects to be re-exposed for sale at the upset price of \mathcal{L} , and that at : That the said subjects were re-exposed accordingly, at which exposure I was, in terms of the said section, entitled to bid for and purchase the subjects: That I offered 3 the said upset price of £ being the only offerer, was preferred to the purchase, all as the said articles of roup and minutes of adjournment, re-exposure, and preference thereon more fully bear: Therefore in consideration of the said price of £ in virtue and in exercise of the said power of sale, and in virtue of the said Act and interlocutor, have sold, and do hereby dispone, to myself, and my heirs and assignees whomsoever, heritably and irredeemably, All and Whole.

¹ If the first upset was less than the principal sum in the selling creditor's bond, it is apparent that the condition of sec. 8 of the 1894 Act—as to the

upset not exceeding the debt—has been complied with. But it is not necessary that this should appear ex facie of the deed. If the condition was not fulfilled, the procedure will be open to objection (subject to sec. 10 of the Act), and no erroneous assertion to the contrary would save it.

- ² A certified copy (or print) of the petition, and a certified copy of the interlocutor, will be put up with the titles.
- ⁸ Or if there was competition, say: That after competition I offered the sum of \mathcal{L} , and being the highest offerer, was preferred to the purchase at that price, all as, etc.
- ⁴ This is quite sufficient without any clause purporting to acknowledge receipt by himself from himself.

DISPOSITION BY TRUSTEES TO SPECIAL LEGATEE OF HERITAGE WITH THE FOLLOWING CLAUSES:—

- (1) As to effect of will as creating substitution or conditional institution, (2) taking over debt, (3) corroborative obligation by legatee to creditor, (4) discharge by creditor to trustees, (5) obligation and real burden for annuity, (6) assignation of relief from casualties. [See sec. XLIX.]
- We, A., B., and C., the trustees of D., acting under his trust-disposition and settlement dated , and registered , and as such trustees heritable proprietors of the subjects hereinafter disponed.

NARRATIVE OF WILL

Considering that the said D. by his said trust disposition and settlement directed his trustees to hold his estate of X. for the liferent use of Mrs. E. F. or D., his wife, and on her death to dispone the same to his eldest son G. or the heirs of his body, whom failing, to his second son H. or the heirs of his body, but in any case under the real burden of an alimentary annuity of £100 for behoof of the testator's daughter I., payable as mentioned in the said trust disposition and settlement.

NARRATIVE OF FACTS

Further considering that the testator died on survived by his wife the said Mrs. E. F. or D., and by his said two sons; that the said Mrs. E. F. or D. died on ; that the said G. and H. are both still in life and both have issue; and that the said estate was at the testator's death and still is burdened with a bond and disposition in security for £5000 granted by the testator in favour of K., dated , and recorded , which is now held by L.

SUBSTITUTION v. CONDITIONAL INSTITUTION

Further considering that the said G., who has attained majority, claims that the directions contained in the said trust disposition and settlement with reference to the said estate of X. created a conditional institution only and not a substitution, and alternatively and without prejudice he claims that the destination, if any be prescribed by the said trust disposition and settlement, is defeasible by him at pleasure, and that accordingly on either view we are bound, on demand by him and with his consent, to dispone the said estate of

X. to him and his heirs whomsoever and assignees without any destination, and he has accordingly (as is testified by his subscription hereto) required us to dispone the said estate in manner hereinafter contained, which we are advised that with his consent we are entitled and bound to do:

DISPOSITION

Therefore, in implement of the said trust disposition and settlement, we as trustees foresaid, on demand and with consent of me the said G. to the effect of evacuating the destination, if any, prescribed by the said trust disposition and settlement, and to the further effect of intimating my approval of the terms of these presents in all respects, and we all with joint consent and assent, do hereby dispone to me, the said G. and my heirs whomsoever and assignees, heritably and irredeemably, All and Whole . But always with and under (first) [the conditions of title, if any require to be referred to]; (second) the said heritable security for £5000 and interest and other consequents thereof as hereinafter specified:

THE TRUSTEES' ACTS AND DEEDS

(third) all feu, leasehold, and other subaltern rights, and all servitudes, leases, and rights of possession, whether created by us the said trustees or our predecessors in office, and whether recorded or otherwise completed or not, and whether current or not yet commenced, and generally and in all respects all the acts and deeds of us the said trustees and our predecessors in office:

THE ANNUITY

And (fourth) the real lien and burden in favour of us the said A., B., and C., and our successors in office, and the survivors and survivor of us and them, as trustees and trustee under the said trust disposition and settlement of the free yearly annuity of £100 during the lifetime of the said I., for her alimentary use and behoof allenarly, the benefit thereof being not assignable nor capable of anticipation by her nor subject to her debts or deeds nor liable to the diligence of her creditors, which annuity shall be payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the term of next 19 , for the period between the said [date of widow's death] to that term and the next term's payment thereof at following for the half year preceding, and so forth at the said two terms during the lifetime of the said I., and with a proportionate part for the period between her death and the last term preceding, payable on the day of her death, with a fifth part more of liquidate penalty of each term's payment of the said annuity in case of failure, and with interest at the rate of five per centum per annum on each term's payment during non-payment, which burden it is hereby prescribed shall be engrossed in any infeftment to follow hereon, and shall be validly referred to in all future deeds or documents of or relating to the said subjects or any part thereof, so long as the said I. is alive, and thereafter so long as any part of the said annuity, penalty, or interest remains unpaid, under pain of nullity: And further I the said G. bind myself and my heirs, executors, and representatives whomsoever, to pay the said annuity, Ity and interest as aforesaid, to the said A., B., and C., as trustees and their foresaids:

FORMAL CLAUSES: ASSIGNATION OF RELIEF y as at the said [widow's death]: And we, the said trustees, assign and have delivered those enumerated in the inventory annexed and l as relative hereto: And further we the said trustees hereby assign said G. and my heirs whomsoever and assignees a disposition granted favour of the said D., dated and recorded in the division of the egister of sasines for the county of bound himself to free and relieve the said D. and his heirs and of all casualties, to which disposition we the said trustees acquired form to (first) the general disposition and assignation contained in rust disposition and settlement, and (second) the notarial instrument our recorded : And we the said trustees assign the -duties and casualties] including those due before as well as after, those current at, the said term of entry, but under obligation on G. to account for the same and the due proportion thereof so far

or the possession before or up to the said term of entry: Bond of Corroboration

the said G. do hereby bind myself, and my heirs, executors, and atives whomsoever without the necessity of discussing them in their pay the said sum of £5000 to the said L. or his executors or assignees wer [usual clauses of bond, including fire insurance if desired]:

DISCHARGE OF TESTATOR'S OBLIGATION FOR THE DEBT consideration of the foregoing obligation I the said L. hereby the testator, his estate and representatives, and the said A., B., and estees foresaid, of all obligations and liability for the said sum of interest, and consequents, but without prejudice to the personal hereinbefore undertaken by and otherwise resting on the said G., and security constituted by the said bond and disposition in security. all consent to registration hereof for preservation and execution.—

p—(1) conveyance, 10s.; (2) annuity, 2s. 6d. per £5 = £2, 10s.; (3) ation, 10s.; (4) discharge, 10s. = £4.

SPOSITION BY TRUSTEES TO RESIDUARY LEGATEE [see sec. XLIX.]

A., B., and C., the trustees of D., acting under his trust disposition ement, dated and registered, and as such trustees proprietors of the subjects hereinafter disponed, Considering that aid trust disposition and settlement the said D. appointed E. to esiduary legatee; that the time for making over the residue has and that the subjects hereinafter disponed form part of the residue, as we in implement pro tanto of the said trust disposition and settle-

ment do hereby dispone to the said E., and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [description], together with our whole right, title, and interest present and future therein. But always with and under : With entry as at the term of last notwithstanding the date hereof: And we assign the writs and have delivered those enumerated in the inventory thereof annexed and subscribed as relative hereto: And we assign the rents [feu-duties and casualties]: And we consent to registration hereof for preservation.—In witness whereof.

NOTICE OF CHANGE OF OWNERSHIP

This was introduced by s. 4 of the 1874 Act upon the abolition of express renewal of investiture. The object is to secure that the superior shall always know who is his vassal.

The first point to be noted in the enactment is, that two things are necessary to free the seller from his personal liability to the superior for payment of feu-duty and performance of the other conditions of the feu, these being, (1) the purchaser's infeftment, and (2) notice of change of ownership. In this connection it will be observed that, assuming an omission to give the notice, the superior, though not losing his claim against the seller, is still entitled to go against the purchaser, but only if he be "the entered proprietor under the entry implied by this Act," i.e. only if he has taken infeftment. It is true that under subsection 4 the superior may bring an action of declarator and for payment of a casualty against the owner "whether he shall be infeft or not," but it will be observed that then the defender is not described as the vassal but as "the successor of the vassal," and further, the action is truly directed against the lands, and it is not clear that the decree can be enforced personally against the defender. And further it is to be observed that, assuming the seller has not given notice, and the purchaser has not taken infeftment, while the superior may not be able to sue the purchaser as personally liable as vassal on the contract of feu-farm, he may be able to make the purchaser liable for feu-duties as an intromitter.

It thus appears that the seller, besides giving the notice of change, has a material interest to see that the disponee takes infeftment. It is not known that this in practice gives rise to a condition of sale to the effect that the purchaser shall take infeftment within a limited time, except in the case of contracts of ground-annual. Apart from stipulation it scarcely appears that the seller would have an action to compel infeftment.

It will, however, be kept in view that even though infeftment and notice concur, their effect may be qualified or nullified thus:—

1. At best the effect is to free the seller for the future. The seller is liable for all obligations which have become prestable previously, practically, that is, for everything which has become prestable before

n date of these three things: (1) the term of purchaser's entry, ser's infeftment, (3) notice of change of ownership.

seller will not be freed even as regards the future if he has uself "and his heirs, executors, and successors jointly and

When the obligations are so expressed there are four possible the seller may be (1) the original obligant, (2) his testamentary his heir or legatee, (4) a subsequent purchaser. In the first uses a notice of change of ownership appears wholly unavailing, on the contrary, is no way affected by the special terms of tion, and notice must be given as in any other case. The district third are more involved. If the sellers are the testamentary if the obligant, it may be a fair question whether, notice or no ey can safely pay away the estate without the superior's. The case is not essentially different if the testator, having in such an obligation, has thereafter in his lifetime sold the except that under these circumstances the trustees would not at to have knowledge of the liability. If, again, the seller is a legatee of the original obligant, notice of change will not free if he be, and so far as he is, lucratus by the succession.

orm of Notice provided by the Act 2 is as follows:—

[Place and dute.]

hereby intimate to you that A. [design the new proprietor] has now a house, I King Street, Edinburgh, and pertinents, which subjects clonged to B. [design the last entered vassal].—I am, Sir,

Your obedient Servant, [Signature].

See the second note to the statutory schedule. be little difficulty about the new proprietor or proprietors, y are a large body of trustees, it is quite sufficient to name the first, and add, "and others, the testamentary trustees of Edinburgh." There may be more difficulty regarding the The attempt ought to be reasonably to identify it in a very and certainly "without giving any detailed description." kept in view that, in terms of the note already referred to, is quite good and effectual although the particulars given the new proprietor and the property are erroneous, and the superior has been misled, unless it can be shown that an intention to mislead.

stered vassal, i.e. "whether by actual entry previous to the ment of this Act or by implied entry under it." Therefore or is not infeft, he will not be the party to be named in the

r, p. 428, *infra*. Sched, A.

³ Sched. A., note 8.

notice as the last vassal. Thus if A. dies infeft and is succeeded by B., who dispones either without serving or at any rate without taking infeftment, while B. ought to give a notice, he will name A. as the last vassal. This case is explicitly contemplated in the fourth note to the schedule.

Signature.—The last-mentioned statutory note provides that the notice may be signed

"by the seller of the feu, or by the heir or the trustees or executors of a deceased proprietor, or by any one of the trustees or executors for himself and his co-trustees or co-executors, or by an agent of any of these parties."

It is not required that the person who signs should state the capacity in which he acts.

Address.—The final note to the statutory schedule in effect differentiates the following cases:—

- 1. When the name and address of (1) the superior, or (2) his agent, or (3) the person to whom the feu-duties have been paid are known, the notice will of course be given to one or other of them at that address. The practice is to give the notice to the agent, or to the treasurer of corporations and public trusts.
- 2. When the above information is unknown the notice is to be addressed to "the superior of the lands (or subjects) within mentioned," c/o the keeper of the office of edictal citations, Register House, Edinburgh, in which case the notice is published by the keeper in the register of edictal citations. If the name is known but not the address, the same course is followed, except that the name will be prefixed to the above address.
- 3. In case of doubt notice is given as stated in the last preceding paragraph, and in addition, "to the person, or to the agent of the person, as to whom such doubt exists."

Evidence.—The Act provides two ways of preserving evidence of the notice having been sent, viz:—

- 1. An acknowledgment by the superior or his agent. The superior or his agent is bound to give this acknowledgment if the notice be sent in duplicate along with a fee of 5s.
- 2. A copy of the notice with a certificate thereon of the postage or delivery thereof, signed by the sender and by two witnesses to the posting or delivery. It is not necessary that the notice should be sent by registered letter. In this case the superior's agent is not entitled to any fee from the giver of the notice.

When notice unnecessary.—Reference is made to what is stated on p. 337 as to cases in which notice may be unavailing, and in which, therefore, it may be said to be unnecessary. In the same way notice is out of place on the occasion of the granting of a subfeu, even if as between the granter and grantee of the subfeu the latter should be

bound to relieve the former of the over-feu-duty and all other obligations of the over-holding. Again, if the feu-duty be unallocated, the notice will have little, if any, effect so long as the seller retains any part of the feu. In this connection it may be observed that it is not proper to insert any reference to apportionment of feu-duty in the notice, and if a reference should be inserted, it appears clear that the superior is not bound to grant an acknowledgment of receipt. But in all ordinary cases the notice is necessary and ought to be given. In particular the following cases are no exceptions, viz.: (1) sales of superiorities or mid-superiorities, (2) alienations by way of ground-annual, (3) reconveyances by ex facie absolute disponees, and (4) alienations of properties which are free from feu-duty, for the failure to give the notice infers continued liability "for performance of the whole obligations of the feu." On the other hand the following may be said to be exceptions:—

- 1. Burgage property, i.e. property held, or which before 1874 was held, burgage, and which has never been feued. Even if the title stipulated for a "feu-duty" as an incident of the burgage holding, the notice is not thereby made necessary, for the stipulation is ineffectual to create a proper feu-duty. In these cases, however, it will be prudent to give the notice. Also it is conceivable that there might be other obligations of the holding which would render a notice prudent if not necessary. In practice the notice is dispensed with in burgage transmissions.
- 2. Disponer uninfeft.—The reason is that he is not vassal, and any liability he may have incurred by intromission will cease with it as regards the future. But this exception does not hold if the seller, though himself uninfeft, represents an infeft vassal. The Act says:

the proprietor last entered in the lands and his heirs and representatives shall continue personally liable to the superior . . . until notice.

Therefore trustees and heirs, though themselves uninfeft, will give notice. In intestate succession the position of the executors (who are specially mentioned in the schedule) is not quite clear in view of the above provision as compared with the case of *Aiton*.¹ It will be prudent for them to see that notice is given.

¹ Aiton v. Russell's Exors., 1889, 16 R.625.

SECTION XVIII

BURGAGE PROPERTY

It may be useful to give a list of the burghs which have a separate register of Sasines:

Aberdeen	Dundee	Jedburgh	Paisley ¹
Annan	Dunfermline	Kilrenn y	Peebles
Anstruther, Wester	Dysart	Kinghorn	Perth
Arbroath	Earlsferry	Kintore	Pittenweem
Auchtermuchty	Edinburgh	Kirkcald y	Queensferry
Ayr	Elgin	Kirkcudbright	Renfrew
Banff	Falkland	Kirkwall	Rothesay
Brechin	Forfar	Lanark	Rutherglen
Burntisland	Forres	Lauder	St. Andrews
Crail	Fortrose	Linlithgow	Sanquhar
Cullen	Glasgow	Lochmaben	Selkirk
Culross	Haddington	Montrose	Stirling
Cupar-Fife	Inverkeithing	Nairn	Stranraer
Dingwall	Inverness	Newburgh	Tain
Dumbarton	Inverurie	New Galloway	Whithorn
Dumfries	Irvine	North Berwick	Wigtown
Dunbar		·	-

There are only a very few points to which it is necessary to refer as practical matters. These are:

Warrandice.—After 1847, and down to 1868, the statutory clause of warrandice was, "And I grant warrandice as accords," which, unless specially qualified, implied absolute warrandice as regards the lands and writs, and warrandice from fact and deed as regards the rents. The addition of the words "as accords" is curious, and should be carefully noted; they would themselves have been held sufficient under certain circumstances to constitute a "special qualification" in the case of non-burgage property.

Description by Reference.—From the time when statutory descriptions by reference were introduced it has always been necessary to specify both burgh and county in the case of burgage property.

¹ Booking. ² 10 & 11 Vict. c. 49, s. 2, Sched. A.

be holden of His Majesty in Free Burgage.—It is suggested hese words should still be inserted in conveyances. It does not that this is in any way inconsistent with the provisions of the Act, and the clause is practically convenient as marking the proper or in which the deed and subsequent deeds should be recorded.

scording of Feu-rights.—Considerable confusion has, it is stood, followed upon the Act of 1874 as regards the question of gister in which feu-rights of burgage property should be recorded. ct (s. 25) authorises future feus, and provides as follows:—

e titles of all such feus granted before the commencement of this Act be unchallengeable on the grounds that such feus are of land held by the tenure, or that such titles have been recorded in the burgh register of a Writs affecting land which immediately prior to the commencement Act was held burgage shall be recorded in the burgh register of sasines.

e question of county or burgh register may come up with reference its in three different positions, namely—(1) transmissions after of a feu constituted before 1874 by registration in the burgh or; (2) transmissions after 1874 of a feu constituted before 1874 gistration in the county register; (3) a feu-right granted after

will be kept in mind that, though the practice varied, it is clear the proper register in which to record, before 1874, deeds coning and transmitting feus of burgage property was the county er. This was clearly decided, and it is equally clearly recognised to section above quoted, giving legislative relief to the past ling of these deeds in the burgh register, which implies that was necessary—that is, that the recording was wrong.

at as regards the period after 1874, and with reference to the cases above stated—

and 2) Prior Feus.—It is submitted that it is clear that, as is all feus constituted before 1st October 1874, wherever recorded, quent transmissions are to be recorded in the county register. Let recognises that that is what ought to have been done in the and the only deeds which it is directed shall in future be recorded burgh register are "writs affecting land which immediately prior commencement of this Act was held burgage," which was not so a cases figured.

) New Feus, i.e. feus constituted after the commencement of the Different views have been suggested. But it is submitted that only competent record is the burgh register. The enactment is that, if the land was held burgage immediately prior to the comment of the Act, the deeds shall be recorded in the burgh er, and that condition is fulfilled in the case now figured. But

¹ Earl Fife's Trs. v. Mags. of Aberdeen, 1842, 4 D. 1245.

it may be worth while to note two classes of deeds which would not be within this rule. These are (1) charters of novodamus after 1874, applicable to ground originally feued out before 1874; and (2) subfeus constituted after 1874, the superior feu having been constituted before 1874. Both of these classes of writs are obviously applicable to prior feus, and therefore both will be recorded in the county register wherever the former writs may have been recorded.

Searches.—See p. 280.

SECTION XIX

ASSIGNATION OF UNRECORDED CONVEYANCES

It is a fundamental rule that no one who is not himself infeft can grant a conveyance on which, by itself alone, the grantee can take infeftment. In other words, he can grant no warrant for infeftment at all: he can simply transmit the warrant which he himself holds from the person last infeft. The operation of this rule was seen more clearly in the days of precepts of sasine, for then the infeftment bore expressly to be given to C., by virtue of the precept of sasine by A., the proprietor last infeft, to B., and the assignation of that precept by B. to C. The corresponding case now is that of a special 1 conveyance granted by an infeft proprietor, the grantee under which, however, for some reason or other, does not record it, but without doing so conveys to a third party; or there may be several transmissions without any infeftment. The last grantee now wishes to complete his title, and the question is, How may he do so? There are three methods:

First Method.—Recording Notarial Instrument alone.

A notarial instrument may be expede and recorded in terms of Sched. J of the Consolidation Act (s. 23). The instrument will, in the first place, set out all the material parts, and particularly the full description, contained in the disposition granted by the proprietor last infeft, and then it will proceed to set out the deed or deeds of transmission which have since been granted. This method is competent whatever may be the form of the deeds of transmission. In particular it is enacted by sec. 29 of the 1874 Act that it is no objection that the progress includes more than one general disposition, or that the general dispositions do not contain assignations of writs. instrument is recorded by itself alone with a warrant on behalf of the proprietor, and this completes the title.

Second Method. — Recording (1) the disposition by the pro-

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¹ None of the methods now to be explained has any application to the case where the deed by the proprietor last infeft is a general disposition. These methods a general disposition never could be.

are confined to the case of transmission of a deed which might have, but has not, been recorded to the effect of infeftment, which

prietor last infeft, and (2) a notarial instrument (1868 Act, s. 23, Sched. N).

The difference here is, that the "unrecorded conveyance," i.e. the special disposition granted by the proprietor last infeft, is recorded, whereas in the former method it was not. But a notarial instrument is not dispensed with. It is still essential, because the transmissions of the "unrecorded conveyance" are not to be recorded. On the other hand the instrument may under this method be, and in fact it is, in a simpler form, because, while it must set out the chain of title, it does not require to give a full description of the lands, seeing that the special disposition of these is itself to be placed on record unico contextu, and as part of the same act. In the instrument the reference to the lands is intended to run in this fashion: "the lands of X. as therein (i.e. in the disposition) described, and which disposition is to be recorded along with this instrument." The property is to be named, not described. This may not always be very easy; but it may safely be said that almost anything, which is not actually wrong or misleading, will do. warrant written on the disposition (Sched. H 2) directs registration of both disposition and instrument, thus:

Register on behalf of A. in the register of the county of along with notarial instrument docqueted with reference hereto.

The docquet on the instrument (Sched. N) runs:

Docqueted with reference to warrant of registration on behalf of A. written on the said disposition.

"The docquet shall be signed by the person, or his agent or agents, signing the warrant" (note to Sched. N).

It appears to be the better opinion that, in view of the terms of s. 23 and Sched. H 2 of the 1868 Act, and notwithstanding the terms of s. 141 of that Act and s. 33 of the 1874 Act, no warrant of registration is required on the notarial instrument. But the keepers of the registers, for their greater safety, act on the contrary opinion, and therefore warrants will be written on both documents.

Third Method.—Recording (1) the disposition by the proprietor last infeft, and (2) the deed or deeds of transmission.

Under this method a notarial instrument is dispensed with altogether. Instead, the plan is simply to record both or all the deeds. This method is apparently available only if the assignations are in the forms, or substantially in the forms, prescribed by statute. The Consolidation Act gives two forms (Sched. M 1 and 2). The one is to be written as a separate deed: the other is to be endorsed on the disposition. In either case the operative part is a mere assignation of the unrecorded deed, not a disposition of the lands; there is, however, a reference to the lands by name, not description; the title

is deduced; and if what is transmitted is different in any respect from the grant contained in the unrecorded deed, "the nature of the right conveyed or assigned" is to be specified. This last point refers to the case of transmissions either limited as regards extent, or qualified in their nature, e.g. a restriction to a liferent or security. The disposition by the proprietor last infeft will bear a warrant ordering registration of that deed, and also of the assignation or assignations, which, if separate, will be referred to as "docqueted with reference hereto" (and in that case they will be docqueted accordingly); but if the assignations are endorsed upon the disposition, the warrant upon the latter will identify them as "the assignations hereon," and no docquets are in that case necessary. It might easily happen that there were two assignations, one being apart and the other endorsed. In that case the warrant would require to direct registration of the disposition "along with (1) the assignation hereon, and (2) an assignation docqueted with reference hereto," and the latter assignation would be so docqueted. Again, it is thought to be the better opinion that no warrant is required on any of the assignations; but, for the practical reason above stated, a warrant will be written on each assignation, whether it be a separate or an endorsed deed.

Generally, as to all these methods, one would be well advised, as far as possible, to avoid them. It should very rarely be necessary to fall back upon them. Anyone from whom a title is being taken should be required to take infeftment in the first instance, and then the disposition from him will be a warrant for direct infeftment by recording de plano. Further, if A., holding an ordinary unrecorded disposition, grant a similar deed in favour of B., it is of course still possible to complete A.'s title, assuming he is still in life, by recording the disposition in his favour with a warrant on his behalf, and then B.'s disposition may be recorded with a warrant on his behalf. In this way, again, all the three methods above given are This suggested course is not to be in the least confounded with the third of the three methods above stated, for (1) that method is apparently confined to cases where the transmissions are in the form of statutory assignations; (2) the warrant there on the "unrecorded conveyance" is in favour of B., and that method is available though A. should be dead. The above suggested course, on the other hand. proceeds on the principle of accretion, and requires A.'s survivance. It has the effect of completing his title, which may under certain circumstances be an objection.

If any of the three statutory methods is to be followed, it is suggested that No. 1 is, on the whole, the preferable. There may, indeed, be cases in which No. 3 may save expense. No. 2 is the most undesirable.

ASSIGNATION BY THE ORIGINAL DISPONEE OF THE WHOLE, WRITTEN AS A SEPARATE DEED (1868 Act, s. 22, Sched. M)

I, A., in consideration of the sum of £ paid to me by B., hereby assign to the said B., and his heirs and assignees, the disposition granted by C., dated , by which he conveyed the lands of X.¹ as therein described [or the house 1 King Street, Edinburgh, as therein described, or the house being the eastmost house on the third flat above the street flat of the tenement 1 Queen Street, Edinburgh, as therein described] to me²: With entry to the said B.³ at the term of : And I assign the writs,⁴ and have delivered the said disposition and the writs which were delivered therewith⁵: And I assign the rents⁶: And I bind myself to free and relieve the said B. and his foresaids of all feu-duties, casualties, and public burdens: And I grant warrandice 7 to the same effect as if this clause were contained in an ordinary disposition of the said subjects.—In witness whereof.

- ¹ Reference to Property.—See p. 344.
- ² If assignation endorsed on disposition, the only difference will be that the disposition will be described thus: "the foregoing disposition of the lands of X. [or otherwise] as therein described granted in my favour."
- ³ Entry.—This is a clause which is, by the notes to Sched. M, directed to be inserted. In this instance the words "to the said B." are introduced to prevent any appearance of ambiguity with reference to the immediately preceding words, "to me."
- ⁴ Assignation to Writs.—This is clearly superfluous, looking to the nature of the deed itself, but it should be retained if an assignation to rents is inserted.
 - ⁵ An inventory of writs should in almost all cases be avoidable.
- ⁶ Assignation to Rents.—There appears no reason for leaving out this clause: the rents assigned are different from those assigned under the disposition itself.
- ⁷ Warrandice.—It appears reasonably clear that the ordinary clause, "and I grant warrandice," would have the same effect as this fuller clause; but it is to be remembered at the same time that this is not, in form at least, a conveyance of the *property*.

Burdens, etc.—It will be observed that no provision is made for any reference to feuing conditions and similar burdens which may exist in the titles. It is clear that a reference is here unnecessary. It is to be assumed that the disposition is complete in that respect, and this deed is merely an assignation of that disposition, so that all its clauses are in terms carried on.

ASSIGNATION BY ONE WHO IS HIMSELF AN ASSIGNEE, OF THE WHOLE, WRITTEN AS A SEPARATE DEED (1868 Act, s. 22, Sched. M)

[As above, to "therein described," and proceed] to D.: To which disposition I acquired right conform to the following writs, namely (first) assignation by the said D. to E., dated , and (second) assignation by the said E.

to me, dated : With entry at the term of : And I assign the writs, and have delivered the said disposition, the writs therein stated to be delivered therewith, and the said two assignations: And I assign the rents: And I bind myself to free and relieve the said B. and his foresaids of all feu-duties, casualties, and public burdens: And I grant warrandice to the same effect as if this clause were contained in an ordinary disposition of the said subjects.—In witness whereof.

Notes, p. 346.

Specification of Transmissions.—It is quite unnecessary to say anything about the contents of these documents, assuming that each transferred the whole absolutely and simply. It is already stated that A. acquired right to the "disposition."

ASSIGNATION BY THE ORIGINAL DISPONEE OF A PART, WRITTEN AS A SEPARATE DEED (1868 Act, s. 22, Sched. M)

I, A., in consideration of the sum of £ paid to me by B., hereby assign to the said B., and his heirs and assignees (but only to the extent after specified), the disposition granted by C., dated , by which he conveyed the two houses No. 1 and 2 Queen's Gardens, Edinburgh, as therein described, to me: But declaring that these presents do and shall assign the said disposition only to the extent of and so far as the same concerns the following part of the subjects therein conveyed, namely, All and Whole the house 1 Queen's Gardens aforesaid, solum thereof, ground attached thereto, and pertinents thereof, being the subjects conveyed in the first place in the said disposition: With entry at the term of : And I assign the writs to the extent foresaid; and in respect the same relate to other property and cannot be delivered, I bind myself to make the said disposition and the writs which were therewith delivered to me forthcoming to the said B. and his foresaids on all necessary occasions on the usual receipt and obligation, so long as they remain in my possession, and to take the person to whom I may ultimately deliver the same bound in like manner: And I assign the rents to the extent foresaid: And I bind myself to free and relieve the said B. and his foresaids of all feu-duties, casualties, and public burdens: And I grant warrandice to the same effect as if this clause were contained in an ordinary disposition of the said subjects.—In witness whereof.

Notes, p. 346.

Endorsed (instead of separate) Assignation.—This is certainly not a case for an endorsed deed.

Specification of the Part.—This form assumes that the part now transmitted is described articulately in the disposition. Probably, however, that is not so, in which case there must be inserted here a full and particular description of the part.

Apportionment of Feu-duty, etc.—It will almost certainly be necessary

to make provision for the incidence of feu-duty and various other common charges. The appropriate clauses will be introduced here. For forms, see p. 322.

Generally, it goes without saying that any such deed as the above is undesirable in the extreme. The form is given for the sake of completeness, but, except in some very extraordinary case, it should not be followed. Let A. complete his title and grant an ordinary disposition.

NOTARIAL INSTRUMENTS

For forms, see p. 384.

SECTION XX

CONSOLIDATION

CONSOLIDATION may be effected in any one of three ways, namely, (1) resignation, (2) minute of consolidation, (3) prescription.

Consolidation by Resignation.—It has been suggested that since 1874 this is incompetent, but there appears to be no good reason for that view. At the same time this method ought not to be adopted. It is, however, necessary to refer to it briefly, as it will still occasionally require attention in examining titles. It took either of two forms, namely, (a) a separate procuratory, or (b) a clause of resignation in a disposition of the property by the vassal to the superior. In either case the titles of both estates required to be first completed. The following particulars may now be sufficient:—

To 1845. Ceremony in presence of superior's commissioner, notary, and two witnesses; instrument expede; and recorded within sixty days of its date.

1845 Act 1 authorised superior's known agent to receive resignation, and dispensed with the Latin docquet on the instrument.

1847 Act² introduced short clause for use in dispositions, "And I resign the said lands and others for new infeftment," which was declared, "in the case of conveyances by a vassal to his superior, as equivalent to a procuratory of resignation ad remanentiam."

1858 Act³ went back on this, and provided that the clause of resignation should be held to be *in favorem* only unless expressly ad rem.; but at same time that dispositions by vassal to superior between 1847-58 with indefinite clause should form a good warrant for an instrument ad rem.

1858 Act also dispensed with the instrument (s. 4), and allowed procuratory ad rem. or disposition with express clause ad rem. to be recorded with a warrant; or a notarial instrument was allowed as a substitute; or an instrument of resignation was still competent, but a simpler form was given (s. 76, Sched. D). In whatever way the infeftment was taken it was competent at any time during the party's life (s. 4).

^{1 8 &}amp; 9 Vict. c. 85, s. 8.

⁸ 21 & 22 Vict. c. 76, s. 5.

^{* 10 &}amp; 11 Vict. c. 48, s. 3, Sched. A.

Consolidation by Minute. 1—The titles must first be complete. This is a matter on which a mistake may easily be made. The minute must be recorded at a time when the person on whose behalf it is recorded is infeft in both estates. If it is recorded before (though the infeftment be the immediately subsequent writ on the register), accretion cannot operate, for the statute is peremptory that the title shall have been completed; and if it be recorded after he has been divested, it is equally bad. It sometimes happens that a seller has to expede and record a minute of consolidation; in that case it should be seen that the minute is signed and recorded before the disposition by him is even signed. This is more than is essential, but it is the proper practice. If not recorded in the lifetime of the party who signs it, the minute is useless, and cannot be used to any effect whatever.

Consolidation by Prescription.—What are required to this end are: (1) an ex facie valid superiority title ex facie embracing the lands, and (2) possession of the property on that title for the prescriptive period, which will now usually be twenty years. The chief difference between consolidation by prescription, on the one hand, and consolidation by feudal method (resignation or minute), on the other, is in connection with entails: see infra, p. 351.

Double Consolidation.—It is possible to conceive the same person holding not two, but three, separate fees. In that case it is clear that there must be two minutes of consolidation. If one of the three fees is the dominium utile, there will be a minute in each of the two forms given on pp. 352-3; and there will be no doubt as to the fees to which these respectively relate. But if none of the three fees is the dominium utile, both the minutes must be in the second form; and if the statutory form be strictly adhered to, it will be quite impossible to say which is which. It cannot be said that this really matters, but it is hardly satisfactory; and if that view be shared, some reference to the titles may be inserted.

Effects of Consolidation.—There are several matters of much importance which require consideration.

Title.—After consolidation what is the title? It is often said that the only title then is what was formerly the superiority title. But there are two difficulties in that view, namely, (a) what if that title is ex facie limited to "the superiority" or "dominium utile"? and (b) what if the property title embraced certain rights and privileges which are not in the superiority title? In this latter case it will be for consideration whether consolidation should be effected, or whether, on the contrary, care should not be taken to secure that it shall not operate, and, on the other hand, that the rights and privileges in question shall be regularly and fully exercised and evidenced. Both

the cases just figured require consideration in the matter of making up titles. Suppose A. holds (a) "the superiority of the lands of X.," without salmon-fishings, and (b) the property of the same lands, with salmon-fishings 1; he consolidates; dies; and a title has to be made up by his heir or by a general disponee. It is manifest that it will not do to produce to the notary only the superiority title, for it includes neither the lands nor the fishings. There must be produced both infeftments and the evidence of the consolidation. This suggests for consideration whether the same course should not be followed in all cases, even though the superiority title ex facie embraces the lands. It is submitted, however, that in that case it is not necessary. It clearly would not be if prescription had operated. But of course such a matter as the fishings above referred to stands on a different platform altogether: in every case a distinct title must be completed to them. See the same question stated in the case of teinds.²

Destination.—The rule is that after consolidation the united fee descends according to the destination in what was formerly the superiority title. It is possible that consolidation is often effected without the client understanding, or having explained to him, that this result will follow. Wherever the destinations are in any respect different, this should at once receive attention. It is scarcely likely that he would wish the two fees to go to different heirs, but that does not settle the question of which? It will not be sufficient not to consolidate, for that may be operated by prescription. The remedy is to consolidate, and then, if necessary, make a new destination of the united fee. Cases of much difficulty in this sphere may arise with reference to double superiority titles, and (in successions opening prior to the 1874 Act) with reference to the distinction between heritage and conquest.

Entailed Superiority.—If A. holds (a) the superiority under an entail, and (b) the property in fee-simple, and consolidates, does the property fall under the entail in the sense that it cannot be got back except by a disentail? It does in the following cases, namely, (1) if consolidation is by prescription (in which case the superiority title must have embraced the lands), and (2) if consolidation is by resignation or minute, provided (a) the superiority title ex facie embraces the lands, and (b) prescription has operated. In considering these questions it is necessary to have regard not only to the rules as to consolidation, but also to the statutory requisites of an entail. Even though the property is not finally dedicated to the entail, it will, after

¹ E. Zetland v. Glovers of Perth, 1870, 8 M. (H. L.) 144.

² Spier v. Officers of State, 1858, 20 D. 525.

² Park's c. b. v. Black, 1870, 8 M. 671. ⁴ Pattison v. Dunn's Trs., 1866, 4 M. 1104; affd, 6 M. (H. L.) 147.

⁵ E. Selkirk v. D. Hamilton, 1740, Elchies, Heritage and Conquest, No. 3.

⁶ Elibank v. Campbell, etc., 1833, 12 S. 74; Bontine v. Graham, 1837, 15 S. 711.

Heron v. D. Queensberry, 1733, 1 Paton's App. 98; Galbraith v. Graham, 14 Jan. 1814, F. C.

consolidation, descend to the heirs who are heirs under the entail, and that whether the superiority title is ex facie limited to the dominium directum or not. In these cases the procedure is to reconstitute the feu as a fee-simple estate.

The Over-superior.—Sec. 7 of the 1874 Act provides that "no consolidation that may be effected shall in any way affect or extend the rights or interests of any over-superior, or entitle him to any more than the duties or casualties to which he would have been entitled had there been no consolidation." So far as can be seen, this has reference only to untaxed casualties. Thus suppose A., prior to 1874, feued to B. for a feu-duty of £5, with untaxed casualty; B. sub-feus to C. for a feu-duty of £10; C. puts up buildings with a rental of £1000; C. then buys up his feu-duty of £10, obtains a disposition from B., and consolidates. It is clear that before the consolidation the highest casualty which A. could demand would be the sub-feu-duty of £10 (subject to any question as to casualties or duplicands falling due from the sub-feus in the year in which A. became entitled to his casualty, or claimed it). But after the consolidation all the buildings are held direct of A., and but for this provision it would appear that he would be entitled to claim the £1000, under the usual deductions. This section prevents that. But it will be observed that it is limited to consolidations that "may be" Further, as time passes, it might not be easy to clear up what the superior's claims would have been if certain things had not been done which, in point of fact, have been done, perhaps many generations ago (assuming that casualties shall be so long suffered to live). The proper course is to redeem the over-casualty under the 1874 Act. That should, in the case above figured, be done before C. buys the mid-superiority from B.

Heritable Securities.—Though either or both of the fees should be burdened with securities, that is no objection to consolidation. But the consolidation may be undone by action under the bonds, e.g. a sale by the creditor of either of the fees. If the bond and the granter's title (truly a superiority) both ex facie include the lands, and if the granter subsequently prescribes the full dominium, it appears to follow that the bond will cover the united fee.

MINUTE OF CONSOLIDATION [1874 Act, Sched. C]

1. WHERE ONE OF THE FEES IS THE dominium utile

I, A., heritable proprietor both of the immediate superiority and of the property of All and Whole [describe or refer to the lands b] hereby consolidate the property of the said lands with the immediate superiority thereof.—In witness whereof.

¹ Earlier statutes contained similar provisions; 10 & 11 Vict. c. 48, s. 12; 1858 Act, s. 24; 1868 Act, s. 108.



2. Where neither of the Fers is the dominium utile

, heritable proprietor both of the immediate superiority and of the priority of All and Whole [describe or refer b], hereby consolidate superiority of the said lands with the immediate superiority thereof. ness whereof.

mediate Superiority.—In the first form these words mean immediate, in the feudal chain to the actual property or dominium utile, not their necessary meaning, and they do not bear it in the second in that form they mean simply immediate, i.e. next, in the feudal the other estate dealt with in the minute, which in that case is not erty, but a mid-superiority. There is no doubt that the junction in most of the words (a) immediate superiority, (b) mid-superiority, and and Whole the lands—is confusing. The first fee (a) is "immediate" second fee (b), and not to the lands (c). The word "the" midty is also confusing, and not necessarily correct. What is really "proprietor of (first) a mid-superiority, and (second) the immediate ty of such mid-superiority of All and Whole."

scription.—If the consolidation re-unites an entire feu, the natural on will be that contained in the feu-right. Again, if the two titles ferent descriptions really meaning the same thing, the proper thing to insert one of the descriptions and then go on, "which subjects are a described as," and then insert the other.

ereof, i.e. really of the mid-superiority. See note a.

SECTION XXI

RECORDED LEASES

It is necessary to keep clearly in view the exact scope and effect of the Registration of Leases Act, 1857.1

To enable a lease to be registered under the Act, it is necessary—

- 1. That the lease be probative.2
- 2. That the endurance be thirty-one years or upwards,² or that there be an obligation to renew so as to make up that period.³
- 3. That the name of the lands of which the subjects let consist or form a part shall be set forth, unless (a) the property is burgage, or (b) the lease was executed prior to the Act (10th August 1857), or (c) is executed in terms of an obligation to renew contained in a lease dated prior to the Act.⁴
- 4. That the extent be specified and shall not exceed fifty acres, unless in the three cases—(a), (b), and (c)—last excepted, or (d) unless the subject is mines or minerals.⁴
 - 5. That the registration be at or after the term of entry.5

The Act further states the obvious requirement that the lease shall be "valid and binding as in a question with the granters thereof"; but apart from general matters of contract, this does not appear to add anything.

As in a question with a singular successor of the granter, the contrast between recorded and unrecorded leases is:

- 1. Registration takes the place of possession, provided the purchaser's "infeftment is posterior in date to the date of such registration." Therefore, when there is competent registration, possession is unnecessary.
- 2. The recorded lease must not only be in writing, but must be probative; and the want of this requirement cannot be supplied by any rei interventus.
- 3. Under a recorded lease it is not necessary that there should be a rent not illusory.

^{1 20 &}amp; 21 Vict, c. 26,

⁴ Sec. 18.

⁹ Sec. 1.

³ Sec. 17.

4. Nor that there should be a definite ish, provided there is an endurance of thirty-one years at least.

As regards the main element in the statute, namely, registration, the effects may be summarised thus:

- 1. Registration is an alternative (but only an alternative) mode of completing a title, instead, i.e. of possession.
- 2. In the same way securities may be constituted by recording the security deed without the creditor taking possession; but to enable this to be done the granter of the security must have a title duly completed by registration.
- 3. The creditor incurs no liability to the landlord unless and until he enters into possession.¹

The first of these matters, namely, that even after a lease has been recorded, registration on the occasion of subsequent transfer is only an alternative to possession, is of much importance. Suppose A. has a registered lease; he assigns it to B.; B., without recording, enters into possession, either actual or civil; thereafter A. assigns the lease to C., who relies upon a search. B. will prevail against C.² This is a distinct risk.

It is important also to keep in view what the statute does not do. It does not make leases feudal rights, and therefore the recording is not infeftment. From this it would appear that even recorded leases will yield no terce.

A purchaser of a property is entitled to resile if it turn out that, unknown to him, the title is leasehold.³

ASSIGNATION OF WHOLE LEASE BY ORIGINAL LESSEE

- I, A., in consideration of the sum of now paid to me by B., assign to the said B. a lease, dated , and recorded in the division of the general register of sasines for of date , granted by C. in my favour, of All and Whole [shortly mention subjects 1], in the parish 2 With entry as at and county of of [where sub-lease 4] I assign the rents from the said term of entry 3: And I grant absolute warrandice 5: And I bind myself to free and relieve the said B. of all rents and burdens due to the landlord or others at 6 and prior to the said term of entry in respect of said lease: And I consent to registration for preservation.—In witness whereof.7
- ¹ Description.—The schedule prescribes no description; the subjects are to be merely "mentioned." A description is unnecessary when the whole lease is assigned, for the lease is identified. Nothing more should be inserted than, say, "the piece of ground, extending to a quarter of an acre or there-

Sec. 6.
 Rodger v. Crawfords, 1867, 6 M. 24.

³ M'Connel v. Chassels, 1903, 10 S. L. T. No. 496, per Lord Kincairney (999 years' lease).

abouts, forming the site of Hawthorn Cottage, Joppa, with garden and ground attached."

- ² Parish.—Notwithstanding that the mention of the parish is now unnecessary in feudal conveyancing, it should not be omitted here.
- ⁸ Entry: Assignation of Sub-rents.—The assignation of rents, if inserted, will be from "the said term of entry," though the statutory form evidently does not assume that as a matter of course. The rents are assigned "from" the said term of entry, the meaning of which is not declared. If there is any peculiarity in the payment of the sub-rents, care must be taken here to see that each party receives his due.
- 4" Where Sub-lease."—This refers to a sub-lease of the property in favour of a sub-tenant, so that the purchaser will receive civil, and not natural, possession. But the clause of assignation of rents is equally applicable to all cases where there is a sub-tenant, whether he holds a lease or not.
- ⁵ Warrandice.—The words in the schedule are, "And I grant warrandice." By sec. 20 of the Act, the clauses in the schedules are declared to have the like meaning as the corresponding clauses in the schedules to the Heritable Securities Act, 1847 (10 & 11 Vict. c. 50). The only Schedule to that Act is the form of a bond and disposition in security. On the whole it is recommended that the absolute warrandice should be express.
- ⁶ Rents, etc.—The wording of this clause is peculiar. If it had referred to rents, etc., for the possession, or the period, to the term of entry, it would have been different. But as it is, if the rents were payable in advance, or if under the lease a fire premium were payable at the term of entry,—and it, of course, would be in advance,—it would appear that the seller would have to relieve the purchaser of it under the express terms of the clause. That would require to be negatived. On the other hand, if the rents were back-handed, the purchaser would require to see that his interests were protected.
- ⁷ Consent to Registration.—The schedule runs, "and execution"; but these words are an obvious error, and ought certainly to be omitted. The whole clause may of course be safely omitted.

ASSIGNATION OF PART OF LEASE BY ORIGINAL LESSEE

I, A., in consideration of the sum of £ now paid to me by B., assign to the said B. a lease, dated , and recorded in the division of the general register of sasines for , of date , granted by C. in my favour, of All and Whole 1 a piece of ground in the village of in the parish of and county of , but in so far only as regards the following portion of the subjects leased, namely, All and Whole [specify particularly the portion 3]: With entry as at And [where sub-lease] I assign the rents from the said term of entry: And I bind myself to make the said lease furthcoming on all necessary occasions on the usual receipt and obligation for re-delivery: And I grant absolute warrandice: And I bind myself to free and relieve the said B. of all rents and burdens due to the landlord or others at and prior to the said term of entry

in respect of said lease: Declaring, and it is hereby agreed, that as regards the period after the said term of entry, the proportion of the rent of \pounds payable under the said lease allocated upon the portion of the said subjects hereby vested in the said B. is hereby fixed at \pounds 4: And I consent to registration for preservation.—In witness whereof.

- ¹ See notes to previous form.
- ² Description of Whole.—Here there is still less necessity for any description of the whole property, for it is the part only that is being parted with.
- ⁸ Description of Part.—This being the first separation of the part, it must be carefully described, care being taken as regards mutuality, or otherwise, of walls, etc. See p. 322.
- ⁴ Apportionment of Rent.—This will, of course, be made express as between seller and purchaser. But this will (subject to the terms of the lease) leave the original tenant liable to the landlord for the whole rent. There is no machinery for allocation by the landlord: the remedy would be a new lease. Others matters than rent might require to be dealt with.

ASSIGNATION OF WHOLE BY ASSIGNEE

- I, A., in consideration of the sum of £ now paid to me by B., , and recorded in the division of assign to the said B. a lease, dated the general register of sasines for the county of , of date granted by C. in favour of D., of All and Whole , in the parish of , and my title to which is recorded in and county of 1: With entry as at the said register of date : And [where sub-lease I assign the rents from the said term of entry: And I grant absolute warrandice: And I bind myself to free and relieve the said B. of all rents and burdens due to the landlord or others at and prior to the said term of entry in respect of said lease: And I have delivered the writs specified in the inventory 2 annexed and signed as relative hereto: And I consent to registration for preservation.—In witness whereof.
- ¹ Seller's Title.—This is the document under which the seller has recorded his title, and that document only, no matter how many transmissions there may have been.
- ² Inventory of Writs.—This is not indispensable; and especially if there has been but one transmission, the clause may run, "And I have delivered the said lease, and the assignation by the said D. in my favour, recorded as aforesaid."

ASSIGNATION OF PART BY ASSIGNEE WHO HAS ACQUIRED RIGHT TO THAT PART ONLY

I, A., in consideration of the sum of £ now paid to me by B., hereby assign to the said B. a lease, dated , and recorded in the division of the general register of sasines for the county of , of date , granted by C. in favour of D., of All and Whole , in the

, and my title to which, to the parish of and county of extent after specified, is recorded in the said register of date in so far only as regards the following portion of the subjects leased, namely, All and Whole [description or reference 1]: With entry as at [where sub-lease] I assign the rents from the said term of entry: And I grant absolute warrandice: And I bind myself to free and relieve the said B. of all rents and burdens due to the landlord or others at and prior to the said term of entry in respect of said lease: Declaring, in terms of my title, that the payable under the said lease, allocated proportion of the rent of £ upon the portion of the said subjects hereby vested in the said B., has been fixed at £ : And I have herewith delivered the assignation in of the inventory annexed and signed as relative my favour, being No. hereto: And I assign my right to require production of the other writs in said inventory: And I consent to registration for preservation.—In witness whereof.

¹ Description of Part.—Seeing that the part has already been particularly described, namely, in the seller's title, there is not the same necessity for going into details here. At the same time a mere reference ought not to be relied upon. The following is what is recommended, e.g. "that cottage known as Braehead, with solum thereof, ground attached, and pertinents, being the subjects particularly described in the assignation by in my favour, dated , and recorded as aforesaid in the said register on ," i.e. both identification and reference.

RENUNCIATION OF LEASE

I, A., renounce as from the term of , in favour of B., a lease granted by the said B. of All and Whole , in the parish of and county of , which lease is dated , and recorded in the division of the general register of sasines for the county of on , and [if not original lessee] my title to which is recorded in the said register on .—In witness whereof.

Notarial Instruments, p. 385.

SECURITIES, p. 438.

SECTION XXII

NOTARIAL INSTRUMENTS ON IRREDEEMABLE RIGHTS

Nature and Function.—"A notarial instrument does not in any sense operate as a conveyance, or service, or other legal method of transmitting lands. The Act assumes that the right is in the person who expedes the instrument. The instrument in itself is no more than a statement of the titles which confer the right, and, on being recorded, it will operate as an infeftment. If the right does not otherwise exist, it will do nothing."

The instrument has no legal existence until it is recorded. The date of registration is its only date. If not recorded in the lifetime of the person on whose behalf it is expede, it can never be recorded or used to any effect in the progress of titles; it thereby becomes as if it had never been.

The person claiming the title is entitled to have a notarial instrument expede on production of what he considers to be his warrants. He proceeds suo periculo. Take the case of a person founding on a will which he maintains is holograph. He is not to be prevented having his title, or alleged title, put upon record by a notarial instrument until he produces evidence to the notary that the will is really holograph. Any number of cases similar in principle may be imagined, e.g. questions as to the identity of the testator with the person named in the last infeftment, the testamentary capacity of the testator, the claimant's identity with the legatee, the fulfilment of conditions in the will. It is obvious that all these matters must be ultimately established, if challenged, in order to vindicate the right. But to do so before the notary is out of place: it is unnecessary as regards the title, and insufficient as regards the right. See Mowbray's Styles, 155.

When Notarial Instruments are necessary.—As to questions between infeftment de plano and by notarial instrument, see p. 235.

On the general question of testamentary trustees completing titles to the heritable properties which belonged to the testator, there is one sense in which it may be said that it is necessary that they should do so without delay—necessary, that is to say, if they are to protect the estate and the beneficiaries against a risk of loss, and themselves

¹ Kerr's Tr. v. Yeaman's Tr., 1888, 15 R. 520.

against a risk of personal liability. The risk is the possibility of the heir making up a title in his own person, and granting rights to bond fide third parties relying upon the faith of the records.

Assuming that trustees, whether inter vivos or testamentary, have once completed a title, there is no necessity to renew the infeftment, no matter how many assumptions of new trustees may take place, so long as one of the trustees whose title was completed survives and acts. But in these cases care must be taken, in regard to any deed dealing with the property, to see (1) that it is signed by a quorum at least of the whole acting trustees at the time; and (2) that the signatures include those of the trustee or trustees who hold the feudal title. In form the deed may bear to be granted by these latter with concurrence of the other acting trustees, or simply by all the trustees without any distinction. And it will be unnecessary to trouble about any defects, or supposed defects, in the deeds of assumption; for either they are good or they are not; if they are, you have the signature of a sufficient number of the assumed trustees; if they are not, the only effect is that the original trustees have the only title, you have their signatures, and the others can do no harm. This, however, does not apply to defects in stamp duty, for there the deed is good enough, but a fiscal requirement has yet to be complied with.

Warrant.—When the granter of a general disposition was himself infeft on a notarial instrument it is sufficient to produce to the notary (1) the prior instrument, and (2) the general disposition, without also producing the warrants on which the prior instrument proceeded.² This is plain from the terms of the leading schedule (L) of the 1868 Act, which directs the production of "the disposition or other deed or instrument." The correct distinction is here drawn between "deed" and "instrument," and by the interpretation clause instrument is applied to all sorts of notarial instruments, and no other kinds of documents are there mentioned. The production of "official extracts" is equivalent to production of the principals; and this is not limited to extracts from the books of council and session and sheriff court books; in particular it includes extracts from the register of sasines. Further, though an extract is produced, it is not a good objection to the instrument that it states that the document itself was presented.⁸

Description.—The person expeding the instrument may or may not hold a disposition granted by the person last infeft specially conveying the particular property. If he does not, it is necessary to produce and set forth the last infeftment (Sched. L, 1868 Act); if he does, then the disposition is alone set forth. Accordingly, in the latter case, as the disposition is not to be recorded, and the instrument

³ Ibid., at p. 208.



¹ See p. 297.

² Smith v. Wallace, 1869, 8 M. 204, per L. O. at p. 207.

me in place of it on record, it is evident that the property be described in the instrument exactly as in the warrant, in in the former case, the direction in Sched. L of the 1868 Act escribe the lands as the same are described in the said on."

ding alone, it is plain enough that the natural meaning of this is that the description as contained in the disposition shall be practically verbatim in the instrument, and shall not be l by a reference to the disposition or any other deed. ly clear that the direction in Sched. L of the 1868 Act is by s. 61 of the 1874 Act, and that a reference is thereby made nt. It does not appear correct to say that the direction of the hed. is altogether repealed. The property is still to be described nstrument as it is described in the warrant. The description virtue of a. 61 of the 1874 Act be imported by reference, but it to be still necessary that the reference shall be either to the itself (which is the natural course) or at least to some docuwhich the description is identically or substantially the same as varrant. Whether s. 11 of the 1868 Act had the same effect ave been a fair question, but it is now of no importance, as the ence of s. 61 of the 1874 Act gives it retrospective effect.

rence may be here made to cases of wills containing bequests rty described in popular terms, e.g. "my house, 1 King Street, gh." The first thing to be said of a description like that is, that he definite and exclusive enough to warrant de plano recording, as recommended that the procedure be by notarial instrument, hese bequests so expressed doubt might arise on the question of tity of the subject of bequest with the property described in the sinfettment or on account of intervening changes. These are on which, of course, third parties would require to be satisfied, point is, that there would be a good infettment without proof evidence of identity. It is recommended, however, that the ent should expressly set forth an allegation or representation of (see p. 374). Or the title may be made up by service of, and note by, the heir, which in some cases will be the safer mode as to avoid questions and objections afterwards.

ate of Superiority.—In a disposition of superiority the only is the exception of feu-rights, which appears not in the disclause at all, but in the warrandice. Accordingly, if any ent completing title to a superiority is to show to what it it will be necessary to set out the warrandice clause and the nof feu-rights therefrom. But this is not essential.

solidated Estates.—Take the case of completion of title by instrument in the person of testamentary trustees, the testator had separate estates of superiority and property which he

consolidated in his lifetime by recorded minute of consolidation. the theory that after consolidation the sole title is what was formerly the superiority title, it would seem that it should be sufficient to produce it alone to the notary. And if the consolidation had been by prescription, it is clear that this is so. But in the case supposed, namely, consolidation by feudal method, it seems equally clear, on the contrary, that if the superiority title was a title to the "superiority" only, it cannot be sufficient to produce it alone. To do so would stamp the trustees' title on the face of it as a title to a bare superiority and nothing more. In that case there must be produced and set forth (1) the superiority infeftment, (2) the property infeftment, and (3) the minute of consolidation. If, again, the testator's infeftment in the superiority ex facie embraced the lands, it may be that the case is different, and that it is sufficient to produce it only; but that is not clear; and it will meet all views, and can do no harm, to produce and set forth all three writs as in the other case.

Specification of Burdens, etc.—When the instrument is in favour of a special disponee, or anyone acquiring right from him, so that all the warrants are unrecorded, it is evident that all burdens and conditions contained in the warrants must be verbatim repeated in the instrument. Sched. J of the 1868 Act is express to that effect. But there is no similar direction in Sched. L applicable to instruments in favour of general disponees; and accordingly it is clear, in virtue of sec. 32 of the 1874 Act, that even though the infeftment of the granter of the general disposition contains a full specification of existing burdens, or a new constitution of burdens, or both, it will be sufficient to insert in the instrument a reference to the burdens as contained in the warrant, in the form of Sched. H of the 1874 Act.

Where Part of the Property has been sold.—If part of the property has been alienated after the date of the infeftment or deed which is produced as the warrant, or one of the warrants, of the instrument, this ought to be made to appear. It is not, however, necessary, and it will often be impossible, to produce to the notary the deed of alienation of the part (see p. 368).

Specification of General Dispositions.—In Sched. L of the 1868 Act, the words are simply, "the whole heritable estate of which he might die possessed." Though there are half a dozen words of conveyance in the general disposition, it is quite enough to repeat one of them, say "dispone." If there is a destination to survivors, it ought to be repeated (see p. 364). But if all those who are appointed as trustees have accepted office, there is no need to set out a destination to acceptors or acceptor. If, on the other hand, any have declined office, this ought to be mentioned, and it is proper that the evidence be produced and specified. In the same way, if any have died, that will require to be mentioned, but it is unusual to produce any

evidence. In no case is it necessary to set out a destination to the heir of the last survivor, for to do so can have no effect in the way of completing the title of the heir. It may be thought desirable to repeat any provisions as to quorum and power of sale.

On Probates, etc.—When a notarial instrument is to proceed on a will which has been proved in England or Ireland, or any British colony or dependency, or in a foreign country, the difficulty is that the registered will is deposited in the Court of Probate, and therefore cannot conveniently be produced to the notary. The different cases stand thus:—

- 1. English, Irish, Colonial, Indian Probates.—The probate, or an exemplification of it, is a sufficient warrant in lieu of the original,1 Resealing in Scotland is not required. Observe that for this purpose it is of little importance who has proved the will. For one thing, the instrument may be in favour of a legatee. Again, it is not uncommon in English wills to find separate trustees and executors respectively; in a case of that kind the instrument will probably be in favour of the trustees, though the probate runs in favour of the executors. But even assuming that the same persons are appointed trustees and executors, the probate may be in favour of only one or more of them, power being reserved to make the like grant to the others or other; in that case the instrument ought to run in name of all the trustees. Finally if the probate bears that one or more of the executors have renounced the execution of the will, while that may be sufficient warrant for omitting the name or names from the instrument on a statement therein to that effect, still on examination of title further evidence should be required that they have actually disclaimed the trusteeship. In the same connection note that English trustees cannot act by a majority.
- 2. English, Irish, Colonial, Indian Letters of Administration with the will annexed.—These are issued in cases of testacy where the will has either contained no appointment of executors or it has failed. The letters of administration, or an exemplification of them, with the will (that is, a copy of it) annexed may be used as a warrant in lieu of the original will.² This does not mean that the administrators who have obtained the grant may complete a title to heritable property in Scotland. They cannot do that, for the title of an administrator is by the common law of England limited to personal estate, and the statutory extension is limited to real estate in England.³ But it enables any trustees (as distinct from executors) under the will to complete a title to heritable property in Scotland, if under the will they have a title to it, and the same as regards a direct legatee of Scots heritage. Resealing in Scotland is unnecessary.
- 3. Foreign Probates.—Section 51 of the 1874 Act may be extended to foreign countries by order in council.⁴ This has not been done. If

^{1 1874} Act, s. 51.

² 1887 Convey. Amend. Act, s. 5.

⁸ Land Transfer Act, 1897. Foreign Jurisdiction Act, 1890.

it were done, then, subject to the terms of the order, resealing would not be necessary.

4. Foreign Letters of Administration with will annexed.—There appears to be no existing machinery for extending s. 5 of the 1887 Act in like manner.

Terms of the Instrument.—(1) Say "comprising an official copy of the said will"; (2) the Court from which the probate is issued and the date of the proving should be stated, but it is not necessary to give a substantive recital of the proving.

Deduction of Title.—The forms of notarial instruments given in the 1868 and 1874 Acts are available not only to disponees, general or special, but also to their assignees and others deriving right from them, e.g. heirs and adjudgers. When the instrument is expede in favour of an assignee or other derivative owner, it is necessary, as regards the connecting links of title, (1) that they be specified, and (2) that they be produced to the notary. But as regards the form of specification, it is quite unnecessary to do more than to describe the deeds briefly by the names of the deeds, the names and designations of the granters and grantees, the dates, and if they are recorded, the dates of registration, without any paraphrase of the contents, except where it may be necessary to show that the conveyance was limited or restricted.

Clause of Direction.—As to notarial instruments on deeds containing clauses of direction, see p. 241. But assuming that infeftment has once been taken on the deed, the restriction does not apply to any notarial instrument which may be expede and in which it may be produced as one of the warrants. Thus, if a testator is infeft on a deed containing a clause of direction, that clause has no application to a notarial instrument in favour of his testamentary trustees though proceeding on the deed as one of its warrants in order to show the testator's infeftment.

Survivorship.—It is recommended that in all cases of instruments in favour of trustees the element of survivorship should be expressed. For this purpose (1) the instrument should commence by setting out that the writs were presented on behalf of "A., B., and C., and the survivors and survivor of them, as trustees and trustee"; (2) in the narrative of the appointment of, or conveyance to, trustees the destination to survivors and survivor will be set forth; and (3) the warrant of registration will be in the same terms as the instrument. Even though the will or other document under which the trustees act does not contain any words of survivorship, that is no reason why the instrument should not begin, and the warrant of registration run, in the terms above suggested.

Attestation.—The notary should not be an interested party. He does not require to affix his motto. He must add the words "notary

1 See further, p. 238.

public" on the last page. It is usual, but not necessary, to add the letters "N.P." on each of the other pages. Erasures in gremio do not matter.¹ No date is inserted in the testing clause. Nor is the place of signing mentioned in that clause, that being supposed to be given in the introductory words of the instrument.

NOTARIAL INSTRUMENTS ON SPECIAL DISPOSITIONS

If the person whose title is to be completed holds a special disposition granted by an infeft proprietor, it will rarely happen that it is desired to expede a notarial instrument on it instead of recording it de plano. When these cases do happen it will usually be because the deed contains a great deal more than the disposition, e.g. a marriage contract or a will containing a special disposition of heritage. Even in these cases, however, it is to be noted (1) that a clause of direction may be used (see p. 241); and (2) that if the deed requires at any rate to be registered in the Books of Council and Session, it may be recorded with a warrant for preservation as well as publication (see p. 42). In practice, therefore, there should hardly ever be a case in which it is justifiable to incur the expense of a notarial instrument on a special disposition by an infeft proprietor. Few forms, therefore, are given.

NOTARIAL INSTRUMENT IN FAVOUR OF MARRIAGE-CONTRACT TRUSTEES [1868 Act, s. 17, Sched. J]

there was, on behalf of A., B., and C., and the survivors and Αt survivor of them, as trustees and trustee under the antenuptial contract of marriage after mentioned, presented to me, notary public subscribing, a contract of marriage, dated , entered into between D. and E., by which contract of marriage the said D. disponed to the said A., B., and C., and the survivors and survivor of them, as trustees and trustee for the purposes therein mentioned, heritably and irredeemably, All and Whole [describe or refer as in the contract], but always [if necessary] with and under the [burdens, etc.] specified in , but always in trust for the purposes mentioned in the said contract of marriage, and power of sale was thereby conferred on the trustees: Whereupon this instrument is taken in the hands of X., notary public, in the terms of the Titles to Land Consolidation (Scotland) Act, 1868. -In witness whereof these presents, written on this and the preceding pages, are subscribed by me before these witnesses Y. and Z.

X., Notary Public.

Y., witness. Z., witness.

¹ 1868 Act, s. 144.



NOTARIAL INSTRUMENT IN FAVOUR OF A WIFE ON LIFE-RENT DISPOSITION IN MARRIAGE CONTRACT [1868. Act, s. 17, Sched. J]

At there was, on behalf of B., presented to me, notary public subscribing, an antenuptial contract of marriage, dated , entered into between A. and the said B., by which contract of marriage the said A. disponed to the said B., for her liferent use allenarly in the event of her surviving him, and for the remainder of her life after his death, All and Whole [describe or refer as in the contract], but always with and under the [burdens, etc.] specified in [as in the contract]: Whereupon, etc.

Title.—As to necessity for an instrument, see p. 365.

Right.—As to expediency of interposing a trust to protect the liferent, see p. 22.

NOTARIAL INSTRUMENT ON GENERAL DISPOSITIONS NOTARIAL INSTRUMENT IN FAVOUR OF TESTAMENTARY TRUSTEES—TESTATOR INFEFT [1868 Act, s. 19, Sched. L]

there was, on behalf of A., B., and C., and the survivors and survivor of them, as trustees and trustee under the general trust disposition and settlement of D. after mentioned, presented to me, notary public subscribing, a disposition granted by E. in favour of the said D., dated recorded in the division of the general register of sasines for the county of , by which recorded disposition the said D. was infeft in All and Whole [describe or refer as in disposition], but [if necessary] with and under the [burdens, etc.] specified in : As also there was presented to me an extract of the general trust disposition and settlement granted by the said D., dated , and registered in the Books of Council , by which general trust disposition and settlement and Session on the said D. disponed to the said A., B., and C., and the survivors and survivor of them, the whole heritable estate which might belong to him at the time of his death, but in trust always for the purposes specified in the said general trust disposition and settlement, and power of sale was thereby conferred on the trustees: Whereupon, etc.

NOTARIAL INSTRUMENT IN FAVOUR OF TESTAMENTARY TRUSTEES—TESTATOR NOT INFEFT [1868 Act, s. 17, Sched. J]

At there was, on behalf of A., B., and C., and the survivors and survivor of them, as trustees and trustee of D., acting under his general trust disposition and settlement after mentioned, presented to me, notary public subscribing, a disposition granted by E., and dated , by which disposition the said E. disponed to F., heritably and irredeemably, All and Whole [description and burdens as in the disposition]: As also there were presented to me the following writs by which the said A., B., and C. as trustees foresaid acquired right, namely, (first) a disposition granted by the

said F., dated , whereby the said F. disponed the said subjects to the said D.; and (second) an extract of the general trust disposition and settlement of the said D. [proceed as on p. 366].

NOTARIAL INSTRUMENT IN FAVOUR OF TESTAMENTARY TRUSTEES—TWO PROPERTIES [1868 Act, s. 19, Sched. L]

At there were, on behalf of A., B., and C., and the survivors and survivor of them, as trustees and trustee of D., acting under his trust disposition and settlement after mentioned, presented to me, notary public subscribing, (first) a disposition granted by E. in favour of the said D., dated, and recorded in the division of the general register of sasines for the county of on, by which recorded disposition the said D. was infeft in All and Whole [describe or refer as in the disposition], but always with and under [burdens, etc.] specified in [as in the disposition]; and (second) a disposition granted by F. in favour of the said D. [specify the deed and its contents as in previous case]: As also there was presented to me [proceed as on p. 366].

Competency.—There appears no reason to question the competency of including in one instrument properties to which the testator acquired right by separate progresses.

Expediency.—But of course it will not be expedient to do so unless there is some connection between the properties, e.g. that they are parts of one property.

Stamp.—It is held that the stamp is just the ordinary 5s.

THE SAME, UNDER DIFFERENT CIRCUMSTANCES

At there were, on behalf of A., B., and C., and the survivors and survivor of them, as trustees and trustee of D., acting under his trust disposition and settlement after mentioned, presented to me, notary public subscribing, (first) a disposition granted by E. in favour of the said D., dated , and recorded in the division of the general register of sasines for the county of on , by which recorded disposition the said D. was infeft in All and Whole [description as in the disposition], but excepting the portion thereof hereinafter described, and always with and under [burdens, etc., as in the disposition]; and (second) a disposition granted by F. in favour of the said D., dated , and recorded in the said division of the general register of sasines on , by which recorded disposition the said D. was infeft in All and Whole [describe the subject, and refer to burdens, etc., as in the disposition]: As also there was presented to me [as on p. 366].

The difference here is, that the one description is relative to the other, by way of exception. There is no necessity to describe the excepted part twice.

Future Description.—In cases like this all future transmissions should ignore the past division of the property, and convey simply, in one lot, the whole area.

NOTARIAL INSTRUMENT IN FAVOUR OF TESTAMENTARY TRUSTEES -PRO INDIVISO SHARES [1868 Act, s. 19, Sched. L]

At there were, on behalf of A., B., and C., and the survivors and survivor of them, as trustees and trustee of D., acting under his trust disposition and settlement after mentioned, presented to me, notary public subscribing, (first) a disposition granted by E. in favour of the said D., dated recorded in the division of the general register of sasines for the county of , by which recorded disposition the said D. was infeft in one-half share pro indiviso of All and Whole [description and reference to burdens as in the disposition]; and (second) a disposition granted by F. in favour of the said D., dated , and recorded in the said division of the general register of sasines on , by which recorded disposition the said D. was infeft in the other one-half share pro indiviso of the said subjects, but always with and under the burdens and others before referred to: As also there was presented to me [as on p. 366].

NOTARIAL INSTRUMENT IN FAVOUR OF TESTAMENTARY TRUSTEES, TESTATOR HAVING SOLD PART OF THE PROPERTY [1868 Act, s. 19, Sched. L]

At there was, on behalf of A., B., and C. [as on p. 366 to end of recital of disposition]: But it was represented to me that the said D. had by disposition, dated , and recorded in the said division of the general register of sasines on , disponed the following part of the said subjects to F., namely, All and Whole [describe the part as in F.'s disposition]: As also there was presented to me [proceed as on p. 366].

NOTARIAL INSTRUMENT IN FAVOUR OF TESTAMENTARY TRUSTEES—CONSOLIDATED FEES [1868 Act, s. 19, Sched. L]

there were, on behalf of A., B., and C., and the survivors and survivor of them, as trustees and trustee of the late D., acting under his trust disposition and settlement after mentioned, presented to me, notary public subscribing, (first) a disposition granted by E. in favour of the said D., dated , and recorded in the division of the general register of sasines for , by which recorded disposition the said the county of D. was infeft in the dominium directum or estate of superiority of All and Whole [describe or refer as in the disposition], but always with and under the [burdens, etc.] specified in [as in the disposition]; (second) a disposition granted , and recorded in the said division by F. in favour of the said D., dated , by which recorded disposition of the general register of sasines on , but always with and under the said D. was infeft in All and Whole [the burdens, etc.] specified in [as in the last mentioned disposition]; and (third) a minute of consolidation granted by the said D., dated. , and recorded in the said division of the general register of sasines on , by which recorded minute of consolidation the said D. consolidated the property of the

said lands with the immediate superiority thereof, being the two fees in which he was infeft under the said two dispositions: As also [proceed as on p. 366].

Superiority Title.—Of course, if the superiority title ex facie embraced the lands, the words "the dominium directum or estate of superiority of" will be here omitted.

Generally, see p. 351.

NOTARIAL INSTRUMENT IN FAVOUR OF TESTAMENTARY TRUSTEES, SUBJECT TO A REAL BURDEN [1868 Act, s. 19, Sched. L]

there was, on behalf of A., presented to me, notary public subscribing, a disposition granted by B. in favour of C., dated and recorded in the division of the general register of sasines for the county , by which recorded disposition the said C. was infeft in All and Whole [description and burdens as in the deed]: As also there was presented to me an extract of a general disposition and settlement granted by the said C., dated , and registered in the Books of Council and Session on , by which general disposition and settlement the said C. disponed to the said A. All and Sundry the whole heritable estate which should belong to him at the time of his death, but always with and under the real burden of the payment to D. of a legacy or sum of £ payable at the term of , with interest thereafter per cent. per annum [or of an annuity or yearly sum of at the rate of during her lifetime after his death, beginning the first payment at [insert terms of payment, and clause as to interest, if the term of any], and it was by the said general disposition and settlement directed [insert direction to refer to real burden in future write and irritant and resolutive clauses, all if and as contained in the Will]: Whereupon, etc.

As to the efficacy of the real burden, see p. 492.

Warrant of Registration.—No warrant is required on behalf of D.

NOTARIAL INSTRUMENT IN FAVOUR OF ASSUMED TRUSTEES, THE ORIGINAL TRUSTEES NOT HAVING TAKEN INFEFT-MENT [1868 Act, s. 19, Sched. L]

At there was, on behalf of A. and B. and the survivor of them, as trustees and trustee assumed and acting under the trust disposition and settlement of C. after mentioned, presented to me, notary public subscribing, a disposition granted by D. in favour of the said C., dated, and recorded in the division of the general register of sasines for the county of on, by which recorded disposition the said C. was infeft in All and Whole [description and burdens as in the deed]: As also there was presented to me an extract of a general trust disposition and settlement granted by the said C., dated, and registered in the Books of Council and Session on, by which the said C. conveyed to E. and F. and the

survivor of them All and Sundry his whole heritable and moveable estate, but in trust always for the purposes specified in the said trust disposition and settlement: As also there were presented to me the following writs whereby the said A. and B., as trustees foresaid, acquired right, namely (first) an , and registered in the extract of a deed of assumption, dated , granted by the said E. and F. Books of Council and Session on as trustees foresaid, by which they assumed the said A. and B. as trustees under the said trust disposition and settlement, and conveyed to themselves, the said E. and F., and to the said A. and B., all as trustees under the said trust disposition and settlement, and the survivors and survivor, All and Sundry the whole trust estate and effects, heritable and moveable, then belonging to them, or under their control, as trustees foresaid; and (second) an extract of a minute of resignation by the said E. and F. of their offices as trustees , and registered in the Books of Council and foresaid, dated Session on : Whereupon, etc.

Narrative of Assumption.—If desired, the narrative of the deed of assumption may be shortened as follows: an extract of a deed of assumption, dated , and registered in on , granted by the said E. and F. in favour of the said A. and B., containing a general conveyance of the trust estate to the said E., F., A., and B., and the survivors and survivor, as trustees and trustee foresaid.

Original Trustees dead.—If the original trustees have died, and did not resign, then (a) "writs" in the 13th line will be altered to writ; (b) "first" in the 14th line will be omitted; and (c) instead of the narrative of the production of a minute of resignation, the following will be inserted: "and it was represented to me that the said E. and F. are now dead": proof is unnecessary.

NOTARIAL INSTRUMENT WHERE (1) ONE TRUSTEE HAS PREDECEASED THE TESTATOR, (2) ANOTHER'S APPOINT-MENT HAS BEEN RECALLED, (3) ONE HAS DECLINED, (4) ONE HAS RESIGNED, AND (5) ONE HAS BEEN ASSUMED [1868 Act, s. 19, Sched. L]

there was, on behalf of A. and B. and the survivor of them, as trustees and trustee acting under the trust disposition and settlement of C. after mentioned [as on p. 369]: As also there were presented to me (first) an extract of a general trust disposition and settlement granted by the , and registered in the Books of Council and Session said C., dated , by which the said C. conveyed to the said A., and to E., on who predeceased him, F., whose appointment was recalled as after mentioned, G., who declined office as after mentioned, and H., who has resigned office as after mentioned, and the acceptors or acceptor and survivors and survivor of them, All and Sundry his whole heritable and moveable estate, but in trust always for the purposes specified in the said general trust disposition and settlement; (second) an extract of a codicil to, and registered along with, the said trust disposition and settlement, which codicil is dated , and

by which the said C. revoked the appointment of the said F. as one of his trustees; (third) an extract of a minute of declinature, dated and registered along with the said trust disposition and settlement, by which the said G. declined office as trustee foresaid; (fourth) an extract of a minute of resignation, dated , and registered in the Books of Council and , by which the said H. resigned office as trustee Session on foresaid; and (fifth) an extract of a deed of assumption granted by the said A., as then sole trustee under the said trust disposition and settlement, dated , and registered in the Books of Council and Session on , by which the said A. assumed the said B. as a trustee under the said trust disposition and settlement, and conveyed to himself, the said A., and the said B., as trustees under the said trust disposition and settlement, and the survivor of them, All and Sundry the whole trust estate and effects, heritable and moveable, then belonging to him, or under his control, as trustee foresaid: Whereupon, etc.

Proof.—It is not necessary that proof be produced to the notary of the fact that one of the trustees named by the testator predeceased him. Indeed, the correct view would appear to be that all that must be proved is the title of the person on whose behalf the instrument is expede. If any other person or persons claim office as co-trustees, it lies on them to make out their claim. On this view it would not strictly be necessary to prove recal, declinature, or resignation.

NOTARIAL INSTRUMENTS IN FAVOUR OF TESTAMENTARY TRUSTEES OR EXECUTORS WITHOUT ANY CONVEYANCE IN THEIR FAVOUR

Under sec. 46 of the 1874 Act, when a will contains a direct bequest of heritage to a legatee, and also names trustees or executors, but without any conveyance in their favour, titles may be completed (1) by the trustees or executors "as if the bequest had been expressed to be in favour of them as such trustees or executors," and as such they must of course "hold, administer, and dispose of such lands for the purposes of such" will; (2) by the legatee, if "the completion of such title shall not be at variance with the purposes or directions" Under these circumstances the proper course, from a purchaser's point of view, is to have one or other title completed, and a conveyance by the trustees and the legatee. Therefore the most complete and satisfactory mode of completing the title, when there is no immediate intention of selling, is by a notarial instrument in favour of the trustees, and a disposition by them to the legatee; but in many cases this additional expense may be safely avoided, and a title completed simply by the legatee.

It will be observed that the appointment of an executor will do; the section applies only to cases in which there can be no doubt that the testator intended the will to carry the property in question, for ex hypothesi he has made an express bequest of it to a legatee. On

the other hand, it goes without saying that the appointment of executors might be in terms so restrictive as to exclude the operation of the section, though what would be sufficient to do so is not so clear, e.g. an appointment of A. as "executor of my moveable estate," or of "my moveable estate only."

It will often be the case that there are in the will (1) a general disposition to the trustees, and (2) a special bequest of a house to a legatee. That case is not within this section. The trustees will then complete title as ordinary general disponees.

FORM OF INSTRUMENT IN FAVOUR OF TRUSTEES OR EXECUTORS UNDER SEC. 46 OF THE 1874 ACT

[Present disposition as on p. 369] As also there was presented to me an extract of a general trust disposition and settlement granted by the said D., and dated , and registered in the Books of Council and Session on , by which general trust disposition and settlement the said D. bequeathed to X. his house in Great King Street, Edinburgh, which it was represented to me was the subject before described, and he thereby appointed the said A., B., and C. to be his trustees and executors [or trustees or executors]: Whereupon this instrument is taken in the hands of , notary public, in the terms of the Titles to Land Consolidation (Scotland) Act, 1868, and the Conveyancing (Scotland) Act, 1874.—In witness whereof.

1 Narrative of Bequest.—This is essential, because the statute makes the existence of the bequest the condition of the trustees or executors completing title without conveyance; and besides, without it, there would be nothing to show that the will purported to deal with heritage. The description of the property in the will in these cases will often be in popular terms as here assumed.

NOTARIAL INSTRUMENTS IN FAVOUR OF A SUBSTITUTE TRUSTEE [1868 Act, s. 19, Sched. L]

1. WHERE THE SUBSTITUTE TRUSTEE TAKES AS AN INSTITUTE

(1) By Predecease of first-named Trustee

At there was, on behalf of A., as trustee of the deceased B. under the trust disposition and settlement after mentioned, presented to me, notary public subscribing, a disposition granted by C. in favour of the said B., dated , and recorded in the division of the general register of sasines for the county of on , by which recorded disposition the said B. was infeft in All and Whole [description and burdens as in the disposition]: As also there was presented to me an extract of a general trust disposition and settlement granted by the said B., dated , and registered in the Books of Council and Session on , by which general trust disposition and settlement the said B. disponed to X. (who, it was represented to me, predeceased the said B.), whom failing to the said A., as

trustee, the whole heritable estate which should belong to him at his death, but that in trust always for the purposes therein mentioned; and power of sale was thereby conferred on the trustee: Whereupon, etc.

(2) By Declinature of first-named Trustee

[As above, but proceed] by which general trust disposition and settlement the said B. disponed to X., whom failing to the said A., as trustee, the whole heritable estate which should belong to him at his death, but in trust always for the purposes therein mentioned; and power of sale was thereby conferred on the trustee: As also there was presented to me a minute of declinature, written on the extract of the said general trust disposition and settlement [or written on the said general trust disposition and settlement, and registered therewith], by which the said X. declined the office of trustee under the said general trust disposition and settlement: Whereupon, etc.

2. Where the Substitute Trustee takes as a Substitute after the first-named Trustee

[As above, but proceed] by which general trust disposition and settlement the said B. disponed to X., whom failing to the said A., as trustees in succession, the whole heritable estate which should belong to him at his death, but that in trust always for the purposes therein mentioned; and power of sale was thereby conferred on the trustee: As also there were presented to me the following writs, by which the said A., as trustee foresaid, acquired right, namely (first) minute of acceptance by the said X., written on the extract of the said general trust disposition and settlement [or written on the said general trust disposition and settlement [or written on the said x. accepted office as trustee foresaid; and (second) extract decree of general service granted by the sheriff of , and dated at on

, whereby the said A. was served as nearest lawful heir of provision in general in trust to the said X. under and by virtue of the said general trust disposition and settlement: Whereupon, etc.

Necessity for Service.—It is here assumed that X., the first-named trustee, accepted office, and has died. That being so, it is submitted that A. must serve. In the form above it is assumed that X. was not infeft.

- If X. was infeft, A.'s service may still be a general service, but the form of instrument will be quite different. In that case, however, special service recorded will be cheaper.
- If X. resigned, instead of dying, he should grant a conveyance to the new trustee: declaratory adjudication is an alternative.

NOTARIAL INSTRUMENT IN FAVOUR OF DIRECT LIFERENTER AND FIAR UNDER GENERAL MORTIS CAUSA CONVEY-ANCE [1868 Act, s. 19, Sched. L]

At there was, on behalf of A. and B. for their respective rights and interests, presented to me, notary public subscribing, a disposition granted by D. in favour of C., dated , and recorded in the division of the

¹ But see Kerr's Trs. v. Yeaman's Trs., 1888, 15 R. 520; Inglis, L. P., in Smith v. Wallace, 1869, 8 M. 204.

general register of sasines for the county of on , by which recorded disposition the said C. was infeft in All and Whole [describe or refer as in disposition], but always [if necessary] with and under the [burdens, etc.] specified in : As also there was presented to me an extract of a will [or as the case may be] granted by the said C., dated , and registered in the Books of Council and Session on , by which will [or otherwise] the said C. disponed his whole estate, heritable and moveable, to the said A. in liferent and to the said B. in fee: Whereupon, etc.

NOTARIAL INSTRUMENT IN FAVOUR OF DIRECT AND ABSOLUTE MORTIS CAUSA DISPONEE, HE BEING UNNAMED AND PROPERTY INDEFINITE [1868 Act, s. 19, Sched. L]

At there was, on behalf of A., presented to me, notary public subscribing, a disposition granted by B. in favour of C., dated recorded in the division of the general register of sasines for the county of Edinburgh on , by which recorded disposition the said C. was infeft in All and Whole [description and burdens as in the disposition]: As also there was presented to me an extract of the will [or other name] of the said C., dated , and registered in the Books of Council and Session , by which will the said C. made a provision in the following terms: "I leave my Edinburgh house to my brother, whom failing to his son," and it was represented to me (first) that the subjects contained in the said disposition in favour of the said C., and hereinbefore described, are the subjects referred to by the said C. in his said will as his "Edinburgh house," (second) that his only brother was D., (third) that the said D. predeceased the said C., and (fourth) that the only son of the said D. is the said A.: Whereupon, etc.

See pp. 235, 361. Many questions may be raised as to A.'s right; but assuming them, if raised, to be decided in his favour, it is submitted that his title is duly completed under the above instrument.

NOTARIAL INSTRUMENT IN FAVOUR OF DIRECT AND ABSOLUTE MORTIS CAUSA DISPONEE OF RESIDUE ONLY [1868 Act, s. 19, Sched. L]

At there was, on behalf of A., presented to me, notary public subscribing, a disposition granted by B. in favour of C., dated , and recorded in the division of the general register of sasines for the county of on , by which recorded disposition the said C. was infeft in All and Whole [description and burdens as in the disposition]: As also there was presented to me an extract of a trust disposition and settlement granted by the said C., dated , and registered in the Books of Council and Session on , by which trust disposition and settlement the said C. made special bequests of certain parts of her estate, but not including the said subjects, and she thereby disponed the residue of her estate,

heritable and moveable, to the said A., which residue accordingly included the said subjects: Whereupon, etc.

NOTARIAL INSTRUMENT IN FAVOUR OF ASSIGNEE OF GENERAL DISPONEES WHO HAVE NOT TAKEN INFEFT-MENT

1. Granter of General Disposition Infept [1868 Act, s. 19, Sched. L]

At there was, on behalf of A., presented to me, notary public subscribing, a disposition granted by B. in favour of C., dated recorded in the division of the general register of sasines for the county of , by which recorded disposition the said C. was infeft in All and Whole [description and burdens as in disposition]: As also there was presented to me an extract of a general trust disposition and settlement granted by the said C., dated , and registered in the Books of Council and Session on , by which general trust disposition and settlement the said C. disponed to D. and E., as trustees, the whole heritable estate which should belong to him at his death, but that in trust for the purposes therein mentioned: As also there was presented to me a general disposition granted by the said D. and E., as trustees foresaid, in , by which general disposition the favour of the said A., dated said D. and E., as trustees foresaid, and in implement of the directions coutained in the said trust disposition and settlement, disponed to the said A. the whole heritable estate which belonged to them as trustees foresaid: Whereupon, etc.

2. Granter of General Disposition not Infert [1868 Act, s. 17, Sched. J]

At there was, on behalf of A., presented to me, notary public subscribing, a disposition granted by B. in favour of C., dated , by which disposition the said B. disponed to the said C. All and Whole [description and burdens as in disposition]: As also there were presented to me [proceed to produce (1) C.'s will, and (2) the disposition by C.'s trustees to A., as above].

NOTE.—There may be cases in which it is convenient that testamentary trustees, instead of completing title in their own persons, should convey to the beneficiary and allow him to complete his own title. The conveyance in these cases may quite well be a simple general conveyance, such as is contained in an ordinary deed of assumption, without any particular description of the property. The above are forms of the notarial instruments which will be expede to complete the beneficiary's title, according as the testator was or was not infeft.

NOTARIAL INSTRUMENTS IN FAVOUR OF GENERAL DISPONEES, UNNAMED BUT CALLED AS A CLASS

· The best example of this class of cases is a conveyance to the children of a certain person or of a certain marriage. The first point

is to determine that the children are really institutes or disponees, and not substitutes or heirs. If they are heirs, they will require to complete title by service. Then, if they are disponees, and if their title is a special disposition, they will be able to take infeftment de plano (see p. 235). But if the title is a general disposition, they must proceed by way of notarial instrument. But while it is thought to be clear that this is a correct statement, still in view of Macdougall's case 1 it is probable that a purchaser will require a general service to the fiduciary fiar in all cases. There appears no authority for requiring the service to be set out in the instrument, and it may as well be obtained after as before the recording of the instrument, but it is recommended that it be obtained before and set out in the instrument.

It goes without saying that in these cases it is necessary to determine the question of vesting as affecting the right (p. 227).

Then, even though the children take as disponees, it may happen that one or some of them have died. In that case the shares of the deceased children must be traced through them either by testate or intestate succession,—deed, will, or service. Where the children take as heirs, nothing vests till survivance, but the issue of a predeceasing child may take by representation.

I. WHERE THE CHILDREN WHO TAKE SHARES ARE ALL ALIVE WHEN THE TITLE IS COMPLETED [1868 Act, s. 19, Sched. L]

(1) Immediate Vesting

there was, on behalf of C., D., and E., the children of the deceased B., presented to me, notary public subscribing, a disposition granted , and recorded in the by F. in favour of the now deceased A., dated division of the general register of sasines for the county of , by which recorded disposition the said A. was infeft in All and Whole [description and burdens as in the disposition]: As also there was presented to me an extract of a general disposition and settlement granted by , and registered in the Books of Council and Session the said A., dated , by which disposition and settlement the said A. disponed the whole heritable estate which should belong to him at his death to B., in liferent for her liferent use only,* and to her children in fee: As also there was presented to me an extract of a general service of the said C., D., and E., as heirs of provision in general to the said B. under the said general disposition and settlement, which service was expede before the sheriff of , and is dated and extracted on : Whereupon, etc.

Alternative.—If no service at date of instrument, it may run after "in fee,"—and it was represented to me (first) that the said B. is now dead, (second) that the said C., D., and E. are all children of the said B., and (third) that

¹ 1900, 3 F. 99.

they are the only children she ever had, (add if it be the case) except one child, G., who predeceased the said A. without leaving issue b: Whereupon, etc.

FACTS.—A., the testator, was infeft. He made a will in favour of B., in liferent only, and her children in fee. A. and B. both dead. B. had four children, C., D., E., and G., but as G. predeceased the testator, he takes no share.^b

- * Liferent only.—It will be remembered that, in the absence of some taxative word, B. would probably have the fee, so that at best the children would be heirs,—if they took at all.
- ^b G.'s issue might or might not take if they existed and survived the testator, according as the circumstances are or are not such as to permit of the operation of the conditio si sine liberis.

(2) Postponed Vesting

[As in last form, to "liferent use only," and proceed] and to such of her children as should survive her in fee: As also there was presented to me an extract of a general service, etc.

Alternative.—If no service at date of instrument, say after "in fee," and it was represented to me (first) that the said B. is dead, (second) that the said C., D., and E. are all children of the said B., and (third) that they are the only children she had who survived her, her only other child, G., having predeceased her without leaving issue: Whereupon, etc.

FACTS.—A., the testator, was infeft. He made a will in favour of B. in liferent only, and such of her children as should survive her in fee. A. and B. both dead. B. had four children, C., D., E., and G.; but as there was no vesting till B.'s death, and G. predeceased B., G. took no share.

II. WHERE THE CHILDREN WHO TAKE SHARES ARE NOT ALL IN LIFE WHEN THE TITLE IS MADE UP [1868 Act, s. 17, Sched. J]

there was, on behalf of A. and B., children of the deceased C., and each entitled as after mentioned to one-half pro indiviso of the subjects after described, presented to me, notary public subscribing, a disposition granted by D., and dated 1 , by which disposition the said D. disponed to the said C. in liferent only, and her children in fee, heritably and irredeemably, All and Whole [description and burdens as in the disposition]: And it was represented to me (first) that the said C. is dead, (second) that the only children she ever had were the said A. and B. and X. and Y., and that they all were in life at, or were born after, the date of the said disposition2: As also there was presented to me an extract decree of general service by the , dated at , by which the said sheriff of on A. was served nearest and lawful heir in general of the said X.: As also there was presented to me an extract of a general disposition and settlement granted by the said Y., now deceased, dated , and registered in the Books

of Council and Session on , by which general disposition and settlement the said Y. disponed to the said B. the whole means and estate, heritable and moveable, which should belong to him at his death: Whereupon, etc.

Facts.—Inter vivos special disposition by D. to C. in liferent only, and her children in fee. C., now dead, had four children, A., B., X., and Y. They were all in life at, or born after, the date of the disposition. Therefore each took a vested right to one-fourth. X. died. A. is his heir and has obtained a general service as such. This gives A. his own original $\frac{1}{4}$ and X.'s $\frac{1}{4} = \frac{1}{2}$. Y. died, leaving a will in favour of B. This gives B. his own original $\frac{1}{4}$ and Y.'s $\frac{1}{4} = \frac{1}{2}$.

The disposition by D. being *special*, and A. and B. being *disponees*, they could record *de plano*. But that is only as regards their own original one-fourths respectively; and as a notarial instrument is necessary to complete title to their derivative fourths, it is better and cheaper to use it for all the shares.

- ¹ Prior Infeftment.—Even if the disposition was recorded so as to feudalise a fiduciary fee in C., that, it is submitted, is no reason why this form of title should not be adopted. See p. 232.
- ² Vesting.—In the case supposed, no child who had died before the date of the grant, i.e. the disposition, could take any share. Probably the date for the purpose would be the date of delivery.

Derivative Shares.—The shares of X. and Y. will be liable for their debts, and there will be Government duties on the devolutions from them.

III. WHERE THE CHILDREN COMPLETE TITLE DURING LIFE-TIME OF PARENT (LIFERENT TITLE BEING COMPLETED IN SAME INSTRUMENT) [1868 Act, s. 19, Sched. L]

there was, on behalf of (first) A., and (second) B. and C., all for their respective rights and interests, presented to me, notary public subscribing, a disposition granted by D. in favour of E., dated , and recorded in the division of the general register of sasines for , by which recorded disposition the said E. was infeft in All and Whole [description and burdens as in disposition]: As also there was presented to me an extract of a general disposition and settlement granted by the said E. now deceased, dated , and registered in the Books of Council and Session on , by which general disposition and settlement the said E. disponed to the said A. in liferent for her liferent use allenarly, and to her children in fee, the whole heritable estate which should belong to him at his death, and it was represented to me (first) that the said B. and C. are children of the said A., and (second) that they are the only children she has ever had [or are her only children who were in life at the death of the said E., her only other child, F., having predeceased him without leaving issue]: Whereupon, etc.

FACTS.—E., the testator, was infeft. He left a will in favour of A., in liferent only, and her children in fee. E. is dead. A. is alive. She has had three children. B., C., and F. F. predeceased E. without issue. Further Issue.—The special point here is that A. may yet have more children. These may be entitled to share.

NOTARIAL INSTRUMENTS IN FAVOUR OF TRUSTEES ON SEQUESTRATED ESTATES

Completion of Title unnecessary.—Assuming that the bankrupt was infeft, it is not necessary for the trustee to make up any title to enable him to deal with the estate. The Bankruptcy Act (s. 105) provides that

the trustee may, without making up a feudal title in his person, and without concurrence of the bankrupt, grant conveyances of the heritable estate belonging to the bankrupt which conveyances shall be as effectual to the purchaser as if they had been granted by the bankrupt with concurrence of the trustee.

But if the bankrupt's title was not completed, it will be the trustee's duty to complete a title.

And further, and specially, it may be desired to complete the trustee's title for the purpose of competition with rights granted by the bankrupt. This takes two forms: (1) the bankrupt may have granted securities over the property when he himself was not infeft, and his title may never have been completed; (2) though his title was completed, the securities granted by him may not have been put on record, or may have been invalidly recorded. In each of these cases the purpose of completing the trustee's title is to cut out the securities. In the first case, the completion of the bankrupt's title would validate the securities by accretion, which is prevented by completing the title of the trustee. In the second case, if the trustee completes his own title before the securities are duly recorded, their subsequent registration will come too late. But as to heritable securities, see p. 570.

Firm and Partners.—If it is the case of a sequestration of a firm and partners, as such and as individuals, and the same person is trustee on all the estates, care will be taken to make up the title in his favour as trustee on the proper estate. Thus, if the property belonged to one of the partners, the title will be made up in his favour as trustee on the estate of that partner only, and not as trustee on all the estates. The estates must be kept separate.

en such notarial instrument.—The 1868 Act (s. 25) declares—on such notarial instrument being so recorded, the trustee shall be held to be in all respects in the same position as if the bankrupt or any previous trustee had granted a conveyance of the lands contained in the notarial instrument in favour of such trustee and as if such conveyance had been recorded, or followed by an instrument of sasine or notarial instrument in favour of such trustee duly expede and recorded.

¹ But see footnote, p. 450.

Three cases may be distinguished:—

- (1) Previous trustee infeft. This is quite clear. The notarial instrument is equal to a conveyance by him to the new trustee, duly recorded.
- (2) Bankrupt infeft; no previous trustee, or previous trustee not infeft. This also is clear. The notarial instrument is equal to a conveyance by the bankrupt to the trustee duly recorded. All right of the prior trustee if any is vested in the new trustee, who is quite entitled to take a feudal title in this way.
- (3) Bankrupt not infeft. The words of the section, as quoted above. are not well adapted to meet this case. There is no difficulty about the form of the instrument. There must be specified, "the title by which such lands are held by the bankrupt" (s. 25); Sched. O (lands) refers to "the title or series of titles"; and Sched. LL (securities) provides for deduction of title. But then the section makes the instrument equivalent to a conveyance by the bankrupt recorded, which would not give a title if the bankrupt was not infeft; and, accordingly, it has been suggested that if the bankrupt was not infeft, the trustee must resort to declaratory adjudication. But it is submitted that this is erroneous. For there are added the words, "or notarial instrument duly expede and recorded." This may easily be read to mean not merely an instrument proceeding upon a supposed disposition by the bankrupt by itself alone, but in proper form upon all the writs, starting from the last infeftment. Alternatively the trustee may have a notarial instrument as an assignee of an unfeudalised special disponee under 1868 Act, s. 17, Sch. J; Bankruptcy Act, 1856, s. 102 (2); and the two forms will be found to be indistinguishable.

Trustee in Cessio.—At least as regards irredeemable rights trustees under cessio proceedings are in a different position, in point of title, from trustees in sequestrations. Unless and until the trustee obtains a disposition omnium bonorum, he has no title to heritable estate (Debtors (Scotland) Act, 1880, s. 9 (5)); and to enable him to convey and give a warrant for de plano infeftment, he must complete his title. As to heritable securities, see p. 570.

NOTARIAL INSTRUMENT IN FAVOUR OF TRUSTEE IN SEQUESTRATION—BANKRUPT INFEFT [1868 Act, s. 25, Sched. O]

At there was, on behalf of A., trustee on the sequestrated estate of B., presented to me, notary public subscribing, a disposition granted by C. in favour of the said B., dated , and recorded in the division of the general register of sasines for the county of on , by which recorded disposition the said B. was infeft in All and Whole [describe or refer as in the disposition], but [if necessary] with and under the [burdens, etc.]

specified in : As also there was presented to me an extract act and warrant of confirmation in favour of the said A. granted by the sheriff of , and dated at on , whereby it was evidenced that the whole estates and effects, heritable and moveable and real and personal, wherever situated, of the said B. were transferred to the said A. as trustee foresaid: Whereupon, etc.

THE SAME, BANKRUPT NOT INFEFT

At there was, on behalf of A., trustee on the sequestrated estate of B., presented to me, notary public subscribing, a disposition granted by C. in favour of the said B., dated , by which the said C. disponed to the said B., All and Whole [describe or refer as in the disposition], but always with and under [refer to burdens as in the disposition]: As also there was presented to me an extract act and warrant of confirmation in favour of the said A. as trustee foresaid, granted by the sheriff of , and dated at on , whereby it was evidenced that the whole estates and effects, heritable and moveable and real and personal, wherever situated, of the said B. were transferred to the said A. as trustee foresaid: Whereupon, etc.

NOTARIAL INSTRUMENT IN FAVOUR OF TRUSTEE IN CESSIO FOLLOWING ON DISPOSITION OMNIUM BONORUM [1868 Act, s. 19, Sched. L]

At there was, on behalf of A., trustee for the creditors of B., acting under decree of cessio and disposition omnium bonorum after mentioned, presented to me, notary public subscribing, a disposition granted by C. in favour of the said B., dated , and recorded in the division of the general register of sasines for , by which recorded on disposition the said B. was infeft in All and Whole [describe or refer as in the disposition], but [if necessary] with and under the [burdens, etc.] specified in : As also there were presented to me (first) a decree of cessio granted by the sheriff of , dated at the said B. was decerned to execute a disposition omnium bonorum in favour of the said A. as trustee for behoof of the creditors of the said B., and (second) a disposition omnium bonorum granted by the said B. in implement of the said decree in favour of the said A. as trustee for the creditors of the said B., whereby the said B. disponed to the said A., as trustee foresaid, his whole estate and effects, heritable and moveable: Whereupon, etc.

Bankrupt not Infeft.—In that case make alterations as above.

Special Disposition.—There appears no reason why, if the bankrupt is willing, there should not be added a special disposition after the general words in the disposition omnium bonorum. In that case the deed might be recorded de plano, assuming the bankrupt to be infeft. This would be most useful where the estate embraced several separate heritable properties, in which case, however, cessio would be hardly appropriate.

NOTARIAL INSTRUMENT IN FAVOUR OF TRUSTEE FOR BEHOOF OF CREDITORS [1868 Act, s. 19, Schod. L]

At there was, on behalf of A., as trustee for behoof of the creditors of B. under the trust deed after mentioned, presented to me, notary public subscribing, a disposition granted by C. in favour of the said B., dated , and recorded in the division of the general register of sasines for the county of , by which recorded disposition the said B. was infeft in All and Whole [describe or refer as in disposition], but [if necessary] with and under the [burdens, etc.] specified in : As also there was presented to me an extract of a trust deed granted by the said B. in favour of the said A., as trustee foresaid, dated , and registered in the Books of Council and Session on , by which trust deed the said B. disponed to the said A., as trustee foresaid, All and Sundry his (the said B.'s) whole heritable estate, and power of sale was thereby conferred on the said A.: Whereupon, etc.

Note.—This is simply an ordinary instrument in favour of a general disponee, but it is convenient to introduce it here. If the debtor is not infeft, alter as on p. 366.

NOTARIAL INSTRUMENTS IN FAVOUR OF LIQUIDATORS OF JOINT STOCK COMPANIES

Completion of Title unnecessary.—It is not necessary for the liquidator to make up any title to enable him, so far as title is concerned, to deal with the estate, assuming that the company was infeft. The estate is not vested in the liquidator¹; the theory is that he exercises the company's powers as by a mandate. Thus sec. 95 of the 1862 Act enables an official liquidator (subject as mentioned below) "to execute in name of the company all deeds, and for that purpose to use, when necessary, the company's seal," and sec. 133 gives the same power to voluntary liquidators. As to completion of the liquidator's title in order to cut out preferences, see p. 379 in the case of trustees in sequestrations.

Deeds by Liquidator infeft.—If the liquidator does complete a title, it will be well, if not necessary, that any deed afterwards granted by him should run not only in name of the company, but also in his own name as liquidator; thus: "We, the Y. Company Limited, etc., in liquidation, and I, A., liquidator thereof." As to the liquidator's powers, see p. 301.

What to be produced.—All that the section of the 1868 Act (s. 25) and the relative schedules (O and LL) direct to be produced is the appointment of the liquidator, and therefore there can be no doubt that it is strictly not necessary to produce or set out the resolution as

¹ Gray's Trs. v. Benhar Coal Co., 1881, 9 R. 225; Clark v. West Calder Oil Co., 1882, 9 R. 1017.

to winding up. The appointment of liquidator may be by the same resolution or by another, but even in the former case only the part relating to the appointment need be set forth. The other part, however, is so short that many may prefer to include it also, or the separate winding up resolution, as the case may be.

Effect of Notarial Instrument.—See the same matter treated with reference to trustees in sequestrations, pp. 379-80.

NOTARIAL INSTRUMENT IN FAVOUR OF LIQUIDATOR, COMPANY INFEFT [1868 Act, s. 25, Sched. O]

1. JUDICIAL LIQUIDATION

there was, on behalf of A., as liquidator for winding up the At X. Company Limited, incorporated under the Companies Act, 1862 to and having their registered office at , presented to me, notary public subscribing, a disposition granted by B. in favour of the said X. Company Ltd., dated , and recorded in the division of the general register of sasines for the county of on , by which recorded disposition the said X. Company Ltd. were infeft in All and Whole [description or reference], but always [if necessary] with and under the [burdens, etc.] specified : As also there was presented to me an extract of an act and decree of the Lords of Council and Session, dated , and extracted , by which it was ordered that the said X. Company Ltd. be wound up, and the said A. was appointed liquidator, and the Court thereby declared that the said A. might exercise any of the powers specified in sec. 95 of the Companies Act, 1862, without the sanction or intervention of the Court: Whereupon, etc.

2. VOLUNTARY LIQUIDATION

[As in previous form, but proceed] As also there were presented to me (first) a minute of an extraordinary general meeting of the said company, held , containing a resolution of the said company passed at the said meeting, by which it was resolved that the company be wound up voluntarily, and that the said A. be, and he was thereby, appointed liquidator: and (second) a minute of another extraordinary general meeting of the said company, held at on , containing the resolution passed at the said previous meeting, which was thereby confirmed: Whereupon, etc.

Note.—The necessary changes will be made according as the resolution is (1) an ordinary resolution under subsec. 1 of the 129 sec. of the Companies Act, 1862, or (2) an extraordinary resolution under subsec. 3.

NOTARIAL INSTRUMENT IN FAVOUR OF LIQUIDATOR. COMPANY NOT INFEFT [1868 Act, s. 25, Sched. O]

there was, on behalf of A., as liquidator for winding up the X. Company Ltd., incorporated under the Companies Acts, 1862 to and having their registered office at , presented to me, notary public subscribing, a disposition granted by B. in favour of the said X. Company Ltd., dated , by which the said B. disponed to the said X. Company Ltd. All and Whole [description or reference], but always with and under : As also there was presented to me [liquidator's appointment]: Whereupon, etc.

NOTARIAL INSTRUMENTS ON ASSIGNATIONS OF UNRECORDED CONVEYANCES

NOTARIAL INSTRUMENT TO BE RECORDED ALONG WITH THE DISPOSITION [COMPLETING THE TITLE OF B., THE ASSIGNEE, UNDER SECOND FORM ON p. 346] [1868 Act, s. 23, Sched. N]

At there was, on behalf of B., presented to me, notary public subscribing, a disposition granted by C. and dated , by which disposition the said C. conveyed to D. All and Whole the lands of X. as therein described [or, the house 1 King Street, Edinburgh, as therein described; or, the house being the eastmost house on the third flat above the street flat of the tenement 1 Queen Street, Edinburgh, as therein described], and which disposition is to be recorded along with this instrument: As also there were presented to me the following writs by which the said B. acquired right to the said disposition, namely, (first) assignation by the said D. to E., dated , (second) assignation by the said E. to A., dated , and (third) assignation by the said A. to the said B., dated : Whereupon, etc.

To feudalise.—Record (1) the disposition, and (2) this instrument; but not the assignations.

A warrant will be put on each of the disposition and notarial instrument.¹ On the former it will run (1868 Act, Sched. H 2):—

Register on behalf of B. [of course designed] in the register of the county of , along with the notarial instrument docqueted with reference hereto.

The notarial instrument will be docqueted thus (1868 Act, Sched. N, note):

Docqueted with reference to warrant of registration on behalf of the said B. written on the said disposition.

"Signed by the person or his agent or agents signing the warrant."

NOTARIAL INSTRUMENT TO BE RECORDED ALONE (COM-PLETING THE TITLE OF B., THE ASSIGNEE, UNDER SECOND FORM ON p. 346) [1868 Act, s. 23, Sched. J]

At there was, on behalf of B., presented to me, notary public subscribing, a disposition granted by C. and dated , by which disposition the said C. disponed to D., and his heirs and assignees, heritably and irredeemably, All and Whole [description and reference to burdens as in the disposition]: As also there were presented to me the following writs by which the said B. acquired right, namely, (first) assignation by the said D. to

1 See p. 344.

E., dated , (second) assignation by the said E. to A., dated , and (third) assignation by the said A. to the said B., dated : Where-upon, etc.

To feudalise.—Record the instrument by itself alone with a warrant in ordinary form.

NOTARIAL INSTRUMENTS ON RECORDED LEASES WHERE THE FIRST RECORDED TITLE IS *NOT* THAT OF THE ORIGINAL LESSEE [1857 Act, s. 5, Sched. C]

1. Assignee of Original Lessee

Be it known that by lease dated A. let to B. All and Whole , in the parish of and county of , to which lease C-has made up title as assignee of the said B. in virtue of assignation granted by the said B. in his favour, dated : Wherefore this instrument is taken by the said C. in the hands of D., notary public, in terms of the Registration of Leases (Scotland) Act, 1857.—In witness whereof [testing clause as on p. 365].

Note.—The Act does not (like the 1868 Act) prescribe a form of testing clause for notarial instruments, and it may therefore be preferred to insert place and date of signing, especially as the instrument does not set out the place at the beginning. But, of course, neither place nor date is essential.

2. Assignee where there have been Several Transmissions

Be it known that by lease dated A. let to B. All and Whole , in the parish of and county of , to which lease C. has made up title as assignee of F. in virtue of assignation by the said F. in his favour, dated , and to which lease the said F. acquired right conform to the following writs, namely, (first) assignation by the said B. in favour of D., dated , (second) assignation by the said D. in favour of E., dated , and (third) assignation by the said E. in favour of the said F., dated : Wherefore, etc.

3. GENERAL DISPONEES (IN TRUST)

Be it known that by lease dated A. let to B. All and Whole , in the parish of and county of , to which lease C. and D. have made up title as trustees and general disponees and assignees of the said B. in virtue of his general trust disposition and settlement, dated , and registered in the Books of Council and Session on : Wherefore, etc.

4. HEIR

Be it known that by lease dated A. let to B. All and Whole , in the parish of and county of , to which lease C. has made up title by service as eldest son [or otherwise] and heir of the said B., conform to extract decree of general service expede before the sheriff of

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, and dated at the day of , and recorded in Chancery and extracted the day of : Wherefore, etc.

Two or more Transmissions.—In these cases, after mentioning the lease, the instrument immediately proceeds to mention the last writ of all, being the immediate title in favour of the person expeding the instrument; and, finally, it goes on to deduce the other transmissions, beginning with the earliest.

Description.—As regards description in the instrument it must be kept in view that the lease is to be recorded along with the instrument. Therefore there is no question of identity, and brevity ought specially to be studied.

Recording.—Along with the instrument the lease itself is recorded, but the transmission or transmissions are not recorded. There will be a warrant of registration both on lease and instrument, but it is not necessary that they should in any way refer to each other. The lease will naturally be placed first on record.

NOTARIAL INSTRUMENTS ON RECORDED LEASES IN FAVOUR OF SUCCESSORS OF PARTY WHO DIED FULLY VESTED [1857 Act, s. 8, Sched. F]

1. GENERAL DISPONEES (IN TRUST) OF ORIGINAL LESSEE

Be it known that by lease dated A. let to B. All and Whole, in the parish of and county of, which lease is recorded in the division of the general register of sasines for the county of on, and to which C. and D. have made up title as trustees and general disponees of the said B. in virtue of general trust disposition and settlement dated, and registered in the Books of Council and Session on: Whereupon, etc.

Note.—It may be desired to refer to deaths, declinature, resignation, and assumption of trustees (see p. 371).

2. General Disponees of an Assignee

Be it known that by lease dated A. let to B. All and Whole , which lease is recorded in the and county of in the parish of division of the general register of sasines for the county of and to which C. and D. have made up title as trustees and general disponees of G. in virtue of the following writs, namely (first) assignation by the said B. , and recorded in the said division of the said in favour of E., dated register on , (second) assignation by the said E. in favour of F., dated and recorded in the said division of the said register on , (third) assignation by the said F. in favour of the said G., dated , and recorded , and (fourth) general trust in the said division of the said register on disposition and settlement of the said G., dated , and registered in the Books of Council and Session on : Whereupon, etc.

3. Heir

Be it known that by lease dated A. let to B. All and Whole , in the parish of and county of , which lease is recorded in the

division of the general register of sasines for the county of on , and to which C. has made up title by service as [specify relationship] and heir of the said B. expede before the sheriff of , and dated at the day of , and recorded in Chancery and extracted the day of : Whereupon, etc.

NOTARIAL INSTRUMENTS ON RECORDED LEASES IN FAVOUR OF SUCCESSOR OF PARTY WHO DIED HOLDING AN UNRECORDED ASSIGNATION [1857 Act, s. 9, Sched. F]

- 1. Form of Instrument.—The form is the same as the preceding forms (Sched. F), except, of course, that the recording of the deceased's immediate title cannot be specified.
- 2. Recording.—The assignation in favour of the deceased is recorded along with the instrument. There must of course be a warrant on each, and both warrants must be in favour of the successor.

SECTION XXIII

ENTAILS

THE correct meaning of an entailed or tailzied destination is any one under which the ordinary course of succession is cut off, whether the successive holders are or are not placed under restraint. But the common use of the word now is to describe a strict entail made in virtue of the Act 1685, c. 26, and it is in that sense that it is used here. Moveables cannot be entailed.

The essentials of a strict entail are: (1) a proper destination, (2) the three cardinal prohibitions, (3) irritant and resolutive clauses, (4) publication of the fetters in the sasine register, and (5) registration in the register of entails.

DESTINATION

The destination will usually be in such terms as:

To the entailer, whom failing his son A. and the heirs-male [whom failing the heirs-female] of his body, whom failing the entailer's son B. and the heirs-male (as before, and so on through the entailer's sons), whom failing the entailer's daughter C. and the heirs-male (as before), whom all failing the heirs whomsoever of the entailer, excluding heirs-portioners throughout the whole course of the succession, the eldest daughter or other female heir and the descendant of her body always succeeding without division.

It will not do to destine the estate to heirs whomsoever,² nor is this remedied merely by excluding heirs-portioners.³ Either of these destinations results in no entail at all, but gives a fee-simple estate to the institute; and the same is the result if under an entail the estate comes into the possession of an heir of entail after whom no one but his own, or the entailer's, heirs whomsoever are called.²

Sec. 13 of the Entail Amendment Act, 1875, deals with this matter, but only in certain cases. Its object is to give statutory authority for holding in fee-simple without any judicial procedure. It deals with (1) entails made, and (2) entails directed to be made. As regards the first it provides:

Where any tailzie under which any estate is held shall not be valid and

² Colvill v. C., 1843, 5 D. 861.

effectual, in respect the destination contained in such tailzie is in favour of the institute or heir in possession and his heirs whomsoever or his heirs general, such estate shall be deemed and taken to be a fee-simple estate without any declarator or other judicial procedure.

And as regards entails directed to be made, it provides:

And where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing lands to be entailed under the same or like destinations, or where any lands are or shall be directed to be entailed under the same or like destinations, but the direction has not been carried into effect, such trust money or other property, and such lands, though still unentailed, may be dealt with under this section in all respects as such lands might have been dealt with if entailed in terms of such trust or direction.

The destination must expressly provide for the case of heirs-portioners. The most common way is to give the whole succession to the eldest and her descendants without division. But it appears to be competent to provide for the actual division of the estate, i.e. the lands, in that event, so that thereafter each divided part shall be held as under a separate entail. This would be very awkward, and it is not easy to see how it could be done often. In any case the right must not be divided; there is to be no pro indiviso holding. If under the entail the succession opens to heirs-portioners in the ordinary way without special provision for the case, then the estate is fee-simple, but only in their persons, and not in the person of the preceding heir in possession.²

THE CARDINAL PROHIBITIONS

These are the prohibitions against (1) alienation, (2) contraction of debt, and (3) alteration of the order of succession.

In view of the provisions of the 18th section of the 1858 Act, it would be out of place to devote much space to the construction of express prohibitions; but as old entails must still be passed through hands, reference to these clauses cannot be wholly omitted.

- 1. Alienation.—The chief point is that it was not sufficient to prohibit sales, for that would not strike at gratuitous alienations³; and quære whether it would have struck at excambions? or long leases? As to leases in general, see p. 608.
- 2. Contracting Debt.—There are very few cases in which this prohibition was held defective. Of course it does not (though it has been argued that it does) mean that the holders of the estates are to contract no debt at all⁴; nor is even the burdening of the institute's or heir's own interest in the estate a contravention; but in

⁴ Denham v. D., 1737, 5 Br. Suppl. 200.



¹ Mure v. M., 1837, 12 F. 546; 1838, 3 S. & M'L. 237.

² Russell v. R., 1852, 15 D. 192.

² Collow's Trs. v. Connell, 1866, 4 M. 465.

this latter case, as he holds the fee, he must be careful to qualify the deed by making it subject to the entail fetters.

3. Alteration of Succession.—This was the prohibition the defective nature of which brought down most entails. The cause of this was that, while there might be words apparently against alteration, they were limited to particular kinds of alteration, namely, alterations following as the result of alienation or contraction of debt. There required to be a substantive prohibition against altering the order of succession. A list of cases, with the clauses quoted, will be found in M'Laren, W. & S., p. 518.

Is Institute bound—This was a great question in old entails, but it is hardly possible that it can arise in any form now. The point was that the institute is a disponee and not an heir, and therefore prohibitions levelled at the heirs did not reach the institute, who was thus left a fee-simple proprietor. But this did not hold in the case of one called as an heir (or substitute) succeeding as institute (or disponee) by reason of the failure of the person called as institute. This is a case of constructive conditional institution, and it was held that his relation to the fetters was fixed by his position in the destination as made and not as it took effect, and therefore that he was bound by the fetters.²

As to implied prohibitions under modern legislation, see next page.

IRRITANT AND RESOLUTIVE CLAUSES

If one did not know how the facts stand, it would appear to be impossible that there could have been so much litigation over clauses which are in their nature so simple. The explanation appears to be, that all the difficulties have arisen from an excess of anxious care. It is understood that the statute would have been fully complied with by two short clauses such as the following:—

And with reference to all the prohibitions hereinbefore contained, it is hereby declared (first) that all contraventions by act, deed, omission, or otherwise shall be null and void; and (second) that the contravener shall forfeit the estate, which shall thereupon devolve upon the next heir of entail.

Irritant Clause.—As in the prohibition against debt, it is the estate that is to be protected; therefore an absolute nullity is not required³; it is enough if the acts or deeds are declared null against the estate.

Resolutive Clause.—By a confusion of terms, "irritate" is often used to describe the effect of a resolutive clause, e.g. to irritate a feu. So here it is sufficient to "irritate" the right of the contravener, but there ought also to be words of devolution. The rights of the

¹ Ferguson v. F., 1902, 10 S. L. T. No.

⁸ Munro v. M., 1826, 4 Sh. 467; 1828, 3 366.

W. & S. 344.

² Mackenzie v. M., 1822, 1 Sh. App. 150.
⁴ Borthwick v. Glassford, 1858, 16 D. 37.

descendants of the contravener will not be forfeited unless this is done expressly.

Relation of the Irritant and Resolutive Clauses to the Prohibitions.—This is where so many entails come to grief. The irritant and resolutive clauses were said to be framed in one or other of two ways, either enumeration or reference. The one attempted to specify over again everything which had been prohibited, and the other attempted to preface the irritant and resolutive clauses by such words as "all which debts, facts, and deeds." The one often failed by reason of omitting some particular thing prohibited, and the other was always open to the objection that the prefatory words used were not in themselves wide enough to cover all the prohibitions, or that there was something in the collocation or otherwise to limit their application.

IMPLIED PROHIBITORY, IRRITANT, AND RESOLUTIVE CLAUSES

- 1848. Irritant and resolutive clauses only. Under sec. 39 of the 1848 Entail Act, if an entail contained an express clause authorising registration in the register of entails, irritant and resolutive clauses were implied. Applies to deeds dated on or after 1st August 1848.
- 1858. The same as regards both (1) the three cardinal prohibitions, and (2) irritant and resolutive clauses. Titles Act, 1858,
 s. 18. Applies to deeds dated on or after 1st October 1858.
- 1860. The same as regards burgage property. 1860 Titles Act, s. 12. Applies to deeds dated on or after 10th October 1860.

1868. Re-enacted. Consolidation Act, s. 14.

The implied irritant and resolutive clauses are not limited to the three cardinal prohibitions; but extend to "every prohibition, condition, restriction and limitation contained in such tailzie." But they do not forfeit the rights of heirs descended from the contravener's body.

PUBLICATION OF THE FETTERS

The Act 1685, c. 26, contains these words:

It is always declared that such tailzies shall only be allowed in which the foresaid irritant and resolutive clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine.

The expression "irritant and resolutive clauses" in the statute includes the prohibitions. The insertion required to be *verbatim*—at least there must be no material variation.

In modern practice the deed of entail will itself be recorded. If, however, for any reason there is a notarial instrument instead, then there will be set out in the instrument ad longum (1) all conditions

and prohibitions (if any) expressed in the deed of entail; (2) the irritant and resolutive clauses (if any) therein expressed; and (3) the clause authorising registration in the register of entails, if contained in the deed.

REGISTRATION IN THE REGISTER OF ENTAILS

The 1685 Act provides:

It is always declared that such tailzies shall only be allowed in which (as above), and the original tailzie once produced before the Lords of Session judicially, who are hereby ordained to interpose their authority thereto, and that a record be made in a particular register book to be kept for that effect, wherein shall be recorded the names of the maker of the tailzie, and of the aires of tailzie, and the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie, with the foresaid irritant and resolutive clauses subjoined thereto, to remain in the said register ad perpetuam rei memoriam.

There must be a petition to the Court for authority to record. The petition may be at the instance of the institute or any heir, though not in possession and however remote.

POWERS OF HEIR IN POSSESSION

These include the following, which will be found treated at other places as follows:—

Feu, p. 199.

Lease, p. 608.

Grant family provisions, Sec. XLIII.

Charge improvement expenditure, p. 463.

Charge general debt, p. 462.

As to excambions, the statutory enactments are so extensive that it would not be justifiable to take up the space which would be required to deal with them. A full exposition will be found in an article by Mr. J. A. S. Millar, W.S., in Green's *Encyclopædia*, vol. v. p. 118.

There remain the following to be treated here: (1) charging family provisions on the fee, (2) charging Government duty on the fee, (3) sale, and (4) disentail.

CHARGING FAMILY PROVISIONS

The 1848 Act (s. 21) authorises provisions to younger children to be charged on the fee by bond and disposition in security at the sight of the Court (s. 23). The 22nd section limits the creditor's remedy, as against the lands, to the principal, two years' interest, and penalties. Under the petition to charge, the amount of the provisions is fixed. If the heir does not wish to charge the provisions, but only to fix the amount, he will proceed by declarator 1; but under a summary petition

¹ Carter Campbell v. Lamont Campbell, 1894, 21 R. 614.

it is competent to fix the provisions of both widow and children if it is combined with a prayer to charge the latter 1 or to disentail. Children entitled to provisions may bring a declarator, but they have no title under the Act to present a summary petition; they are not entitled to have the provision charged on the fee so long as the heir in possession is not seeking to disentail or burden the estate. If, however, the heir in possession does not charge the provision on the fee, it must be paid, subject (as regards statutory provisions) to the terms of secs. 10 and 13 of the Aberdeen Act, the former of which sets the heir free if he assign one-third of the free rental for the children, and the latter of which saves for him, as against all statutory provisions, one-third of the free rental, and subject (as regards provisions under deeds of entail) to the terms of any special clauses in the deeds of entail themselves, which are sometimes very difficult to construe and apply.

In some cases it has been held that the terms of the deed of entail bound the heir in possession to pay off the provision, and were a bar to his seeking to perpetuate it by putting it on the fee.³ But it is doubtful whether these would now be followed.⁴

In accepting securities on the fee for these provisions, regard will be had to the question of prior securities, as referred to on p. 466.

CHARGING GOVERNMENT DUTY

The only duties which may be charged on the fee are (1) estate duty, and (2) settlement estate duty; but the heir is not allowed to charge (1) the expense of settling these duties, nor (2) the expense of the petition to charge.⁵

ORDER OF SALE

The 1882 Act introduced the principle of sale without disentail. The property is converted from land to cash; the cash remains entailed estate 6; and the rights of parties are reserved entire. The scheme is wholly statutory, and is fully developed in secs. 19 to 27 inclusive of the 1882 Act. It is sufficient to observe that apparently a creditor is not entitled to present the application; that while heirs and creditors are entitled to appear for the purpose of seeing that their respective interests are protected, they are not entitled to oppose the application (s. 20); and that the Court "shall, unless it appear that any patrimonial interest would be injuriously affected thereby, order the estate, or a part of it" (i.e. according to the petition) "to be sold" (s. 21).

¹ Paterson's tutors, Petrs., 1899, 7 S. L. T. No. 234.

² Balfour Melville v. Mylne, 1901, 3 F. 421.

² Campbell and ors., Petrs., 1854, 16 D. 396; Baillie, Duncan's Entail Manual, 339.

⁴ Hope-Johnstone v. H.-J., 1880, 8 R. 160.

⁵ Laurie, Petr., 1898, 25 R. 636.

⁶ As to investment see M. of Queensberry, 1898, 5 S. L. T. No. 458.

DISENTAIL

In judging whether an heir in possession is entitled to disentail without consent, or what consents are necessary, it is still necessary to distinguish between old and new entails. An old entail is one dated before 1st August 1848. A new entail is one granted on or after that date. But in applying this distinction two matters require attention:

- 1. A testamentary entail, i.e. one actually made by the testator himself, as distinguished from one made by his trustees in terms of his directions, is taken to be of its own actual date, and not of the date of the testator's death. Thus a mortis causa entail dated prior to 1st August 1848 is an old entail notwithstanding that the entailer died after that date.¹
 - 2. The Entail Amendment Act, 1848, s. 28, provides:

For the purposes of this Act, the date at which the Act of Parliament, deed, or writing placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail.

The words "first came into operation" mean came into operation to any, though quite a different, effect, and though an entail could not then have been made.² So that if a testator directed his trustees to make an entail, no matter at what period, and died before 1st August 1848, then the entail is an old entail, though the deed of entail is subsequent to that date. But as to the limit of operation of this enactment, see p. 399. On the other hand, if the testator made his will before, but died on or after, 1st August 1848, the entail subsequently made would be a new entail; whereas if he had himself embraced the entail in his will, it would have been an old entail (supra).

The position of the heir in possession as regards disentailing is as follows:—

OLD ENTAILS

If he is of full age, then—

- 1. If he was born on or after 1st August 1848, he requires no consent.
- 2. If born before 1st August 1848, he may disentail with the consent of the heir-apparent born on or after that date.

NEW ENTAILS

If he is of full age, then-

1. If he was born after the date of the entail, he requires no consent.

¹ Riddell, Petr., 1874, 1 R. 462; Riddell

² Black v. Auld, 1873, 1 R. 133; Bruce,
v. Lord Polwarth, 1876, 3 R. 879.

Petr., 1874, 1 R. 740.

2. If born before the date of the entail, he may disentail with consent of the heir-apparent born after the date of the entail.

It is not unimportant to note here that there is a curious difference between the first and second sections of the 1848 Act. In the case of new entails, what about the case of an heir in possession born on the date of the entail? Does he require any consent? If so, it is assumed that it would not be enough for him to obtain the consent of the heirapparent, also born on the date of the entail, if such a state of facts could exist. But this latter point might quite well come up in an application by an heir in possession born before the date of the entail, who claimed that the only necessary consent was that of the heirapparent born on the date of the entail. It is submitted that one born on, has not the same right or power as one born after, the date of the entail; that if not born after, he is in the same position as if born before. The last sentence of s. 1 is quite express. Contrast s. 2 (old entails).

WHETHER OLD OR NEW

If twenty-one years of age, he may disentail-

1. Without any consent if he is the only heir of entail in existence for the time;

Or,

2. With consent of the whole heirs of entail if there be less than three in being at the date of these consents and at the date of the petition;

0r,

3. With consent of the three nearest heirs who at these dates are for the time entitled to succeed in their order successively immediately after himself;

0r,

4. With consent of the heir-apparent and of the heir or heirs, in number not less than two, including the heir-apparent, who in order successively would be heir-apparent.

With reference to all these matters there are several points which require to be mentioned.

Heir-Apparent is "the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect" (1848, s. 52). Quære, if the heir in possession be a woman of seventy years of age, and the heir next in succession be her brother, is he heir-apparent? It is thought not. The existence of a clause of devolution which may in a certain event forfeit the heir's right does not deprive him of the character of heir-apparent.

Personal Conditions.—Under the 1848 Act it was necessary

(1) that the petitioner should be twenty-one, (2) that the heir-ap
1 Beattie's Trs. v. Mefan, 1898, 25 R. 765.

2 Forbes v. Burness, 1888, 15 R. 797.

parent or nearest heir consenting should be twenty-five and not subject to any legal incapacity, and (3) that a petitioner disentailing as the sole heir in existence at the time should be unmarried. The first of these alone remains: the petitioner for disentail must still be major.¹ All the others have disappeared. The age of twenty-five for the nearest heir was reduced to twenty-one in 1875,² and abolished in 1882.³ The condition as to marriage was repealed in 1875.⁴

Bar to Petitioning or Consenting under Marriage Contract.
—See the 1848 Act, s. 8, and the 1882 Act, s. 17; also Sec. XLIII., and the cases noted.⁵

Bar to Consenting in respect of Debt.—See the 1848 Act, ss. 9 and 10; the 1853 Act, ss. 20 and 21; and the 1882 Act, s. 13; also p. 461. Notwithstanding the concluding words of section 10 of the 1848 Act, and sec. 21 of the 1853 Act, it appears from the 1882 Act that any creditor of the heir-apparent "or other nearest heir," in any loan contracted prior to 18th August 1882 "on the security of his right of succession," may oppose the consent of the heir-apparent or other nearest heir until arrangements are made for the creditor's payment or security to the satisfaction of the Court; and further, that the same applies to loans made on or after 18th August 1882, provided in that case there be an express assignment of the expectancy or interest, and the same be intimated to the heir in possession.

Propulsion.—When the fee has been propelled it is important to keep in mind the following points as to powers, petitions, and consents:—

- 1. When the propulsion is without reservation of the granter's liferent, the heir to whom the fee is propelled is heir in possession. He alone will petition; and he alone will execute the instrument of disentail and other documents. The consents, if any, which must be obtained or dispensed with are exactly the same as if the granter of the propulsion were dead and the grantee had succeeded in ordinary course.
- 2. When the propulsion is under reservation of the granter's liferent, and the entail is an old entail, all statutory powers, including disentail, may be exercised by either the granter or grantee of the propulsion, and during the latter's lifetime the consents if any are the same as if there had been no propulsion.⁷ It does not appear clear that these enactments are extended to new entails.⁸
- 3. But when the fee of only part of the estate is propelled, then the grantee is not heir in possession of the estate, and he cannot exercise power of disentailing or otherwise.⁹ Neither, apparently, can the granter

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<sup>1</sup> 1882 Act, s. 11.
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⁹ 1875 Act, s. 4.

³ 1882 Act, s. 12.

^{4 1875} Act, s. 5.

⁵ Scott Douglas and ors., Petrs., 1883, 10 R. 952; Pringle v. P., 1891, 18 R. 895.

⁶ Brander, Petr., 1902, 9 S. L. T. No. 321.

⁷ Entail Acts, 1853, s. 22; 1868, s. 13.

⁸ Entail Act, 1882, ss. 3, 4.

⁹ Dupplin v. Hay, 1871, 10 M. 89.

of the propulsion. An *impasse* is thus created, which may be cured by the grantee reconveying to the granter or the latter making the propulsion complete.

DISPENSING WITH CONSENTS

What is stated above as to consents being necessary is to be taken in the sense that the consents must be obtained or dispensed with for value, i.e. that the heir in possession, if he cannot make other voluntary arrangements, must compensate certain interests, but is in a position to acquire the consents under compulsory powers. This began in 1875 (s. 5) as regards all but the nearest heir, and it was extended to him in 1882 (s. 13). The result is that every heir of entail in possession under any entail, being major, is entitled to disentail, though he may have to pay for it. The position of the heir or heirs appears to be different according as the petition is by the heir in possession or by a creditor of the heir in possession or the trustee in his sequestration. In the former case, the ascertained compensation is to be "paid into bank," or "proper security shall be given over the estate"; 1 whereas, in the latter cases, the Court ordains "the heir in possession to grant a bond and disposition in security over the estate for the amount so ascertained," 2 and if he fails to do so the Clerk of Court signs the bond. It thus appears that when the petition is by a creditor or a trustee in the sequestration of the heir in possession, the next heir may be required to accept a bond instead of cash, whether it be a good security or not.3 In Somervell's case Lord Pearson expressed the opinion that the next heirs must take a bond ranking after other encumbrances constituted by the heir in possession without the sanction of the Court. But, with deference, this is doubted. True the other creditors cannot be compelled to postpone their securities, but if a bond postponed to them be not such a security as the next heirs are compellable to accept (which is the view now submitted), then the petitioner cannot obtain disentail until he finds cash or obtains a postponement.4 It is incompetent for the Court to find that the value of the expectancy does not exceed a certain sum and to allow disentail on consignation of that amount.⁵ But the interlocutor is competent if pronounced of consent.⁶

Valuation of Expectancies. The leading point is that it is not a case of book values; the actual state of health of the lives may be enquired into, and anything which has or may have affected the probability of life is relevant for enquiry. The enquiry may be by

¹ 1875, s. 5 (2) (b); 1882, s. 13; Farquharson v. F.'s. c. ad lit., 1886, 14 R. 231.
² 1882, s. 18.

³ Millar (Napier's Tr.), 1901, 3 F. 579; More (Somervell's Tr.), 1903, 10 S. L. T. No. 491.

⁴ On the facts, all the points arose in

Millar's case, but they were not argued or decided.

⁵ Baird v. B., 1891, 18 R. 1184.

⁶ Order of H. L. in M'Donalds v. M'D., 1880, 7 R. (H. L.) 41.

⁷ Bankes v. Anderson and ors., 1899, 1 F. 1194, and cases cited.

proof or remit according to circumstances. The same holds of course as to the value of the estate itself. Allowance is to be made for the contingent rights of disentailing and charging provisions.

COMPLETION AND EFFECT OF DISENTAIL

Completion.—The instrument of disentail must be recorded in the register of entails. Until that is done there is no disentail, and if the petitioner should die before it is done, the whole process falls as if it had never been begun.¹ Along with the instrument there must be presented an extract of the decree in the petition: the two are recorded together. It is usual also to record the instrument in the register of sasines: this is proper enough, but not essential; and of course, for the reason stated, the first recording will be in the register of entails. When it comes to be registered in the register of sasines, it is usual to record for preservation as well as for publication.

Effect.—The effect of the recorded disentail is, according to its terms, that the lands are held free from the fetters. Accordingly, the heir in possession may alter the order of succession, but the disentail is not of itself such an alteration. The destination stands unless and until altered.² It will therefore often be proper for the disentailer at once to execute a disposition in favour of himself and his heirs whomsoever.

TRUST DIRECTIONS TO ENTAIL

The law on this subject cannot be better stated than in the rubric of the recent case of Sandys,³ which is as follows:—

When a testator directs his trustees to make a valid entail of lands, such an express trust will not be impaired by a specific direction to insert clauses which, taken alone, would be inadequate for that purpose. On the other hand, when a testator confers no power to make an entail, and the trustees are directed to carry out the intention of the truster by a definite method, they must conform their action exactly to the directions so given, even although it may be apparent that the testator had some object in view which cannot be effectually attained by the methods prescribed.

That the subject is a difficult one, is shown by the fact that the Court reversed Lord Kincairney's judgment. The prior cases are fully dealt with in his and Lord Kinnear's opinions.

But trustees have been held entitled to introduce an exclusion of heirs-portioners though not expressed in the destination prescribed by the truster.

If there is a valid direction to execute an entail, then the execution of an invalid entail does not fulfil the trust, and the trustees are still entitled and bound to execute a valid entail.⁵

¹ Scott, Petr., 1850, 12 D. 1256.

⁴ Duthie v. D., 1841, 3 D. 616; Stewart's Trs. v. S., 1851, 14 D. 298.

² Gray v. G.'s Trs., 1878, 5 R. 820. ³ Sandys v. Bain's Trs., 1897, 25 R. 261.

⁵ Ochterlony v. O., 1877, 4 R. 587.

Statutory powers are given for acquiring in fee-simple "any money or other property heritable or moveable" held "in trust for the purpose of purchasing land to be entailed." The conditions are the same as for disentailing. The application is made by the party who, if the land had been entailed in terms of the trust, would be the heir in possession, but in the 1882 Act there is added "when the direction to purchase and entail has become operative." 2 Contrast these last words with the provisions of s. 28 of the 1848 Act, p. 394, and see them in effect carried out though not referred to in the case cited.8 There the will had come into operation, but it directed the trustees to carry on certain farms till the lease expired; also to provide a certain annuity—and on these purposes being fulfilled, to entail. During the currency of the lease and annuity the intended institute presented a petition to acquire in fee-Petition refused, but suggested that arrangements might be competent for accelerating the entailing date. Lord Rutherfurd Clark said that s. 28 of the 1848 Act had no application, being intended only to fix whether the entail is to be treated as an old or a new entail. But it is thought that to this must be added that it determines whether the institute and heirs are born before or after the constructive date of the entail.

As to inhibition in cases of this kind, see p. 452; and as to difficulties arising in, and from, intimation of securities, see pp. 444, 452.

DEED OF ENTAIL

I, A., considering that I am desirous of settling the lands and others hereinafter disponed under strict entail, do hereby dispone,

DESTINATION

to myself and the heirs-male of my body, whom failing the heirs-female of my body, whom failing my own nearest heirs whomsoever, excluding heirs-portioners throughout the whole course of the succession, the eldest daughter or other female heir and the descendants of her body always succeeding without division,⁴

SUBJECTS AND BURDENS

heritably and irredeemably, All and Whole [description, which may be by reference, and, if necessary, reference to subsisting burdens, conditions, etc.]:

ENTAIL AND SPECIAL FETTERS

But always with and under the obligations, conditions, irritant and resolutive clauses, and clause of authority to register in the register of entails all hereinafter written; That is to say,

⁴ See p. 389.



¹ 1848 Act. s. 27.

² 1882 Act, s. 26.

³ Craig v. Picken's Trs., 1886, 13 R. 603.

TO REGISTER THE ENTAIL

(*First*) If these presents shall not have been registered in the register of entails in my lifetime, then the heir 1 succeeding on my death shall be bound at his own expense to register the same in the said register within six months after my death;

TO FEUDALISE THE ENTAIL

(Second) In like manner, if the title under these presents shall not have been feudalised in my lifetime so as to effectually publish the destination and entail fetters and the other clauses hereof, then the heir succeeding on my death shall be bound to make up title under these presents, and to effectually publish the destination and entail fetters and all the other clauses hereof in the register of sasines, all within six months after my death;

To Possess under the Entail only

(Third) The said lands and others shall be held and possessed under these presents and under no other title whatever;

TO USE NAME

(Fourth) The heirs 1 of entail shall, while in possession of the estate under these presents, adopt and constantly use the name of X. as their only or last surname 2;

EXCLUSION OF TERCE AND COURTESY

(Fifth) The widows and widowers of the heirs 1 of entail shall not be entitled to terce or courtesy out of or in respect of the said lands and others, all which rights of terce and courtesy are hereby excluded;

To insert or refer to Conditions, etc.

(Sixth) Without prejudice to the second condition hereinbefore written, all the heirs 1 of entail shall, in all investitures of the said estate, or any part thereof, and in all other writs referring thereto, either insert at full length or validly refer to the destination, obligations, conditions, irritant and resolutive clauses, and clause of authority to register in the register of entails, all herein contained:

IRRITANT AND RESOLUTIVE CLAUSES

And with reference to all the obligations and conditions herein contained, it is hereby provided that if any heir 1 of entail shall contravene any of them by act, deed, omission, or otherwise, such contravention shall be null and void, and the contravener shall forfeit the estate, which shall thereupon *ipso facto* devolve upon the next heir of entail:

GENERAL CLAUSES

With entry at the date hereof: And I assign the writs: And I assign the rents: And I grant warrandice: And I reserve power of revocation, even after

¹ If the granter is not the institute, it is necessary to apply all clauses to the institute as well as to the heirs.

² These last words are not implied (*Hunter* v. Weston, 1882, 9 R. 492).

registration in the register of entails and infeftment: And I dispense with delivery:

AUTHORITY TO REGISTER

And without prejudice to or from the other clauses herein contained, I grant authority for registration of these presents in the register of entails.—In witness whereof.

INSTRUMENT OF DISENTAIL (Sched. 1848 Act)

Αt the day of , in presence of notary public, and of the witnesses subscribing, I, A., heir [or institute] of entail in possession of the lands and others after mentioned, namely, All and Whole [take in jull description from titles], which lands and others are held by me under a deed of entail, dated , and recorded in the register of entails on , take instruments in the hands of the said notary public subscribing that the said lands and others are now held by me free from the conditions, provisions, and clauses prohibitory, irritant, and resolutive of the entail [and clause therein contained authorising registration in the register of entails], by virtue of the Entail Amendment Act, 1848; the Entail Amendment Act, 1853; the Entail Amendment Act, 1875; the Entail Amendment Act, 1882; and the Entail Acts: And I consent to the registration hereof in the register of tailzies, and also in the Books of Council and Session and others competent, therein to remain for preservation, and thereto constitute my procurators, etc.—In witness whereof I and the said notary public have subscribed this instrument of disentail [proceed with ordinary testing clause].

The notary will add, after his signature, the letters "N.P."

Reference to the Acts.—The 1848 Act only will be referred to if the powers of that Act only are required. But (1) if the instrument is executed before the authority of the Court is obtained, the 1853 Act will be referred to. (2) If consents of an heir or heirs other than the nearest heir are dispensed with, the 1875 Act will be referred to. (3) If the consent of the nearest heir is dispensed with, the 1882 Act will be referred to. (4) The same Act will be referred to if the disentailing power is under that Act only; and (5) for precaution's sake, it may be desired to add a general reference to "the Entail Acts" in any case (1882 Act, s. 2).

DEEDS OF CONSENT

The only matters which need be referred to are the following:-

Absolute or Conditional.—Consents to disentail are in terms absolute, nor is it usual for them to express any consideration. These are matters which are otherwise attended to. But sec. 4 of the 1848 Act, dealing with powers "to sell, alienate, dispone, charge with debts or encumbrances, lease, and feu," refers expressly to consents being granted "subject to conditions, restrictions, and limitations."

Irrevocable.—All consents are irrevocable (1848 Act, s. 50).

A Tutor or Curator ad litem may consent, and he does not—

incur any responsibility on account of such consent in respect of any alleged error in judgment, or inadequacy of consideration, or want of consideration therefor, unless it shall be alleged and proved that he acted corruptly in the matter.¹

By Attorney.—The deeds may be granted by an attorney, but, of course, he must have special power to that effect. The attorney may be the heir in possession, but obviously that is very undesirable.²

¹ 1882 Act, s. 12; Maxwell Heron v. ² Munro v. M., 1902, 10 S. L. T. No. Dunlop, 1893, 21 R. 230. 32.

DEED OF CONSENT BY MAJOR HEIR

- I, A. [designation, including "place of abode"1], being of full age, and the heir next in succession, being heir-apparent of B., the heir [or institute] in possession, under a deed of entail, dated , and registered in the register of entails on , executed by C. in favour of D. and the heirs of entail therein specified, of All and Whole the lands of X. in the county of Y., do hereby consent to the disentail by the said B. of the whole lands, estate, and others contained in the said deed of entail, and that in the form and manner authorised by the Entail Amendment Act, 1848, [add other Acts if necessary; see p. 401]: And I consent to the registration hereof for preservation.—In witness whereof.
- ¹ The "place of abode" must not be omitted (see A. S., 18th November 1848).
- ² If he is the nearest heir, but not heir-apparent, say, "and the heir next in succession to B.," etc.
- ⁸ It is not necessary to set forth the destination if there is a reference to the registered entail (M'Lagan, 1896, 34 S. L. R. 18).
- ⁴ The form in the Act of Sederunt requires (1) the leading name or a general description, and (2) the county or counties.
- ⁵ If the purpose is not disentail, but charging with debt, etc., state here distinctly and briefly what is consented to.

DEED OF CONSENT BY (1) A MARRIED WOMAN; (2) MINOR WITH CONSENT OF CURATOR ad litem, and (3) TUTOR ad litem OF PUPIL

We, the parties following, namely, (first) A., residing at , wife of B. [designation], also residing there, with the special advice and consent of my husband, and I, the said B., as taking burden on me for my wife and for my own right and interest, I, the said A., being of full age and the heir next in succession to K., the heir [or institute] in possession under [refer to deed of entail and lands as in previous form]; (second) C., eldest son of the said A. and B., and residing at aforesaid, being in minority and being the heir next in succession after the said K. and A. under the said deed of entail,

acting with consent of D., my curator ad litem appointed by interlocutor dated, in the petition at the instance of the said K., for authority to disentail the said lands, which petition is at present pending in the Court of Session before Lord, Ordinary, and I, the said D., as curator ad litem to the said C.; and (third) E. [designation], residing at, tutor ad litem to F., second son of the said A. and B., and residing at aforesaid, appointed by the said interlocutor, the said F. being in pupillarity and being the heir next in succession after the said K., A., and C. under the said deed of entail, do hereby for our respective rights and interests, and the right and interest of the said F., consent [as in the previous form].

This deed will be ratified by A.

SECTION XXIV

CONTRACTS OF EXCAMBION

Implied Real Warrandice.—The peculiarity of an excambion is, that there exists implied mutual real warrandice entitling each party to resort to his original property in case of eviction from that which he has obtained under the excambion. The right is effectual against To have this result it is stated by Erskine that singular successors. the deed by which the lands are exchanged must expressly bear to be an excambion. The proper form in which to have the conveyances is in one bilateral deed called a contract of excambion, and with that word occurring in gremio. But three other forms may be figured, namely, (1) one mutual deed with reference to which the word "excambion" is not used; (2) two separate unilateral deeds bearing reference to each other, and reciting that the cause of granting is in each case the counter conveyance; and (3) two separate unilateral deeds without any reference to each other. It is thought that real warrandice would exist in the first of these cases; the second is doubtful, but it is thought the right would not exist; and in the third it is of course clear that it would not.

Express Real Warrandice.—In point of fact it is usual to express the real warrandice, and it is submitted that the express clauses are often not well stated. It is not uncommon to declare in absolute terms that, if either property shall be evicted in whole or in part, then the contract and the infeftments thereon shall be null and void. Thus, if A. is evicted from a part of his acquired property, or if a bond is discovered of less amount than its value, the result would appear, on the reading of the clause, to be that he is totally evicted by his infeftment being rendered null and void. No doubt he gets back his original property, but that may be no equivalent for his acquired property as at the date of eviction. See clause given in the subjoined form. An alternative course is to insert no substantive clause of real warrandice; but, after the clause of personal warrandice, to say, "but that without prejudice to the mutual real warrandice implied in these presents."

Personal Warrandice.—The real warrandice is not exclusive of personal warrandice according to the circumstances. It is submitted that the *implied* personal warrandice would be absolute, the one property being assumed to be a full equivalent for the other. But the personal warrandice should be expressed.

Narrative.—There is no occasion for any narrative, or any reference to the occasion or cause of granting, unless it is required to show that the granters, or one of them, have power to convey. If any money passes for equality, it will of course be acknowledged. In such cases the clause of express real warrandice sometimes proceeds to say that on eviction the payer of the money, or his successor, is to have a claim for repayment of the amount against the receiver of it or his successor. This is wrong on two separate grounds, namely, (1) there is no such claim against a singular successor, and (2) as against the receiver of the money and his heirs the claim is not measured by the sum paid.

Feu-duties, Casualties, and Public Burdens. — The rule between the parties as to these should receive special consideration. Assuming, for instance, that the excambions relate to relatively small parts of larger wholes, the natural way will be that there should be no change in the payment of feu-duty or stipend. Casualties of the nature of duplicands, etc., payable at fixed periods, are in the same position. But casualties payable at death, and rates and taxes, are in a different position, and will naturally follow the land.

Stamp.—If no money passes—10s.; if any money passing does not exceed £100—10s.; if money exceeding £100 passes—conveyance on sale duty thereon only (Stamp Act, 1891, s. 73).

Recording.—The contract will be recorded with two warrants, one on behalf of each of the parties, directing registration for preservation as well as for publication, and two extracts will be ordered.

Trustees' Powers.—A power to sell, even when combined with a power to purchase heritage, does not infer power to excamb.

FORM OF CONTRACT

It is contracted between the parties following, namely, A. on the one part, and B. on the other part, in manner underwritten; That is to say, the parties have agreed to make, and hereby make, the following excambion, namely: In the first place, the said A. dispones to the said B., and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [description and reference to burdens, if necessary]: And, in the second place, the said B. dispones to the said A., and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [description and reference to burdens, if necessary]. Providing, without prejudice to the mutual clauses of absolute personal warrandice hereinafter written, that the parties hereto, and their respective

¹ Bruce v. Stewart, 1900, 2 F. 948.

heirs and successors, shall each have the security of real warrandice over the subjects hereby disponed by himself, and, in order to render such security effectual, that if either of the subjects above disponed, or any part thereof, shall be evicted in whole or in part on account of any fact or deed of the disponer, or of his predecessors or authors, or on account of any defect in the disponer's title, then this contract, so far as regards the other subjects and the infeftment following thereon in such other subjects and all subsequent infeftments therein, shall be null and void: With entry at the term of : And the said A. and B. respectively assign the writs: And they respectively assign the rents: And they respectively bind themselves to free and relieve the other and his foresaids of all feu-duties, minister's stipend and augmentations thereof, and heritors' assessments, now and in all time coming, and of all casualties and public burdens to the said term of entry: And the said A. and B. respectively grant warrandice: And they consent to the registration hereof for preservation.—In witness whereof.

SECTION XXV

SERVITUDES

"Servitudes properly constituted are available against singular successors in the servient tenement and available to singular successors in the dominant, though not followed by infeftment; and it has therefore been held essential that this burden should be limited to such uses or restraints as are well established and defined, leaving others as mere personal agreements." 1

Constitution

Positive Servitudes.—1. Grant, which may be in the titles of either property or in a separate deed, or even under certain circumstances implied,² but this must be very clear.³ In order to be effectual against singular successors it must either (1) appear in the titles or (2) be followed by use.

2. Prescription following on infeftment in the dominant tenement without other grant. The period is still forty years,⁴ and a bounding title is no obstacle to the acquisition of a servitude beyond the bounds.

Negative Servitudes are constituted only by express grant.⁵ The reason is that there can, from the nature of the right, be no possession. The grant or agreement may be in the titles of either tenement or in a separate deed. It is effectual against singular successors though not recorded. This is the real risk in connection with servitudes. A property is purchased; the titles show no servitude; the records show none; and, it being a negative servitude, there is no possession to put one on one's enquiry. Notwithstanding all this, it may turn out that the property is subject to a servitude of a serious nature, e.g. against building higher or against injuring the light or prospect of an adjoining property. Nor is it clear that the seller's warrandice would always cover this, even assuming it to be sufficient. Still, though it is true that there can be no possession, it is equally evident that "the peculiarity of

¹ Bell, *Pr.*, 979. For authorities generally, see same work, 991-9.

² Inglis v. Clark, 1901, 4 F., 288; Bell, Pr., 992.

³ King v. Barnetson, 1896, 24 R. 81.

^{4 1874} Act, s. 34.

⁵ Inglis v. Clark, supra; Metcalfe v. Purdon, 1902, 4 F. 507. But distinguish cases resting on the law of the tenement; see Metcalfe.

the situation" may be sufficiently marked to suggest the existence of some servitude right as the cause and explanation of it, and thus to put a purchaser on his guard.

Without express power a factor and commissioner is not entitled to constitute a servitude.¹

EXTINCTION

- 1. Renunciation, which may, and naturally will, be a separate deed, and need not be recorded in order to be effectual against all parties.
- 2. Prescription. This applies to both positive and negative But in the case of a positive servitude the fact that it is not used to the full extent does not necessarily even limit the right, though it will end in that if the right is constituted by prescription only without written title. And in the case of a negative servitude, the prescription of immunity may be partial only. As to the period of prescription required to extinguish a servitude, it would appear that that will depend on circumstances. If the positive prescription cannot be invoked, the period will be forty years. This will be so, e.g., in the case of a servitude right of road where the ground lies open, and the immunity is pleaded solely on the negative prescription by reason of non-exercise of the servitude right. But in the same case, if a singular successor be infeft for twenty years on a disposition of a building on the site of the servitude road, his title will be secure by virtue of the positive prescription, though the servient tenement may, in that particular case, be liable to provide a substituted road if the ground permit. And even without the positive prescription, the facts as to acquiescence may be such as to bar any challenge.2
 - 3. Confusion.
 4. Change of Circumstances.
- 4. Change of Circumstances.) suspension may arise when both tenements come into one ownership and are subsequently again separated, and also when a change of circumstances renders the servitude useless, e.g. in the case of a servitude of light, when the prospect is destroyed by another building against which no servitude exists.
- 5. Acquisition of the servient tenement under statutory powers. 4—From the Harrogate case it would appear that this is not limited to compulsory acquisition, but includes acquisition by agreement under statute when compulsory powers exist. The servitude owner may have a claim to compensation. Quære whether the servitudes are extinguished except in so far as they would conflict with the statutory purposes.

¹ Macgregor v. Balfour, 1899, 2 F. 345. ² Muirhead v. Glasgow Highland Socy., 1864, 2 M. 420. Further, as to effect on singular successor of author's acquiescence, see Macgregor v. Balfour, 1899, 2 F. 345.

<sup>Inglis v. Clark, supra.
Oban v. Callander, etc., Ry., 1892, 19 R.
912; Kirkby v. Harrogate School Board
[1896], 1 Ch. 437.</sup>

Leasehold.—It is not clear that agreements purporting to create servitudes between two leaseholders are binding upon singular successors, no matter how long may be the terms of the leases, and though they are registered.¹

As matters of practice the following may be noted:-

In Constituting a Servitude.—To embody it in a formal deed which shall identify both properties and shall be recorded in the register or registers applicable to them both. An extract should be put up with each set of titles. As to the terms of the deed it is to be remembered that the presumption is in favour of freedom. If two meanings can be placed on a clause imposing a servitude, that meaning is to be given effect to which is most favourable to the servient tenement. In that case there was a servitude against building within 14 feet of a gable: held that this prohibited only buildings within 14 feet directly ex adverso. It is also very important to note that many restrictions, which are at least commonly spoken of as servitudes, cannot, it now appears, be constituted except as burdens upon a concurrent infettment, and that mere recording in the sasine register may give no real right.

In Selling the Servient Tenement.—To see that the conditions of sale fairly disclose the servitude and that it is excepted in the disposition. The seller has been held entitled to have the servitude excepted from both the dispositive and the warrandice clauses, though, as the seller warrants only what he conveys, it is difficult to see any reason for excepting it from the warrandice if the property is conveyed expressly as burdened with the servitude. But the converse does not at all hold.

In Buying the Servient Tenement.—To examine the deed of constitution, if any, for if a positive servitude be constituted by grant it may go further than is manifested by the possession, which in that case is the badge, but not the measure, of the right. And though no servitude be disclosed, if the situation or circumstances suggest that one may exist, the titles of the supposed dominant tenement may be examined and enquiries may be made. Under certain circumstances it may be proper that the seller should warrant immunity.

In Buying the Dominant Tenement, if the servitude be relied on.—To obtain, if possible, an admission from the servient owner that the right subsists; in any case to see that the facts are not inconsistent with the alleged servitude; to take an express conveyance of the servitude; and if it is not formally on record, to take steps to have this done, e.g. by recording the deed of constitution, or failing that, by inserting full clauses in the disposition, identifying the servient

Metcalfe v. Purdon, supra.
 Campbell's Trs. v. Corporation of Glasgow, 1902, 4 F. 752.
 Glasgow, 1902, 4 F. 752.
 Edin, v. N. B. Ry., 1898, 20 R. 725.

tenement, and recording the deed in the appropriate register or registers. This applies with special force in the purchase of a part of a larger property, where, e.g., the part purchased draws light and air from the remaining part, or drains through it. There ought then to be inserted clauses creating servitudes accordingly. As to the facts being inconsistent, it has been held that a purchaser of the dominant tenement, in the knowledge of buildings on the servient in contravention of a negative servitude, was not entitled to have those particular buildings removed, but without prejudice to the servitude otherwise.¹

When Confusion may have Operated.—When the two tenements have come into one ownership, and are again to be separated by the alienation of either, care should be taken to make it quite clear in the title whether the servitude is, or is not, to revive.

In Discharging a servitude, to take a formal deed and to record it. The consent of tenants, etc., may be required.

Servitude of Road.—The first form below relates to a right of way, and the following points may be noted:—

- 1. The rule is that the owner of the servient tenement is entitled to substitute another road equally convenient.²
- 2. But this does not apply when the precise line of the road has been made matter of express contract between the parties. The servient owner has then no power to alter.³ But *Moyes'* case does not apply to any rural right of way or to any way which has become definite by usage instead of contract.
- 3. If, when there is infeftment in a definite route, the owner of the dominant tenement should consent to the substitution of a new line of road, it is not clear that he has the same real right in the new, as he had in the old, road.⁸
- 4. The ordinary rule, of course, is that the owner of the dominant tenement must maintain the road,⁴ and if by contract the burden be put upon the owner of the servient tenement who grants the servitude, it does not necessarily follow that a singular successor in the servient tenement will be liable. If a singular successor is to be reached, the burden of maintenance must be made a real burden on the servient tenement.⁵
- 5. Opinion, that in no case is it competent for a Dean of Guild to order deviation.³

DEED CONSTITUTING SERVITUDE RIGHT OF WAY

I, A., considering that I am proprietor of All and Whole the subjects in the town of Musselburgh and county of Edinburgh particularly described in the disposition granted by C. in my favour dated , and recorded in the

¹ Muirhead v. Glasgow Highland Society, 1864, 2 M. 420.

² Bell, Pr., 1010; Thomson's Trs. v. Finlay, 1898, 25 R. 407.

Moyes v. M^{*}Diarmid, 1900, 2 F. 918.
 Bell, Pr., 1010.

⁵ Allan v. MacLachlan, 1900, 2 F. 699.

of the general register of sasines for the county of Edinburgh on : That B. is proprietor of subjects on both the east and west of d property, and has requested me to allow him and his heirs and es a servitude right of way across the back ground attached to my y as a means of communication between his said two properties, which agreed to do on the terms and conditions underwritten: Therefore, in instantly paid to me by the said B., of ration of the sum of £ I hereby acknowledge the receipt, I hereby grant and dispone to the , and his heirs and assignees, being proprietors of the properties at belonging to the said B. on the east and west of my said property, but always as after mentioned, a servitude right of way over and across d subjects on a footpath at the place indicated on the plan annexed and as relative hereto: But declaring that these presents are granted with ider the following conditions, namely, (first) the said B. shall forthwith out doorways in the two boundary walls of my property at the points A and B on the said plan, and shall erect substantial gates therein, shall always be kept in proper condition and repair, and be from time e repaired at the sole expense of the said B. and his foresaids; (second) id B. shall form a neat gravelled footpath between the said gates, path shall be feet wide, and shall always be kept in good condition pair at the sole expense of the said B. and his foresaids; (third) the said shall always be kept locked when not in actual use; (fourth) the said of way has been granted with reference to the present state of the said ties belonging to the said B., and shall not be extended so as to apply substantially different condition of matters so as materially to increase rden on my property, and the said right shall at all times be exercised ably and so as to occasion as little inconvenience as may be to me and ccessors.—In witness whereof.

AUSES CREATING BUILDING RESTRICTIONS IN FAVOUR OF ADJOINING PROPRIETOR

is is exactly the kind of deed which is affected by Campbell's Trs. v. ration of Glasgow. The case supposed is a combination of proprietors vent the deterioration of the neighbourhood by the erection of an r class of buildings on adjoining vacant ground. They accordingly ibe and pay a price to purchase the restrictions. It is not enough to n agreement between those proprietors and the builder who is to be ted, in which deed the conditions are clearly set out, and which is ed in the sasine register. The objection is that the restrictions are not known servitudes, but must rest on the creation of a real burden, and an be done only as a qualification of a simultaneous infeftment. gly either (1) the conditions must be put into the builder's original nent on acquisition, or (2) he must be pro forma divested and then ested under the conditions, or (3) he must be divested in favour of a ee under the conditions. In the first of these cases the clauses in the er's disposition may run as under, and clauses to meet the other cases e easily adapted.

¹ 1902, 4 F. 752.

CLAUSES

[Before term of entry 1 and after referring to any subsisting conditions] And further the said subjects hereby disponed are so disponed always with and under the conditions, restrictions, servitudes, real burdens, and irritancy hereinafter specified: That is to say, Whereas the following persons are proprietors of houses on the west side of X terrace aforesaid as follows, viz.: A. is proprietor of the house No. of the said terrace, B. is proprietor of the house No. of the said terrace, C. is [and so on]:—And whereas the said A., B., and C., being desirous of having the restrictions hereinafter expressed constituted over the said subjects hereby disponed to the said D. [builder], have each contributed the sum of £ , making a total of £ which it has been arranged shall be paid to and accepted by the said D. as the price of the restrictions hereinafter imposed: And now seeing that the has been paid to the said D. by the said A., B., and C., the receipt of which he hereby acknowledges: Therefore in consideration thereof it is hereby agreed as follows, viz. (first), the only buildings to be erected on the said property fronting X terrace or within yards of it shall be selfcontained private dwelling-houses, which shall not be of greater height nor of less size than nor of inferior style to those at present on the west side of the said terrace. No house shall be sub-divided nor occupied by more than one family or for any business purpose or for any purpose whatever except only as an undivided private dwelling-house, and by one family only; (second) the building line on the east side of the said terrace shall be kept back so that the breadth of the street measuring from the east extremity of the pavement on the east to the west extremity of the pavement on the west shall be yards; (third) the foregoing conditions and restrictions are not less than hereby constituted and declared to be now and in all time coming servitudes on and over the said subjects hereinbefore disponed, and that in favour of the said A., B., and C. and their respective successors, proprietors for the time being of the houses on the west side of the said terrace hereinbefore specified as belonging to them respectively, and the same shall be enforceable by all or any of them or their foresaids; and (lastly), without prejudice to the immediately preceding clause, it is hereby agreed and declared that the said conditions, restrictions, servitudes, and real burdens, and the irritancy hereby declared shall be inserted or validly referred to in all future conveyances of or deeds relating to the said subjects hereinbefore disponed or any part thereof under pain of nullity.—In witness whereof.

CLAUSES IN DISPOSITION CREATING SERVITUDE OF LIGHT

1. By Constitution in favour of Disponee

[After dispositive clause and before term of entry, say]:

And whereas it is a condition of the said sale that the following servitude should be constituted in favour of the said [disponee] and his heirs and successors in the said subjects hereby disponed: Therefore I agree that neither I

¹ See p. 492.

nor my heirs or successors shall erect any building or structure of any kind on the west side 1 of the said house hereby disponed within yards thereof.

Alternative

Therefore, as regards the window at present existing in the west wall of the house hereby disponed, I agree that neither I nor my heirs or successors shall erect any building or structure of any kind which shall come within a radius ¹ of yards of the centre of the said window, which agreement and restriction is hereby declared to be a servitude in favour of the subjects hereby disponed over the ground affected thereby as aforesaid.

2. By RESERVATION IN FAVOUR OF DISPONER

And whereas it is a condition of the said sale that the following servitude should be constituted in favour of me and my heirs and successors over the subjects hereby disponed: Therefore it is hereby provided, and the said [disponee] by acceptance hereof [or signature hereto] agrees, that no building or structure of any kind shall be erected by him or his heirs or successors on the subjects hereby disponed which shall come within yards of the house retained by me, being No. street, which agreement and restriction is hereby declared to be a servitude over the subjects hereby disponed in favour of the said house retained by me as aforesaid.

CLAUSES IN DISPOSITIONS WITH REFERENCE TO CASES OF COMBINED OWNERSHIP WHERE CONFUSIO MAY HAVE OPERATED

1. SEPARATION BY ALIENATION OF DOMINANT TENEMENT

(1) Where the Servitude is to revive

[Before term of entry.] And whereas in the titles of the said subjects hereby disponed a servitude of the nature after mentioned is constituted in favour of the said subjects over certain other subjects which now also belong to me, namely, the subjects in the county of particularly described in the disposition granted by X. in my favour, dated , and recorded , and the contract is that the said servitude shall now revive or be re-constituted: Therefore I hereby revive or re-constitute in favour of the said [disponee] and his heirs and successors, proprietors of the subjects hereby disponed, the following servitude over the said other subjects belonging to me, namely [specify the servitude distinctly].

(2) Where the Servitude is not to revive

[Before term of entry] And, in order to prevent any question, it is hereby declared, and the said [disponee] by acceptance hereof agrees, that the subjects hereby disponed do and shall possess or enjoy no servitude of any kind over the adjoining or neighbouring subjects belonging to me, being those particularly described in the disposition granted by X. in my favour, dated , and recorded , anything in the prior titles or other documents, or any past or prior use or prescription, to the contrary notwithstanding.

¹ As to the different effect of these two clauses, see Clark's case, p. 409.

2. SEPARATION BY ALIENATION OF THE SERVIENT TENEMENT

(1) Where the servitude is to revive

[Before term of entry] And whereas I am proprietor of other subjects adjoining or neighbouring the subjects hereby disponed, said other subjects being those particularly described in the disposition granted by X. in my favour, dated , and recorded : And whereas, before the two subjects were united in my person, the said other subjects enjoyed a servitude of the nature after mentioned over the subjects hereby disponed, and the contract is that such servitude shall now revive or be reconstituted: Therefore it is hereby provided, and the said [disponee] by acceptance hereof [or subscription hereto] agrees, that the subjects hereby disponed are and shall be affected with the following servitude in favour of the said other subjects belonging to me, namely, a servitude to the effect [specify it].

2. Where the Servitude is not to revive

[Before term of entry] And whereas I am proprietor of other subjects adjoining or neighbouring the subjects hereby disponed, said other subjects being those [as above], it is hereby, in order to prevent any question, provided and declared that the subjects hereby disponed are and shall be free from any servitude of any kind in favour of the said other subjects belonging to me, anything in the prior titles or other documents, or prior or past use or prescription, to the contrary notwithstanding.

DISCHARGE OF SERVITUDE

I, A., considering that I am proprietor of the lands of X., in the county of , as particularly described in the disposition granted by C. in my favour, dated and recorded in the division of the general register of sasines for the said county on : That the said lands enjoy a servitude of [name it, or certain servitudes] over the lands of Y., in the said county, belonging to B., as particularly described in the disposition granted by D. in his favour, dated , and recorded in the said division of the general register of : That in consideration of [specify it] I have agreed to sasines on discharge said servitude [or servitudes], and that I have instantly received the [if any pecuniary consideration] from the said B., of said sum of £ which I acknowledge the receipt: Therefore I renounce and discharge and declare the said lands of Y. to be redeemed and disburdened of the servitude of [name it, or all servitudes] in favour of the said lands of X., whether constituted under [specify any particular deed] or under any other deed or deeds, or by prescription, or otherwise howsoever: And I grant warrandice.—In witness whereof.

SECTION XXVI

HERITABLE SECURITIES

Contract for Loan.—In loan, as much as in any other contract, once there is an agreement made between the parties, mutual rights and obligations arise. It is therefore necessary on both sides to make at the outset all stipulations which are intended, defining the terms of the arrangement, or altering the ordinary rights of parties. Amongst these matters are (1) the representations on which the lender proceeds, i.e. ordinarily the accuracy of the proposal; (2) a valuation, by whom, at whose expense, and showing what margin, and in connection with this and as a check upon it, it is well to know the price, or last price, before concluding the bargain for the loan; (3) period of endurance, with or without permission to shorten this on one or other or both sides in special events, e.g. death or sale; (4) rate of interest to be paid, and rate to be inserted in bond; (5) fire insurance; (6) delivery of titles; (7) reserved power to feu and terms thereof.

At the same time, an agreement to give or to take a loan will not be specifically enforced; the remedy is damages.¹

In all matters of security the two cardinal points are (1) value, and (2) title.

Value.—The element of value is obviously beyond the scope of the present work. The recognised margin in ordinary circumstances is one-third; that is to say, that the loan shall not exceed two-thirds of the value. That is the rule now prescribed by statute in the case of trustees under the Trust Act, 1891 (s. 4). The Act requires the trustees to proceed upon the report of a skilled valuator obtained on their own instructions, and not on the instructions of the borrower. Further, not only capital value, but also rental, must be looked to: it has even been suggested that it is improper to lend over property in the possession of the borrower, and therefore not yielding rent.² But if that rule were acted on, many excellent investments would be lost; and it is to be remembered that, since then, simpler machinery has been supplied for removing the proprietor from possession in case of default³:

South African Territories Ltd. v. Wallington, 1898, A. C. 309.
 Maclean v. Soady's Trs., 1888, 15 R. 966.
 1894 Act, s. 5.

and besides, in the case of land, the proprietor's natural possession may be a positive advantage in the way of preventing tenants' claims.

As bearing on the duty of a law agent in connection with the selection of an investment, it goes without saying that within that sphere much more is commonly left to him than in the case of purchase. For in the latter case, unless in purely investment purchases, the client has wishes and desires of his own; indeed, the property is his selection, and he probably has his own idea of what its value is, or is to him; and really only the title is left to the agent. But in ordinary loans there is no room for this personal element: value and title are both on much the same footing, though of course it is not suggested that the agent's responsibilities are the same as regards both.

The agent should not submit for his client's consideration any loan proposal which in his opinion it would be injudicious to accept. This applies to ordinary clients only; and of course only in the absence of distinct advice not to lend.

In the ordinary case the agent will require that there be produced to him evidence of the representations embodied in the proposal.

What is Heritable?—This may be of very great importance in the case of securities over manufacturing subjects, where the real value probably lies in the machinery, and in all cases it has a certain importance as regards fittings. In all these cases the lender must be made to understand that the machinery and other effects cannot be relied on. But manufacturing machinery, even though somewhat slightly attached, may be held heritable in a question with the bondholder.¹ Property of this kind, if sold for break-up value, usually realises merely a fraction of its cost.

Fittings.—It is suggested that the bond should contain a disposition of fittings and fixtures, present and future. This, of course, cannot be relied upon as giving any benefit. Thus, if the debtor be sequestrated before the creditor enters into possession, it is clear that the trustee will be entitled to claim the fittings as against the heritable creditor. But if the order of events be reversed, and if the creditor enter into possession before sequestration, it would appear that the clause in the bond, followed by the creditor's possession, would entitle him to prevail over the trustee, which it is thought even in this case the mere prior possession without the clause would not do.² And even apart from the debtor's sequestration and creditor's possession, a clause of fittings will, it is thought, enable the creditor under his power of sale to sell both property and fittings.

Pro indiviso Shares.—Lenders.—These are obviously undesirable as securities, but sometimes they must be taken. The outstanding

Howie's Trs. v. M'Lay, 1902, 5 F. 214.
Hobson v. Garrings [1897], 1 Ch. 182, quoted in Howie's Trs., supra.

objections are the divided control and the difficulty and expense of realization. It does not appear that a mortgagee of a pro indiviso share could bring an action of division and sale, so that he would require to realize the share under his bond, in which case the other pro indiviso owner would have him at a disadvantage, and would probably be able to buy the half share at less than half of the true sale value of the whole property. But over and above these general questions, it appears that the purchaser or mortgagee of a pro indiviso share may find himself met by preferable claims at the instance of the other joint owner in respect of outlay upon the property, whether for its erection or maintenance or for necessary outgoings such as feu-duty. In Buchan's case 1 the title had been taken to A. and B. as trustees for themselves, "each to the extent of one half pro indiviso"; held that A.'s claim for excess contributions to the building fund was preferable over B.'s share as against third parties who had lent money to B. on a disposition of his share. The trust may have made a difference, but this is not clear, for even in the ordinary case each is infeft in every part of the property, and it may be that, in the words of the Lord Ordinary in Buchan's case, he is "not bound to concur in any deed affecting the subjects till reimbursed for his outlay on the subjects." And especially as to feu-duty and interest of debt the over-payer would probably be able to obtain an assignation from the creditor which would put his preference past all question. These considerations suggest a good deal of caution in dealing with pro indiviso shares.

From the borrowers' point of view, when their shares are unequal, it is especially a case for having a simple agreement in writing between them stating the proportions in which they are to bear the debt *inter se*. But of course this must not be in the bond, nor must the creditor have anything to do with it.

Prior Securities.—In connection with these the following matters will require attention: (1) that the list of them in the proposal is correct; (2) their contents over and above the principal, e.g. life premiums, which may much increase the prior claims; (3) particularly the rate of interest in the prior securities: this will no doubt be five per cent,, and it will of course not be safe, in judging of sufficiency of rental, to take the rates actually paid as the maximum payable; (4) that there are no arrears of interest or otherwise under the prior securities; a failure to inform the client of the existence of arrears of this kind involves professional liability,2 (5) where the prior securities are catholic,—extending, that is, over some other property also,—it will not do to assume that a proportion only of the prior debt will fall on each property; it must be assumed that the whole of it may fall on the property which forms the subject of the postponed loan.

¹ Buchan v. Livingstons, 1900, 8 S. L. T.

² Campbell v. Clason, 1838, 1 D. 270, 2 D. 1113, 5 D. 1081.

Tenants' Claims.—These may be (1) under the lease, and (2) under the Agricultural Holdings Acts.

Feu-duty, Ground-annuals, Annuities.—Regarding these, three points may be kept in view, namely, (1) to see that the amounts are as represented, (2) to see that there are no arrears, and (3) to see that they are kept down during the currency of the loan. In the case of family annuities it sometimes happens that these are not exacted in whole or in part, but neither are they discharged. It is not fair either that the annuitant should be asked to postpone the annuity, nor, on the other hand, that heaped-up arrears should be claimed against the postponed security-holder. A via media is suggested on p. 589.

Casualties.—Apart from any arrears, which will usually be paid up before settlement, the value is obviously different according to the amount of the *future* claims for casualties, *e.g.* whether a year's feuduty, or a year's rent, or anything between these extremes.

Fire Insurance.—The lender should stipulate that the property and rent shall be insured to an amount to his satisfaction, and in his name. In certain cases the premium may be so high as to form an important element in the consideration of value. Then, when there are separate buildings in the one security, the apportionment of the insurance may require a good deal of consideration. Of course this does not arise if everything is insured to its full value, but the creditor may be restricted to an insurance to the amount of the loan. This is a matter of special importance in those cases to which the Insurance Companies apply the doctrine of average, e.g. theatres, mills, etc. In these cases nothing short of the insurance of all buildings in the lender's name for their full value, though far exceeding the amount of the loan, can be considered satisfactory.

Clause in Bond.—By sec. 119 of the 1868 Act the assignation of rents includes "a power to the creditor and his foresaids to insure all buildings against loss by fire." This clearly means at the cost of the debtor; so that it follows that, without any special clause as to insurance in the bond, any creditor whose security contains an assignation of rents is entitled to insure buildings, and to sue the debtor for repayment of the premiums. Of course it goes without saying that the amount of the insurance, and of the premium according to the risk, would require to be reasonable. But as matter of ordinary business an arrangement would be made with the debtor on the subject.

It will be observed, however, that the above gives no security for the premiums. No doubt it is otherwise after the creditor has entered into possession (s. 122). But in order to give heritable security for premiums when the creditor is not in possession, it is necessary (a) to insert an express obligation in the bond, (b) in that obligation to specify a precise sum, and (c) to let the terms of the

dispositive clause be wide enough to cover this as well as the other obligations.

Procedure after Fire.—When a fire takes place the form of payment of the insurance money will require care. If the property is re-instated by the company under their option to that effect, no question can arise. But if the company pay the money, and if the creditor grants a receipt for it, a question of a serious nature is apt to arise. Of course, if the creditor finally applies the money so received in payment of his loan and grants a discharge of his security, and is done with it, there can be no question. But if in some form or another the money is applied by the creditor towards rebuilding, confusion may arise in competition with a postponed bondholder. The first creditor having received the money from the company, it may be contended that his debt is paid (and therefore, of course, that his security is gone), and that the application of the money towards rebuilding is of the nature of a new loan by him, not covered by his security at all. It is not said that this would be the result, but no question should be allowed to arise. All question may be prevented in any of the following ways: (1) the creditor taking his money and being done with the investment; (2) the company paying to no one, but themselves re-instating; (3) the company, with consent of the creditor, paying to the proprietor only, or to his agent, or some trustee for him. under an arrangement, to the creditor's satisfaction, that the money shall be applied in rebuilding, but the creditor receiving no money from the company, and acknowledging none.

Title Deeds.—The lender ought to stipulate for the custody of these, at least when the property is other than a proper landed estate. If they are not handed over, there ought to be a discharge of lien by the borrower's agent as regards both past and future. Note that when the same agent acts for borrower and lender at the granting of the loan, his lien is held as waived as against the lender without anything being expressed to that effect, and that this does not displace the lien as against third parties, even though the bond contain a clause of assignation and delivery of writs.¹

Reserved Power to Feu.—It is often extremely convenient to insert in the bond a reserved power to the debtor to grant feus of the property on appropriate specified terms. So long as the *minimum* feu-duty is satisfactorily arranged this in the ordinary case is as much to the interest of the creditor as of the debtor. But it will be kept in view that a creditor holding a security over a right of superiority is not entitled to recover the feu-duties from the vassals if the superior's (the debtor's) counter obligations to the vassals under their feu-rights are not fulfilled, e.g. roads, drains, etc.² It will scarcely

¹ Drummond v. Muirhead and Guthrie ² Arnott's Trs. v. Forbes, 1881, 9 R. Smith, 1900, 2 F. 585.

be practicable to forbid all obligations on the superior in the feurights.

The matters requiring attention in the framing of the clauses, whether occurring in the bond itself or in a separate deed of consent, are: (1) the minimum rate of feu-duty, and duplicand, if any; (2) power of allocation (see p. 244 et seq.); (3) any building regulations; (4) ratio of rental to feu-duty: the general rule is that the rental ought in fact to be at least six times the feu-duty; but for the creditor's purpose a less ratio of rental will be sufficient.

If the property has been sold by the original debtor, and the power to feu is given by a subsequent deed of consent in favour of the new proprietor without the consent of the old proprietor (and original debtor), the result will be to discharge the obligation of the original debtor.¹

Power to constitute Ground-annuals.—It is recommended that the creditor should not consent to the debtor having power to dispose of the property under reservation of ground-annuals, which are thus intended to form part of the creditor's security. The difference in this respect between feus and ground-annuals is clear. When the debtor feus his infeftment remains the same as ever: it is the vassal's estate that is new. Therefore it is clear that the creditor's infeftment also remains in law unaffected, and covers the superiority right. But when the debtor sells under a ground-annual he transmits his estate, and what he keeps (or obtains) is something which did not exist before. It may be that under the reservation of the ground-annual the creditor has the benefit of it; but how could he sell it, and who would take a title from him? No doubt clauses might be devised to make the thing better, but they are bound to be awkward and not satisfactory.

Bonds under Powers.—Securities are often constituted under powers. The two most common cases are: (1) when someone not holding the plenum dominium is authorised to charge the fee to a certain amount; (2) when under a bond already granted there is a reserved power to constitute prior or pari passu debt to a certain amount. Questions may arise as to (a) the extent of the power, and (b) its exercise. As to the former of these the chief point is whether, when the power has once been exercised, it is exhausted, or whether, when these securities have been paid off, the power survives to enable the proprietor to reconstitute debt (or preferable or pari passu debt, as the case may be) to the extent specified. This question will depend on the terms of the power, and may be obviated by keeping up the security. As to the exercise of the power, it is of course recommended that the bond which is intended to have the benefit of it should refer to it, and should expressly bear to exercise it (p. 432).

¹ M'Kirdy v. Webster's Trs., 1895, 22 R. 340.

Clauses of Ranking, etc.

1. PARI PASSU

Debts will rank pari passu under the following circumstances:

- 1. Express clauses in the bonds referring to each other, or even in the first recorded bond only, referring to the other.
- 2. Partial assignations of one bond will rank pari passu inter se without reference to their dates, or the dates of recording, and without the necessity of any clauses in the deeds, so long, of course, as they contain no clauses to the contrary.
- 3. Two or more bonds received at the register by the same post, provided they contain no clauses to the contrary.
- 4. Under an omnibus bond—that is, one deed containing really two or more bonds in favour of different creditors—there is a pari passu ranking without any clause to that effect, provided the deed is recorded with a warrant or warrants on behalf of both or all the creditors at one time. Difficulty might arise if (1) the deed had a warrant on behalf of one only of two creditors, or (2) one of the creditors were to expede a notarial instrument on his own behalf only, and record it before the bond was recorded. But even then it is not at all clear that the creditor could maintain a preference: it would rather appear that he could not. The reason is that it would probably be held that under the common deed there was an implied contract among the creditors for a pari passu ranking. Even when the bonds are separate the facts may be such as to give room for this contention.

One special case may be referred to: Suppose A. and B. obtain bonds each for £1000, and having mutual clauses of pari passu ranking, intended to form the first charge on the property. Their loans are settled on 15th May. A. records his bond on the 16th. B. delays recording his till the 18th. On the 17th C., a third creditor, records a bond for £1000. The property sells for £2500. How do A., B., and C. rank? For A. and B. are expressly to rank pari passu, yet C. is postponed to A., and prior to B. It is clear that A. is not to be prejudiced by B.'s delay, and the ranking would simply be:

£1000					A.
1000					C.
500		•	•		В.
£2500	•	•	Price		

A little more complication would arise if the price were only £1500; for while A. is not to be prejudiced by B.'s delay, neither is he to be benefited by it; and accordingly, while he would, as against C., draw

£1000, he would require to hand over to B. £250, being the difference between £1000 and the sum of £750, which only he would have received if A. and B. only had been in the field; so that the final ranking would be:

A.				£750
C.				500
B.	•			250
	Price			£1500

2. PREFERRED

When two or more bonds are being granted at one time the practice is to express the ranking not by clauses of preference, but by clauses of postponement. Clauses of preferred ranking are met with (1) when a bond is to have priority over an already recorded bond in virtue of a power to that effect in the first recorded bond, and (2) when a partial assignation is to have priority over the balance remaining due to the assignor. As to the former, see p. 420. As to the latter, it goes without saying that the effect of the clause is limited to questions between the different holders of the particular bond inter se; and further, that there may in this way be a whole series of rankings and sub-rankings within one bond.

3. POSTPONED

Debts may rank after one another either—

- 1. According to the order of recording, assuming that they contain no clauses to the contrary, and with the exception of deeds received by the same post (p. 421).
 - 2. By virtue of express clauses in the deeds.

As between these two methods, it may seem that when a series of bonds is being granted according to an agreed upon scale of preference, and especially if the same agent is acting for all the creditors, it is unnecessary to insert any clauses of postponed ranking, as the agent can easily see that the deeds are recorded in their proper order so as to keep the ranking right. And no doubt that is so; but at the same time the clauses should not be omitted, for then each bond shews on the face of it what prior debt there is, and, besides, the matter might be forgotten when the deeds were being recorded, and a serious mistake thus be made. It is, however, recommended that even with the clauses of ranking the proper order of recording should be observed. This may cover an error in the expression of the ranking clauses, besides having the advantage of shewing the true position on the search at a glance. It remains to add that of course even in these cases clauses of pari

passu ranking are essential if any of the series of bonds are to rank pari passu.

As to the form of a clause of postponed ranking, it will be kept in view that it is quite different in principle from an exception from the warrandice clause, and that an exception from that clause is not sufficient to give a preference to the excepted bonds.¹

Warrandice.—The ordinary form of clause, "and I (or we) grant warrandice" in a heritable security, imports "absolute warrandice as regards the lands and the title deeds thereof, and warrandice from fact and deed as regards the rents." 2 In the case of a single granter this clause obviously adds nothing to the creditor's security; and the same is the case wherever the granters, if two or more, are jointly and severally liable for the debt and all consequents. In these cases the only use of the clause is that it affords a convenient place at which to introduce a statement of the prior securities if any. which danger may lurk in the warrandice clause are those in which some one concurs in the bond to a limited effect or grants or concurs in it in a fiduciary capacity. Thus there may be a guarantor for interest, or the disposition in security may be concurred in by an annuitant, or it might even be that the same point might arise if the consenter were a prior creditor who concurred to postpone his security. If in these cases the clause runs, "And we grant warrandice," it appears to result that the guarantor or consenter incurs an obligation of absolute warrandice. The chief point is with reference to prior securities not excepted in the warrandice clause. The obligant of warrandice will be bound to indemnify the new creditor against these securities notwithstanding that the latter knew of their existence before he accepted his own security.3 In these cases, therefore, the warrandice ought either to be granted by the principal granter only, or if any warrandice be given by the other granter, it ought to be limited to his own facts and deeds, and expressly under exception of the prior securities. It will be observed that it may not be sufficient to limit it to fact and deed without the exception, for the same party may have consented to some of the earlier securities which will probably bring him in as liable even under the limited warrandice. This was the nature of Horsbrugh's case, which brings us to consider warrandice by trustees and others in a fiduciary relation. A trustee granted a bond binding himself "as trustee," but the warrandice clause ran, "And I grant warrandice." The facts were that prior securities existed; the trustee had concurred in these; apparently they could not have been granted without his concurrence; they were known to the new creditor before he lent, but they were not excepted from the warrandice

Gibson v. Trotter, 1710, Mor. 5695;
 Horsbrugh's Trs. v. Welch, 1886, 14 R.
 Leslis v. M'Indoe's Trs., 1824, 3 S. 49.
 1868 Act, s. 119.



or referred to in the bond in any way. Without deciding whether the trustee was liable in absolute warrandice, it was held that he was clearly liable in warrandice from fact and deed, that the prior securities were his facts and deeds in that sense, and that accordingly he was personally liable. Here again, therefore, the warrandice ought to be limited to fact and deed, and qualified by an exception of the prior charges.

Burghs.—The council of a burgh may not contract debt

unless a resolution of council or of a committee duly authorised to pass such resolution shall have been previously made in that behalf or unless the same has been authorised by some person authorised by standing order of the council to do so.¹

As to execution of the bond, see p. 6.

Tutors.—A bond by a tutor over his pupil's heritage without the authority of the Court is null²; and even as to cases in which the Court's authority is obtained, see p. 292.

Minors.—Even when a minor grants a heritable security with consent of his curators he may be found entitled to challenge it within the quadriennium utile in so far as he can shew that the money was not applied in rem versum.³ It has been held in the Outer House ⁴ that the Infants Relief Act, 1874,⁵ does not apply to Scotland.

Married Women. — (1) Granters. — It is quite settled that a married woman is competent, with her husband's consent, to dispone her property in security of his obligation. The deed ought to be ratified. If the property is held by trustees for the wife's protection, she being entitled to, say, the liferent or an annuity, it has, in one case,6 been decided that she is competent to concur in a security to the above extent, even though the property is held under a marriage contract, so long as the liferent or annuity is not declared alimentary, and a fortiori if there is no trust.7 In this latter case it would appear that the rule should hold even in presence of an alimentary clause,8 but it cannot be said that this is so clear in the case of a matrimonial provision for a married woman as to warrant a conveyancer in accepting the title. Nor, notwithstanding Halkett, is it to be taken as clear that the provision is assignable if created or reserved by a proper matrimonial settlement protected by a trust, even though there should be no alimentary clause. Thus in Christie the Lord Ordinary (Kyllachy) said:

But then it is said that in the case of Menzies v. Murray, of following the

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<sup>1</sup> Town Councils Act, 1900, s. 99.
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² Scott's Trs. v. S., 1887, 14 R. 1043.

³ Harkness v. Graham, 1833, 11 S. 760.

⁴ Whitehead v. Philipps, etc., 1903, 10 S. L. T. No. 373.

^{5 87 &}amp; 38 Vict. c. 62.

⁶ Reliance Mutual Asscs. v. Halkett's Factor, 1891, 18 R. 615.

⁷ Standard Prop. Invest. Co. v. Conce, 1877, 4 R. 695.

⁸ Murray v. Macfarlane's Trs., 1895, 22 R. 927.

^{9 1875, 2} R. 507.

case of Torry Anderson 1 and that class of cases, it has been decided that where a marriage contract provision is protected by a trust—the provision being to be held by trustees and administered for the widow's behoof—that is held to imply as part of the contract an exclusion of the widow's right to alienate during the marriage; and, of course, that is a doctrine about which there is no dispute as applicable to the case of a marriage contract provision duly protected by a trust.²

It is not easy to reconcile this with the decision in *Halkett*, but it is with deference submitted that the ground of the latter judgment is at least practically unsound. What was said was that *Menzies* prevented the wife from renouncing the benefit of the trust provision as by bringing the trust to an end, but that this was not the effect of a security, which on the contrary proceeded on a recognition and execution of the trust. It can hardly be denied that the distinction is formal. The annual charges of the loan may exhaust the income; even if not, the income is no doubt assigned in security of principal also; the deed will contain a power of sale; and finally how will this distinction between defeating and executing the trust apply to an out and out sale of the wife's interest? For these reasons, and in view of Lord Kyllachy's dictum, it is thought that the matter is by no means free of doubt.

But on the other side the following points may be kept in view:

- 1. It is necessary to see whether the trust or the alimentary clause applies to the subject which is being dealt with, e.g. the case ² of an annuity without either trust or alimentary clause, but secured by a conveyance of property to trustees in the same instrument. Held that an assignation of the annuity and security therefor was valid, in which view Lord Kyllachy concurred notwithstanding his dictum supra.
- 2. The protection is limited to the marriage. That is to say that if it be the case of the husband's estate out of which the wife has or is to take a provision through a trust but without an alimentary clause, the wife may, after her husband's death, deal with the provision in any way she thinks right. If again the estate be that of the wife herself, even the concurrence of a trust and an alimentary clause will not protect the wife after the dissolution of the marriage. But in both cases so far as the wife is, stante matrimonio, under disability, it is not to be understood that a deed granted by her during the marriage will become effectual on its dissolution.
- 3. At least so far as regards the wife's estate what has been said has reference to proper matrimonial trust settlements,

for if she executes a settlement without making her husband a party to it, and makes it as secure as language and legal machinery can effect, by constituting a trust and imposing the usual conditions in regard to the benefits

¹ Anderson v. Buchanan, 1887, 15 S. ² Christic's Factor v. Hardis, 1899, 1 F. 1078.

to be taken out of it, nevertheless, as was found in the recent case of Watt,¹ such a trust can be recalled after marriage, and affords no protection to the granter against her own acts or the influence of her husband.²

4. See Lord M'Laren in *Halkett* to the effect that a condition against assignation may not bar arrestment, and *vice versa*.

Assuming that the husband's obligation and consent cannot be obtained, there are difficulties arising from (a) the wife's disability to grant personal obligations, and (b) her disability to alienate her property without her husband's consent. Transactions of this kind have sometimes to be carried through. In dealing with these, reference may be made to sec. 5 of the Married Women's Property Act, 1881, under which, in case of desertion, or where the spouses are by consent living apart, the husband's consent may be judicially dispensed with as regards "any deed relating to her estate." But it is necessary to keep in view that this dispensation, even when obtained, will make the deed no better than if the husband had consented. Therefore it will not enable the wife to grant any obligation which she could not grant without it. And obviously it will not have the effect of introducing any obligation by the husband. These limitations of effect have an important bearing on any bonds and dispositions in security proposed to be granted by a married woman alone.

Personal Obligation.—The general rule is that personal obligations by a married woman are null, and that while her husband's consent will validate deeds of conveyance of her property, his consent will not per se have that effect upon her attempted obligations.³

It is often laid down that to bind a married woman the obligation must be in rem versum. It would appear that this may be to require too much. "The obligations of a married woman with reference to her separate estate are binding on her. Her position is practically the same as that of an unmarried woman Whether it turns out in the result to be a beneficial transaction cannot be the test." But the purpose and intention must be to benefit herself or her estate only: a cautionary obligation (whether in form or effect) will probably not bind her.

Disposition in security.—The married woman may dispone her estate in security without her husband's consent in any of the cases specified on p. 294. Even though the husband is not a consenter the deed ought to be ratified.

It is from time to time necessary to carry through loan transactions with married women without their husbands' consent. The

¹ Watt v. Watson and ors., 1897, 24 R.

² Lord M'Laren in Christie.

² Lord Moncreiff in Galbraith v. Provident Bank Ltd., 1900, 2 F. 1148.

⁴ Henderson v. Dawson, 1895, 22 R. 895, per Lord Kinnear.

⁶ See Biggart v. City of Glasgow Bank, 1879, 6 R. 470.

following are suggestions as to the ways in which these transactions may be carried through:—

- 1. If the loan is to be applied towards the price of the property which is at the same time being purchased by the wife (the fact being recorded ex facie of both disposition and bond), it is thought to be clear that her obligation for the money would be sustained as a good foundation for a valid disposition in security by her; but to make this latter unobjectionable there would be required a judicial dispensation as before referred to, unless the funds forming the balance of the price were held by her free from the jus mariti and right of administration (of which proper evidence would be required and preserved), and the exclusion would of course be inserted in the wife's title.
- 2. In the same case (purchase and loan combined), the seller might dispone to the married woman under a real burden of the loan and interest in favour of the lender. This will secure the lender substantially, under the ordinary disabilities applicable to holders of mere real burdens (p. 497).
- 3. Again, in the same case, the seller may dispone direct to the lender ex facie absolutely, with a back-letter between borrower (purchaser) and lender (disponee). As to the difference in effect between this course and the ordinary case of an ex facie absolute disposition granted by the borrower who is himself infeft, see Lord Kinnear in Ritchie.1
- 4. If the loan is not to be applied to the price, the suggestion is an ex facie absolute disposition by the married woman to the lender judicially sanctioned, unless the jus mariti and right of administration are excluded; as to which, see supra. Of course there may be cases in which the application of the money in rem versum of the wife will support a personal obligation; if so, it is recommended that it be taken as a separate document, coupled with the ex facie absolute disposition.

Married Women.—(2) Grantees.—When the wife is the creditor in the bond the debtor may be asked to allow the insertion of a clause declaring the exclusion of the husband's powers. It is quite common to allow this to pass, but it is thought that the debtor would be entitled to object unless the husband is to sign also. It is clear that this declaration by the debtor will not affect the real rights of the matter: its only effect would apparently be to compel him to accept a discharge by the wife without her husband's consent.

Trustees.—(1) Granters.—Trustees have no power to borrow unless it is expressly conferred (1) under the will or deed of trust, (2) by the Court,² or (3) by deed of consent granted by all the beneficiaries in life at the time.² It is true that they may also have power implied if it is necessary for the execution of the trust, e.g. to pay debts; but in an ordinary transaction the lender should not take the risk of being required to prove the case of necessity afterwards, but should require

¹ Ritchie v. Scott, 1899, 1 F. 728.

² Trusts Act, 1867, s. 3.

the trustees to prove it beforehand to the Court, and obtain judicial power to borrow on the security of the estate. A general power to borrow will in ordinary circumstances imply a power to dispone the estate in security, but in framing these powers this should be made quite clear. In preparing bonds by trustees the main point is, to make it clear whether the trustees are or are not to incur personal Reliance against liability ought not to be placed on the words "as trustees," without the addition of restrictive words expressly negativing personal liability. Even then, of course, they may incur liability, but it will not be by reason of the bond, but on account of their subsequent actings and intromissions. It is clear that if they grant a bond and then go and part with the trust estate, they will incur liability to the creditor for so doing, and that although by so making over the estate they have in no way injured the creditor's security over the property specially disponed to him in security. This doctrine has been carried so far as to subject trustees to liability for paying trust income to the beneficiaries when the interest on the debt was duly paid, and when the creditor was making no claim to have the surplus income applied or accumulated towards the principal of his debt.1 This judgment was pronounced in the face of a vigorous protest by Lord M'Laren. It was the case of a security constituted by the testator, but if it had been granted by the trustees themselves it would have been a fortiori. The practical results are clear, namely, (1) that so long as any debt of the testator or of the trust, whether secured or not, remains outstanding, the trustees should be advised that, if they make any payment at all to any beneficiary, whether of capital or only of income, without the express consent of the creditor, they do so at their own risk, and (2) when the trust comes to be wound up the trustees must not leave even secured debts without obtaining the consent of the creditor, the proper form for which in that case will be a discharge of the personal obligation of the testator and his trustees, estate, and representatives other than the successor in the particular heritage, who will undertake liability either in the disposition in his favour or by a separate bond of corroboration. And even if the subject of the security be the only trust asset, or the only one which it is proposed to make over, this matter should be attended to, for the creditor might be able to aver afterwards that the disponee had prejudiced his security (e.g. by demolition, total or partial, or alterations), and that he had a claim in consequence against the trustees.2 All the trustees (and not merely a quorum) ought to sign any security-deed which the trust may grant.³ As to warrandice, see p. 423.

¹ Her. Sec. Inv. Assoc. v. Miller, 1898, 20 R. 675.

² As bearing on these points generally,

see Mags. of St Andrews v. Forbes, 1898, 31 S. L. R. 225, and cases there cited.

Scott v. Reid, 1822, 1 S. 332.

Substituted Bonds. - The foregoing relates to the constitution of really, and not merely formally, new securities. But it may be that the securities intended to be granted are really in substitution for prior existing securities granted by the testator or even it may be by the trustees under authority. In these cases the natural course is to arrange the matter by assignation instead of discharge and reconstitution. If, however, for any reason that should be inconvenient. then it is competent to obtain authority under s. 3 of the 1867 Act, and this should be required, for their protection, both by the trustees and the new lender.1

Fiduciary Fiars may obtain power to borrow and charge the amount required to defray the cost of necessary extraordinary repairs, plus the expenses of the proceedings and of the security.2

Trustees.—(2) Grantees, see p. 415.—The chief other point is one of form, namely, that the bond should be to the trustees "and the survivors and survivor of them, and their or his assignees"; and the reference to survivors and survivor should appear in (a) the obligation, (b) the disposition in security, and (c) the warrant of registration.8 A destination to "successors in office" may be inserted or omitted at pleasure, its only advantage seeming to be in connection with completion of title. Though the trustees are appointed under a series of deeds of assumption, it is quite out of place to refer to these. However appointed, they are the trustees acting under the will, or marriage contract, or otherwise, and that is sufficient and much shorter.

Companies under the Companies Acts.—The following special matters should be attended to: (1) the Company's power to borrow money and to create securities, (2) a resolution of the Board, and (3) entry in the Company's register of mortgages.

Firms.—(1) Granters.—All the partners must sign the bond. obligation should be by the firm and by all the partners as such and as individuals, all jointly and severally. It is desirable that on any change in the firm a corroborative obligation should be obtained from the new firm and the new partner or partners. It may be rather better, in the interest of the creditor, that the property should not be a firm asset, but should belong to one of the partners, for in that case, in the event of the bankruptcy of the firm, the creditor will not require to deduct the security in ranking on the firm's estate.

Firms.—(2) Grantees.—The money should be acknowledged as lent by the firm, but the obligation and disposition should both be in name of the partners and the survivors and survivor, as trustees and trustee for the firm.

¹ Henders n's Trs., Petrs., 1901, 8 S. L. T. No. 341.

² Pottie, Petr., 1902, 4 F. 876.

³ But see p. 238.

BOND AND DISPOSITION IN SECURITY IN SIMPLEST FORM [1868 Act, Sched. FF, No. 1]

I, A., grant me to have instantly borrowed and received from B. the sum , which sum I bind myself and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to repay to the said B., his executors or assignees whomsoever, at the , within the [place of payment], with a fifth part more of liquidate penalty in case of failure, and the interest of said principal sum at the per centum per annum from the date hereof to the said term of payment, and half-yearly, termly, and proportionally thereafter, during the notpayment of the same, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the term of next for the interest due preceding that date, and the next term's payment thereof at following, and so forth halfyearly, termly, and proportionally thereafter, during the not-payment of the principal sum, with a fifth part more of the interest due at each term of liquidate penalty in case of failure in the punctual payment thereof: And in security of the personal obligation before written, I dispone to and in favour of the said B. and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole [description or reference]: But always with and under [refer to burdens if necessary]: And that in real security to the said B. and his foresaids of the whole sums of money above written, principal, interest, and penalties: And I assign the rents: And I assign the writs: And I grant warrandice: And I reserve power of redemption: And I oblige myself for the expenses of assigning and discharging this security: And on default in payment I grant power of sale: And I consent to registration for preservation and execution.—In witness whereof.

FIRE INSURANCE CLAUSE [see p. 418]

[Insert immediately before disposition in security] And in respect the said B. and his foresaids may, if they think fit, effect and maintain (but without any liability on their part to effect or, if effected, to maintain) an insurance against loss by fire over the buildings erected on the subjects after disponed to the extent of £ , and on the rents thereof to the extent , I bind myself and my foresaids to repay to the said B. and his foresaids, at the term of yearly, the sum of £ , or such other sum, more or less, as may be the amount of the annual premium disbursed by them for the upkeep of such insurance, with interest at the rate of five per centum per annum on each premium from the date of disbursement till repaid: And in security of the personal obligations before written, I dispone And that in real security to the said B. and his foresaids of the whole sums of money above written, principal, premiums, interest, and penalties.

CLAUSES OF RANKING

(1) PARI PASSU

[After the clause "And that in real security"] Declaring always, and the said B. by acceptance hereof hereby agrees, that the said sum of £

hereby secured, with the interest thereof, and penalties if incurred, shall be ranked and preferred upon the said subjects, and the rents and produce thereof, and also upon the price thereof or of any part thereof in the case of a sale of the same, $pari\ passu$ with the further sum of £, interest thereof, and penalties if incurred, due and to become due under a bond and disposition in security granted, or about to be granted, by me in favour of C., and that without regard to the order in which the said last mentioned bond and disposition in security and these presents have been or shall be placed on record.

(2) RESERVED POWER TO CREATE PREFERABLE DEBT

[After the clause "And that in real security"] But these presents are granted and accepted under reservation to me and my foresaids of power to borrow any sum or sums of money not exceding the sum of \pounds , and to constitute security for the same and the interest thereof at any rate or rates not exceeding per centum per annum, and penalties if incurred, over the said subjects, so that such security or securities shall rank in all respects in priority and preference to the security created by these presents; and upon any part of such preferential debt being discharged, I and my foresaids shall be entitled to re-constitute the same at any time, so as to rank in priority and preference to the security hereby created, and so from time to time, so long as the said limit of \pounds of principal of preferential debt is not exceeded at any one time.

CLAUSE OF PREFERENCE IN VIRTUE OF RESERVED POWER

[After the clause "And that in real security"] And whereas under the terms of a bond and disposition in security for £ over the said subjects granted by me in favour of C., dated , and recorded in the said division of the said register on , I am empowered to create preferable debt to the extent of £ of principal, and it is part of the arrangement for the loan hereby contracted that it shall rank preferably to the said bond and disposition in security in favour of the said C.: Therefore, in exercise of the said power, I hereby declare that the said principal sum of hereby due, with the interest thereof, and penalties if incurred, shall rank in all respects in priority and preference to the security created by the said bond and disposition in security in favour of the said C., in the same manner as if these presents had been placed on record before the recording of the said bond and disposition in security in favour of the said C.

(3) POSTPONED

[After the clause "And that in real security"] Declaring always, and the said B. by acceptance hereof agrees, that the said sum of \pounds hereby secured, with the interest thereof, and penalties if incurred, shall be ranked and preferred upon the said subjects and the rents and produce thereof, and also upon the price thereof or of any part thereof in case of a sale of the same, after and postponed to the sum of \pounds , interest thereof, and penalties if incurred due and to become due under a bond and disposition in security granted or about to be granted by me in favour of C., and that without regard to the order in which the said last mentioned bond and disposition in security and these presents have been or shall be placed on record.

BOND IN EXERCISE OF A POWER TO CREATE SECURITY

[After the personal obligations] And whereas, in terms of [specify the entail or other deed], I am empowered to affect the lands [or subjects] and others hereinafter disponed with debt to the extent of \pounds of principal: Therefore, in security of the personal obligation before written, and in exercise of the said power and of every other power enabling me in this behalf, I dispone.

BOND AND DISPOSITION IN SECURITY BY ONE GRANTER OVER TWO PROPERTIES

[Ordinary obligations] And in security of the personal obligations before written, I dispone to and in favour of the said B. and his foresaids, heritably, but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, (first) All and Whole [description or reference]: But always with and under [refer to burdens if necessary]: and (second) All and Whole [description or reference]: But always with and under [refer to burdens if necessary]: Together with, as regards both of said subjects in the first and second places hereinbefore disponed, (first) all buildings erected and to be erected thereon; (second) the teinds parsonage and vicarage, so far as I have or may acquire right thereto; (third) common right to solum, back greens, passages, stairs, and all other pertinents, rights, and privileges; (fourth) the grates, blinds, and gasfittings, and all other fittings and fixtures which now are or may hereafter be in or upon the said subjects, so far as they do or may belong to me; and (fifth) my whole right, title, and interest, present and future, in or to the respective subjects and others foresaid: And that all in real security.

BOND AND DISPOSITION IN SECURITY BY A. AND B. OVER A.'S PROPERTY

We, A. and B., grant us to have instantly borrowed and received from C. , which sum we bind ourselves, jointly and severally, and our respective heirs, executors, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, to repay to the said C., his executors or assignees whomsoever [complete obligations]: And in security of the personal obligations before written, I the said A. dispone to and in favour of the said C. and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole [description or reference]: But always with and under [refer to burdens if necessary]: And that in real security to the said C. and his foresaids of the whole sums of money above written, principal, interest, and penalties; And I the said A. assign the rents: And I the said A. assign the writs: And we grant warrandice: And we reserve power of redemption: And we oblige ourselves, jointly and severally, for the expenses of assigning and discharging this security: And on default in payment I the said A. grant power of sale: And we consent to registration for preservation and execution. -In witness whereof.

BOND AND DISPOSITION IN SECURITY BY PROPRIETORS OF SEPARATE PROPERTIES FOR SAME DEBT

We, A. and B., grant us to have instantly borrowed and received from C. , which sum we bind ourselves, jointly and severally, and our respective heirs, executors, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, to repay to the said C. [complete obligations]: And in security of the personal obligations before written I the said A. dispone to and in favour of the said C. and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole [description or reference]: But always with and under [refer to burdens if necessary]: And in further security of the personal obligations before written I the said B. dispone to and in favour of the said C. and his foresaids, heritably but redeemably as after mentioned. yet irredeemably in the event of a sale by virtue hereof, All and Whole [description or reference]: But always with and under [refer to burdens if necessary]: And that all in real security to the said C. and his foresaids of the whole sums of money above written, principal, interest, and penalties: And we respectively assign the rents: And we respectively assign the writs: And we grant warrandice: And we reserve power of redemption: And we oblige ourselves jointly and severally for the expenses of assigning and discharging this security: And on default in payment we respectively grant power of sale: And we consent to registration for preservation and execution.—In witness whereof.

BOND AND DISPOSITION IN SECURITY BY HUSBAND AND WIFE OVER THE WIFE'S PROPERTY

I, A. [husband] [obligations by him]: And in security of the personal obligations before written I, B., wife of the said A., with the special advice and consent of my husband, and I the said A., as taking burden on me for my wife and for my own right and interest, and we both with joint consent and assent, dispone to and in favour of the said [creditor] and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole [description or reference]: But always with and under [refer to burdens if necessary]: And that in real security to the said [creditor] and his foresaids of the whole sums of money above written. principal, interest, and penalties: And we, with joint consent and assent foresaid, assign the rents: And we, with joint consent and assent foresaid, assign the writs: And we, with joint consent and assent foresaid, grant warrandice: And we reserve power of redemption: And I the said A. oblige myself for the expenses of assigning and discharging this security: And on default in payment we, with joint consent and assent foresaid, grant power of sale: And we consent to registration for preservation and execution.—In witness whereof,

ANNEX ratification.

BOND AND DISPOSITION IN SECURITY BY PRO INDIVISO PROPRIETORS

We, A. and B., grant us to have instantly borrowed and received from C. , which sum we bind ourselves, jointly and severally, and our respective heirs, executors, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, to repay to the said C. [complete obligations]: And in security of the personal obligations before written we dispone to and in favour of the said C. and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole 1 [description or reference]: But always with and under [refer to burdens if necessary]: And that in real security to the said C. and his foresaids of the whole sums of money above written, principal, interest, and penalties: And we assign the rents: And we assign the writs: And we grant warrandice: And we reserve power of redemption: And we oblige ourselves, jointly and severally, for the expenses of assigning and discharging this security: And on default in payment we grant power of sale: And we consent to registration for preservation and execution.—In witness whereof.

¹ This is on the assumption that the granters, amongst them, own the whole property, in which case it is unnecessary to refer to their respective shares or to the fact that they are pro indiviso owners at all. If they do not together own the whole, the conveyance will be of—

All and Whole our respective one-third shares pro indiviso and all other, if any, our shares, present and future, of All and Whole.

Or if the shares are unequal-

All and Whole the one-half share pro indiviso belonging to me the said A., and the one-third share pro indiviso belonging to me the said B., and all other, if any, our respective shares, present and future, of All and Whole.

As to these securities generally, see p. 416.

BOND AND DISPOSITION IN SECURITY BY AN ATTORNEY

I, A., attorney and factor and commissioner for B., conform to power of attorney and factory and commission granted by the said B. in my favour dated and registered in the Books of Council and Session on , whereby I am authorised to grant these presents, do hereby grant me as attorney, factor, and commissioner foresaid to have instantly borrowed and received from C. the sum of £, which sum I bind the said B. and his heirs, executors, and representatives [usual personal obligations]: And in security of the personal obligation before written I as attorney and factor and commissioner foresaid dispone [as in ordinary form to warrandice clause]: And I bind the said B. in absolute warrandice: And I reserve to the said B. and his foresaids and to me as attorney and factor and commissioner foresaid power of redemption: And I oblige the said B. for the expenses of assigning and discharging this security: And on default in payment I as attorney and

factor and commissioner foresaid grant power of sale: And I as aforesaid consent to registration for preservation and execution.—In witness whereof.

BOND AND DISPOSITION IN SECURITY BY A FIRM AND PARTNERS OVER FIRM PROPERTY HELD IN NAME OF THE PARTNERS AS TRUSTEES FOR THE FIRM

We, Messrs A., B., & Co., and we, A., B., and C., the individual partners of the said firm, as such partners and as individuals, grant us to have instantly borrowed and received from D. the sum of £, which sum we, the said Messrs A., B., & Co., bind ourselves, and we, the said A., B., and C., bind ourselves, personally and individually, and all jointly and severally, and the respective heirs, executors, and representatives whomsoever of us, the said A., B., and C., all jointly and severally, without the necessity of discussing them in their order, to repay to the said D., his executors or assignees whomsoever [complete obligations]: And in security of the personal obligations before written we, the said A., B., and C., as trustees for our said firm, dispone to and in favour of the said D. and his foresaids.

BOND AND DISPOSITION IN SECURITY IN FAVOUR OF TWO LENDERS

I, A., grant me to have instantly borrowed and received from the parties following the respective sums following, namely, (first) from B. the sum of £2000, and (second) from C. the sum of £1000: And I bind myself and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to repay (first) to the said B., his executors or assignees whomsoever, the said sum of £2000, and (second) to the said C., his executors or assignees whomsoever, the said sum of £1000, and that both at , within [place], with a fifth part more of each of the said respective sums of liquidate penalty in case of failure, and the interest of the said respective sums at the rate of per centum per annum from the date hereof to the said term of payment, and half-yearly, termly, and proportionally thereafter, during the not-payment of the said respective sums, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the term of next for the interest due preceding that date, and the next term's payment following, and so forth, half-yearly, termly, and proportionally thereafter, during the not-payment of the said principal sums respectively, with a fifth part more of the interest due at each term of liquidate penalty in case of failure in the punctual payment thereof:

FIRE INSURANCE

And in respect the said B. and C. and their respective foresaids may, if they think fit, effect and maintain (but without any liability on their part to effect, or, if effected, to maintain) an insurance against loss by fire over the buildings

erected on the subjects after disponed, to the extent of \pounds on buildings and \pounds on rents in the case of the said B., and to the extent of \pounds on buildings and \pounds on rents in the case of the said C., I bind myself and my foresaids to repay to the said B. and C. respectively and their respective foresaids, at the term of yearly, the sum of \pounds each, or such other sum, more or less, as may be the amount of the annual premium disbursed by them respectively for the upkeep of such insurances, with interest at the rate of five per cent. per annum on each premium from the date of disbursement till repaid:

SECURITY

And in security of the personal obligations before written I dispone to and in favour of the said B. and C. respectively, and their respective foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole [subjects and burdens]: And that in real security to the said B. and C. respectively and their respective foresaids pari passu inter se of the whole sums of money above written, the said respective principal sums, interest, penalties, and premiums of insurance: And I assign the rents: And I assign the writs: And I grant warrandice: And I reserve power of redemption, declaring that I shall be entitled to redeem the security held by either of the said B. and C. without redeeming the other at the same time [but in that case only by way of discharge and not of assignation]: And I oblige myself for the expenses of assigning and discharging the securities hereby created: And on default in payment I grant power of sale, declaring that, as against me and my foresaids, each of the said B. and C. and their respective foresaids may exercise the said power of sale without consent of the other, but without prejudice always to the security held by the other: And I consent to registration for preservation and execution.—In witness whereof.

BOND AND ASSIGNATION IN SECURITY, CONSTITUTING A SUB-SECURITY OVER A HERITABLE SECURITY

[Personal obligations]: And in security of the personal obligations before written I assign and dispone to and in favour of the said B. and his foresaids, but redeemably as after mentioned, yet irredeemably in the event of a sale or extinction total or partial, but in the last case only to the extent of the extinction, by virtue hereof, a bond and disposition in security (hereinafter , and recorded as after called "the principal security"), dated granted by C. in my favour, with interest mentioned, for the sum of £ 1: And also All and Whole [subjects], but always from the term of with and under [burdens if necessary], all as specified and described in the said bond and disposition in security recorded in the division of the general register 2: And that in real of sasines for the county of on security to the said B. and his foresaids of the whole sums of money above written, principal sum of £ , interest, and penalties: With power to the said B. and his foresaids to sue for, uplift, receive and discharge the sums, principal, interest, and others due and to become due under the principal

security, and to enforce all the obligations therein contained or thereby implied, and to accept part for the whole, and to compromise and submit and refer, and to give time, and to give a full and absolute discharge in exchange for a dividend or other partial payment, and that not only in sequestration or other bankruptcy process, but also under any private arrangement, whether concurred in by all the creditors of the said C. or other debtor or debtors under the principal security, or limited to that debt only, or otherwise, and to release the security constituted by the principal security in whole or in part with or without consideration, and to postpone the same, and further and generally to do whatever is or may be or become, or would if these presents had not been granted have been, competent to me or my foresaids, all which powers may be exercised without the consent of or notice to me or my foresaids, and at such time or from time to time and on such terms and conditions, all as the said B. or his foresaids may in his or their uncontrolled discretion think fit, and for all or any of which purposes he or they may use the name of me or my foresaids; but declaring that the said B. and his foresaids are and shall be under no obligation to require payment, or to use any diligence, or take any action or other step for the purpose of obtaining payment of any sum due or to become due under the principal security, nor to prosecute or follow forth any demand, diligence, action, or other step if made or commenced, but shall be entitled to abandon the same or otherwise allow the same to drop or expire, nor to enforce any decree or other authority if obtained, and any prejudicial effect which the principal security shall sustain by exercise of any of the powers hereby conferred, whether by accepting part for the whole or other compromise, or by postponement, restriction, or other abandonment, total or partial, shall be without prejudice to the obligations hereinbefore and hereinafter undertaken by me: And I declare that all deeds of submission, discharge, restriction, postponement, or otherwise to be granted by the said B. or his foresaids, whether during my life or after my death, shall be as valid and effectual to the receivers thereof or other parties thereto and to all others as if the same were made and subscribed by myself: And I reserve power of redemption: And I oblige myself for the expenses of assigning and discharging this security, and for all other expenses which may be incurred in exercise of the powers hereby conferred: And on default in payment I grant power of sale of the said bond and disposition in security 8 in the same manner, as nearly as may be, as if these presents were a direct security over the said subjects granted by me 4: And I consent to registration for preservation and execution.—In witness whereof.

- ¹ Interest.—All arrears will be assigned.
- ² Deduce title if necessary.
- ³ Power of Sale.—The main objection to this form of security is, that on default in payment it is not open to the creditor to sell the property. All that he can do is to sell the direct security, that is, the bond and disposition in security. The purchaser will then be a direct security-holder and in a position to sell the property if the owner makes default. But this involves double procedure, delay, and expense before the property can be realised. To avoid this an alternative form of security may be adopted, namely, an ex facie

absolute assignation of the bond and disposition in security with a separate agreement expressing the sub-creditor's powers.

⁴ Procedure on Sale, i.e. in the sale of the bond and disposition in security under the power of sale in this sub-security deed. The words here suggested will avoid any question as to whether sec. 119 of the 1868 Act applies at all to such securities, and also as to what advertisements are necessary, and where the sale may be.

BOND AND ASSIGNATION IN SECURITY OF A RECORDED LEASE

I, A., bind myself, my heirs and executors, without the necessity of discussing them in their order, to make payment at the term of and within [place], to B. or his 1 executors or assignees, of the sum of £ being money borrowed by me from him, with the interest of the said capital sum at the rate of per centum per annum, payable by equal portions halfyearly at Whitsunday and Martinmas, beginning the first payment at with a fifth part more of principal and of the interest due at each term of liquidate penalty in case of failure in the punctual payment thereof [insert fire insurance clause as on p. 430]: And in security of the personal obligations before written I assign to the said B. and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, a lease of All and Whole , in the parish of Duddingston and county of Edinburgh, which lease was granted by C. of date and recorded in the division of the general register of sasines for the county , and my title to which is registered therein on of Edinburgh on And I assign the rents: And I assign the writs, and have delivered those in my possession: And I grant warrandice: And I reserve power of redemption: And I oblige myself and my foresaids for the expenses of assigning and discharging this security: And on default in payment I grant power of sale 8: And I consent to registration for preservation and execution.—In witness whereof.

For general matters, and particularly the risk of a preferable assignation completed by possession though not recorded, see p. 355. The creditor is not entitled to poind the ground, p. 512.

- ¹ The statutory form has the word "heirs" here, but it ought to be omitted.
- ² If part only is assigned, insert the qualification and description of the part here, as on p. 356.
- ⁸ The power of sale may be exercised exactly in terms of the 1868 Act. See the Heritable Securities Act, 1894, s. 14.

DEED OF CONSENT BY HERITABLE CREDITOR TO THE GRANTING OF FEU-RIGHTS (p. 419)

I, A., considering that I hold a bond and disposition in security for the sum of \mathcal{L} granted by B. in my favour, dated , and recorded in the

division of the general register of sasines for the county of on , over the lands of X. in the county of , and that I have been requested and have agreed to consent to the constitution of feu-rights of the said lands, subject to the conditions hereinafter expressed: Therefore I do hereby consent and agree that, notwithstanding the said bond and disposition in security, it shall be competent to the said B., and to his successors in the said lands or in any part thereof, without the consent of me or my successors, to dispone in feu-farm, to be holden of and under the granter of the feu, any part or parts of the said lands, and that in such manner and on such conditions as the granters of such feus respectively may deem most expedient, but subject always to the conditions following, namely:—

First. That the feu-duty shall in no case be less in amount than at the rate of per imperial acre per annum.²

Second. That in regard to every such feu no grassum, price, or consideration shall be taken or be stipulated to be taken therefor other than such annual feu-duty, with or without periodical duplications or other additions thereto.

Third. That it shall be a condition of every such feu that buildings 3 of the annual value of at least times the amount of the stipulated feu-duty shall within three years after the date of the feu-right be erected and thereafter be maintained on the ground.

Fourth. That it shall not be in the power of the granters of the feus to make or consent to any conditions or stipulations whereby any right competent by law to the superiors for payment or security of the feu-duties, and of the periodical duplications or other additional payments, if any, may be in any way prejudiced.

Fifth. That the superiority of the subjects so to be feued, and the feu-duties and other prestations thereof, and any other right, title, or interest in or to the same which may belong to or be reserved by the granters of the feus, shall be subject and liable to the real security constituted by the said bond and disposition in security, and to the payment of the sums of money therein contained, in the same way and manner as the dominium utile or right of property of the same while unfeued, and that the said real security shall extend over the superiority and feu-duties and others payable therefor, and the ground to be feued in security thereof, and any other right and interest in or to the same which may be reserved to the granters of the feus, in the same manner and as fully in all respects as if the same had been specially assigned in security to me after such feu-rights had been constituted.—In witness whereof.

The alternative method is a clause, or set of clauses, in the bond itself. These will be introduced before the clause "And that in real security." They will be in substantially the same terms as above. But they will take the form of a reservation of power to the debtor and his successors. They will be introduced thus: "Reserving always to me and my successors in the said lands, or in any part thereof, notwithstanding these presents, and without consent of the said A. or his foresaids, power to dispone in feu-farm"; and so on, with the necessary verbal alterations.



Several Creditors.—If there are two or more creditors whose consents are required in respect of separate bonds, one deed only will naturally be taken. It will run thus:

We, the parties following, namely, (first) A., who hold a bond [as in above form]; (second) C., who hold a bond and disposition in security for \pounds granted by the said B. in my favour, dated , and recorded in the said division of the said register on , over the said lands; and (third) D., who hold [as in the case of C.].

- ¹ Superior's Obligations.—This will clearly authorise various clauses under which obligations may be incumbent on the debtor-superior, e.g. in the matter of roads and drains (see p. 153).
- ² Minimum Feu-duty.—See p. 248 as to this as affected by allocation. If it is desired to make the matter perfectly clear, these words may be added:—and this minimum shall be observed and given effect to in any allocation of feu-duty, so that no part of the subjects shall be held in feu at a less feu-duty than at the rate foresaid.
- ⁸ Kind of Buildings.—If desired, building regulations may be inserted in the way of either (a) requiring or (b) forbidding certain classes of buildings.

AGREEMENT BETWEEN A., AGENT FOR X., THE LENDER, AND B., AGENT FOR Y., THE BORROWER, WITH REFERENCE TO LOAN OF £ OVER

Notwithstanding the terms of the bond and disposition in security for \pounds granted by Mr Y. in favour of Mr X., dated , it is agreed as follows:

- 1. Mr X. is not to be asked to accept repayment at an earlier term than
- 2. Provided the feu-duty and interest [and all prior charges] be punctually paid, and provided the principal sum be repaid when required in terms of the bond as modified by this agreement, and provided the other obligations in the bond be duly fulfilled, the rate of interest will be restricted to per centum per annum.
- 3. Provided the feu-duty and interest [and all prior charges] be punctually paid, and provided the other obligations in the bond be duly fulfilled, and provided no material change, in Mr X.'s opinion, take place in the circumstances of Mr Y., or in the security, the loan will not be called up for repayment at an earlier term than

Place and date.

SECTION XXVII

ENTAIL SECURITIES

ENTAIL securities may be classified according as the security is (1) the estate of the heir in possession; (2) the expectancy of the heir-apparent; (3) the expectancy of an heir-presumptive; or (4) the fee of the estate.

I. LOANS TO THE HEIR IN POSSESSION

In many practical effects the estate of an heir in possession is on the same footing as a liferent, but in its legal aspect it is radically different, inasmuch as he is infeft in the fee, subject only to fetters. That being so, the difficulty which exists as to constituting securities over direct liferents of heritable estate 1 does not arise.

Of course there must be insurance on the life of the heir in possession for the amount of the loan and a small margin. The age will be admitted on the policy, and the insurable interest also if the policy is taken in the lender's name. As to the other points requiring attention in connection with the life insurance, see Sec. XXXIX.

The transaction works out as follows:—The rents meet the interest on the loan and the premium on the policy during the lifetime of the borrower, and on his death the policy meets the principal of the debt. The security being of a wasting nature, it is specially necessary to see that no arrears are allowed to arise. At the same time the creditor has, or may have, the advantage of (1) any backhand rents at the heir's death; (2) any sum insured beyond the principal of the debt; and (3) bonus additions, if any. It is also an advantage to the creditor that the premiums are payable in advance; and, if desired, the same rule may be applied to the interest, which, however, is not usual.

It may be kept in view that the heir in possession may, if willing, be able to give an additional security, namely, an assignation of uncharged improvement expenditure.² If the expenditure be considerable with reference to the estate, the heir will no doubt prefer to exercise his charging power at once; but if for any reason he does not wish to do so, the asset exists, and may be made available as additional security.

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² 1875 Act, s. 11; 1882 Act, s. 4.

There are no doubt objections to this course from the point of view of both the borrower and lender. If the former should afterwards wish to charge the improvement expenditure, he will require to arrange with the assignee, but in any case it would probably be necessary to have the debt (i.e. what may be called the "liferent" debt) discharged or postponed, for an insurance company or other lender would not willingly lend on the fee of an entailed estate to an heir in possession whose lifeinterest already stood preferably charged with other debt. Then, from the point of view of the lender over the life-interest, the proposed additional security is exposed to the objection that its validity in law is not perfectly clear. Recording may not (though it is thought that it will) perfect the right, and there is no one to whom intimation may be made. But notwithstanding questions of competition which may arise, the assignation may be a valuable additional security. If it be taken, there must of course be delivered full information and vouchers regarding the expenditure assigned.

More particularly with reference to the title, the following points may be noted:—

Fetters.—It is no concern of the lender to see that the fetters of the entail are properly expressed and duly completed, for if not, then so much the better for him.

Divestiture.—It must be seen not only that the heir in possession has completed his title, but also that no nearer heir can come into existence.

Devolution.—If there is any clause of devolution carrying away the estate in the event of, say, the heir in possession succeeding to some other estate, this must be seen to, for if it be possible that the devolution clause may come into operation, it will impair the intended security. An insurance against the contingency may be possible.

Irritancy.—It may of course be the case that the heir in possession has already incurred an irritancy under the entail. On this point the lender has the protection of sec. 40 of the 1848 Act, which provides

that no irritancy committed, or that may be committed, by any heir of entail in possession shall operate to set aside, impair, or in any way affect, directly or indirectly, in the person of any purchasers or bond fide onerous creditors, any securities granted in reference to such estate, or the rents thereof, prior to the execution of the summons of declarator on which decree in respect of such irritancy shall proceed, and not invalid as being inconsistent with the provisions of the entail under which such estate is held.

The terms of this section suggest the propriety of a search in the signet office. It may be possible to suggest that there is room for a distinction between irritancies of which the lender has, and those of which he has not, notice. Of the former class would or might be a failure to use the name prescribed by the entail, or the granting of a

conveyance, recorded in the register of sasines, without clauses protective of the entail; but this distinction does not appear to derive any support from the terms of the section.

Entailer's Debts.—If any exist, they may of course be made to affect the fee.

Terce and Courtesy.—These rights will exist if not excluded by the entail or otherwise barred.

Other Prior Charges.—In addition to the ordinary searches inquiry should be made as to any outstanding provisions for (1) the husband or widow and children of any former heir or heirs in possession, (2) the widow and children of any former heir-apparent, granted in terms of sec. 6 of the 1868 Act; and (3) even the spouse and children of the heir in possession. These last provisions cannot be payable in his lifetime, not even an annuity to the innocent spouse on divorce.¹ But they may be important if value be attached to the power to disentail, for then it is thought they must be allowed priority. The wife may be unable to postpone her right owing to alimentary restraint; and the children, even if major, owing to absence of vesting, as to which see the Aberdeen Act, s. 10 of the 1875 Act, and s. 3 of the 1878 Act. These sections are not confined to Aberdeen provisions.

Government Duties.—Obtain a certificate by the Inland Revenue authorities that all claims have been satisfied. See further, p. 455.

Passing to consider the terms of the security deed, the following points may be noted:—

Protection of Entail.—In order to prevent an irritancy a clause must be inserted declaring that the conveyance in security is to be no further effectual than is consistent with the entail. But there is no reason why this clause should go further than is necessary (see p. 446).

Life Insurance.—There will be full clauses as to keeping up the life policy and any substituted policies.

Fire Insurance.—There may be an obligation as to fire insurance.

Security for Premiums.—As regards these obligations for life and fire premiums regard must be had to the rule that there can be no indefinite burden on land.

Improvement Expenditure.—If the deed contains an assignation of uncharged improvement expenditure, there should be, quantum valeat, an obligation by the granter that neither he nor his executors or successors will charge that or any other improvement expenditure, or other sums, upon the estate, or any part of it, until the loan now being contracted is repaid.

Lands or money held in trust to entail.—A special assignation will be taken of the granter's right to the income of the estate or money, and all his right and interest in them, capital as well as income; if the particular heritage which the trustees thus hold may come to be entailed,

¹ More (Somervell's Tr.), Petr., 1908, 10 S. L. T. No. 491.

the deed will contain a special description of it, and deal with it as if the entail were already granted; and the granter's right to call for the execution of an entail, and to disentail and acquire in fee simple, and to apply under sec. 26 of the 1882 Act, will be assigned with a direction that on the execution of an entail the estate of the granter thereunder shall be created under the real burden of the loan, interest, and consequents, but in such terms as not to incur an irritancy. As to how the situation could be worked out if and when the trustees were ready to execute an entail, one thing is certain—they could not dispone to the creditor, not even for the lifetime of the debtor, for (if for no other reason) A. cannot be infeft for B.'s lifetime. The expedient of a qualified real burden appears quite feasible. But in point of fact the trustees, if they could, would probably simply refrain from executing the entail until either the debtor died or settled with his creditors, and here sec. 26 of the 1882 Act is in point. Of course the security will be intimated to the trustees, and inhibition might be found useful.

BOND AND DISPOSITION AND ASSIGNATION IN SECURITY
BY HEIR OF ENTAIL IN POSSESSION OVER (1) HIS INTEREST
IN THE ESTATE, (2) IMPROVEMENT EXPENDITURE, AND
(3) LIFE POLICY

I, A., [insert receipt and obligation for repayment]:

ADDITIONAL YEARLY SUM

[A] And further, so long as the sums due and to become due under these presents, or any part thereof, shall remain unpaid, I bind myself and my foresaids to pay to the said B. [creditor] and his foresaids in said [place of payment], at the term of Whitsunday yearly, the additional yearly sum of [insert a round sum amply sufficient to cover the premiums and any extra premiums], beginning the first term's payment thereof at the term of Whitsunday [next term] for the year to that term, and so forth thereafter at Whitsunday yearly, with a fifth part more of each term's payment of the said additional sum in case of failure in the punctual payment thereof, and interest at the rate of per centum per annum from the respective terms of payment till paid: But declaring that this yearly additional sum, after deducting the necessary expenses to be incurred in the recovery thereof, shall be received and applied by the said B. and his foresaids as follows: (first) towards payment of the premiums, and extra or additional premiums, on the policy of assurance hereinafter assigned, and on any additional or substituted policy or policies of assurance which may be effected by the said B. or his foresaids on my life (as they are hereby authorised to do at my expense in such terms and for such amounts as they may think fit), and towards repayment to the said B. and his foresaids of all the said premiums and extra or additional premiums if advanced in the first instance by the said B. or his

¹ Ker's Trs. v. Justice, 1868, 6 M. 627.

foresaids (which they shall be entitled, but not bound, to do), with a fifth part more of each premium and extra or additional premium in case of failure in punctual payment thereof, and with interest at the rate of per annum on each premium and extra or additional premium from the date of advance till repaid, and towards reimbursement to the said B. and his foresaids of all loss, damage, and expenses which they may sustain or incur in any manner of way in connection with the said policies, or any failure on my part to keep the same in force: Declaring that I shall be bound, as I hereby bind myself and my foresaids, to keep the said original and additional and substituted policies in force, and for that purpose to pay all premiums and extra or additional premiums becoming due thereon, and to deliver all receipts therefor to the said B. and his foresaids fourteen days at least before the last day of grace for payment of each such premium and extra or additional premium, and generally to observe and comply with all the terms, conditions, and regulations affecting the said original and additional and substituted policies; (second) towards payment of all premiums of fire insurance which the said B. or his foresaids may effect on the buildings erected or to be erected on the subjects hereinafter disponed, but without any obligation on the said B. or his foresaids to effect, or, if effected, to maintain, any such insurance; and (third) towards payment of all expenses for which I am or shall become liable under these presents or in consequence hereof or which may follow hereon: And in case and as often as the said B. or his foresaids shall receive the said additional sum of \mathcal{L} , they shall be bound to account to me or my foresaids for the surplus, if any, in their hands after satisfying the purposes foresaid, according as their intromissions shall be instructed by their bare accounts: Reserving, nevertheless, to the said B. and his foresaids full recourse against me and my foresaids, and I hereby bind myself and my foresaids, for all further sums due and to become due in respect of premiums and extra or additional premiums, loss, damage, and expenses, premiums of fire insurance, penalties and interest as aforesaid, exceeding the said additional sum of £ per annum [B]:

DISPOSITION IN SECURITY

And in security of the obligations hereinbefore and hereinafter undertaken I do hereby, in the first place, dispone to and in favour of the said B. and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, but always under the declaration hereinafter written, All and Whole [describe or refer to the lands and any burdens]: And that in real security to the said B. and his foresaids of the whole sums of money, principal and interest, yearly additional sums, interest thereon, penalties, expenses, and others before and after mentioned:

RESERVING THE ENTAIL

[C] But providing, as it is hereby provided and declared, that as the said lands, estate, and others are held under settlements of strict entail containing prohibitions against alienating or encumbering the same (or at least so far as the same are so held), it is hereby declared by me, and the said B. by accept-

ance hereof hereby agrees, that neither these presents nor any adjudication or other process or diligence to follow hereon shall affect or be made to affect the said lands, estate, and others, or any part thereof, or the rents, feu-duties, or other proceeds thereof, to any extent or effect inconsistent with the entail or entails thereof, nor shall the same operate to infringe the right of any person or persons who shall succeed or become entitled to succeed to me as heir or heirs of tailzie in the said lands, estate, and others, except in so far as the same may be consistent with the entail or entails, and these presents shall in all respects be construed so as not to operate in any manner of way as any contravention of, or any infringement upon, or irritancy of, the entail or entails under which the said lands, estate, and others are held, or any derogation therefrom: But declaring always that the provisions and declarations before written protecting the entail or entails shall have no force or effect if and so soon as the said lands, estate and others shall be disentailed, or I shall have acquired or become entitled without any consent to acquire the same in fee-simple and without being subject to the restrictions of the entail or entails; and, further, the said provisions and declarations are without prejudice to all statutory rights, powers, and remedies competent or which may become competent to the said B. or his foresaids [D.]:

FORMAL CLAUSES

And I assign the rents, feu-duties, and casualties, but only so far as consistent with the entail or entails: And I assign the writs, but only so far as consistent with the entail or entails: And I grant warrandice: And on default in payment of the said principal sum, interest, yearly additional sums, interest thereon, penalties and expenses, or any of them or any part thereof, I grant power of sale of the said lands, estate, and others, but nowise to any extent or effect inconsistent with the entail or entails subject as aforesaid:

Assignation of Improvement Expenditure

And whereas I have expended upon the said estate the sum of £ in permanent improvements in the sense of the Entail Acts, conform to schedule annexed and signed as relative hereto, no part of which expenditure has yet been charged upon the estate: Therefore, in further security of the obligations hereinbefore and hereinafter undertaken, I do hereby, in the second place, assign to the said B. and his foresaids the said sum of £ and all my rights, interests, and powers in respect thereof and of the said improvements, and I have herewith delivered up the vouchers of the said expenditure: And I bind myself and my executors and successors not to charge or attempt to charge the fee of the said lands, estate, and others, or any part thereof, with the said sum of £ or any part thereof, or with any other improvement expenditure or other sums, until the whole sums due and to become due under these presents shall have been repaid: And I agree and declare that whenever a case shall arise authorising a sale under the power of sale hereinbefore written, the said B. and his foresaids may thereupon or at any time thereafter sell the said sum of £ , and all rights, interests, and powers as aforesaid, either with the said lands and others or separately, and either by public roup or private bargain, or by way of private discharge thereof in favour of the heir in possession for the time being, and that without any notice to me or my foresaids or otherwise, and with or without advertisement:

LIFE POLICY

[E] And in further security of the obligations hereinbefore and hereinafter undertaken I do hereby, in the third place, assign to the said B. and his foresaids, but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, the policy of assurance granted by the [name of company] in my favour on my own life for the sum of £ . numbered , on which there is a premium of $\boldsymbol{\pounds}$ and dated payable on the in each year; Together with the said sum contained in the said policy of assurance, and all bonus additions of £ which have accrued and which may accrue thereon, and my whole right, title, and interest, present and future, in or to the said policy of assurance, and in or to any claim, advantage, or benefit which has arisen or which may arise thereby in any manner of way, with full power to the said B. and his foresaids, in their sole discretion, without the consent of me or my foresaids, to uplift, receive, or recover the sums contained in and to become due under the said policy of assurance, and to give all necessary receipts and discharges therefor, and all other deeds and writings, all which shall be valid and effectual to the receivers thereof: And further I hereby agree and declare that whenever a case shall arise authorising a sale under the power of sale hereinbefore written, the said B. and his foresaids may thereupon or at any time thereafter sell the said policy of assurance, either with the said lands and others or separately, and either by public roup or private bargain, or by way of private surrender thereof to the assurance company, and that without any notice to me or my foresaids or otherwise, and with or without advertisement; And further I hereby agree and declare that the powers of realisation and of sale by public roup or private bargain and of private surrender hereinbefore expressed regarding the said policy of assurance hereinbefore assigned shall apply and extend also to any and all additional and substituted policies of assurance which may be effected as hereinbefore referred to [F]:

POWER OF REDEMPTION, ETC.

And I reserve power of redemption of the said lands, estate, and others, improvement expenditure, and policy of assurance, at any term of Whitsunday or Martinmas on three months notice in writing addressed to and received by the said B. or his foresaids, and that by payment or consignation in the said [bank] of the said principal sum, interest, yearly additional sums, interest thereon, penalties, expenses, and others before and after mentioned: And I oblige myself and my foresaids for the expenses which may be incurred by the said B. and his foresaids in exercise of the powers hereby conferred or implied, or otherwise in consequence hereof or in relation hereto, or to the premises in any manner of way, including the expenses of charging the said improvement expenditure, and the expenses of assigning and discharging this security: And I consent to registration for preservation and execution.—In witness whereof.

Annex schedule of improvement expenditure.

II. LOANS TO THE HEIR-APPARENT

Transactions with the heir-apparent or any heir-presumptive stand in an entirely different category from transactions with the heir in possession as regards both their legal and their financial aspects. The fundamental difference and difficulty, in the legal sense, is that the borrower is not infeft, and therefore can grant no warrant on which his disponee may forthwith take infeftment. On the financial side the obvious differences are that there is no present income from which to meet the charges of the loan, and not only so, but there may never be any security at all so far as the estate is concerned, inasmuch as the heir may never succeed.

Dealing first with the financial aspect, it is necessary to complete the security by effecting an insurance of the borrower's life. As to the duration of the policy: if the borrower will on his succession be entitled to disentail without any consent (which is now the common case), there will be a survivorship policy against the life of the heir in possession, and covering also a certain period after the latter's death. That is to say, the policy becomes payable only if the heir-apparent should die before the heir in possession, or within, say, two years after him. If not, the policy never becomes payable at all. The basis, accordingly, is that the lender is bound to have the security of the estate or the policy, one or other. As to this period after the death of the heir in possession, it is not clear that in strictness it is necessary at all, having regard to s. 11 of the 1848 Act and the proviso to s. 3 of the 1882 Act. But clearly there may be a question as to this, and it is one of which the lender ought not to take the risk. Assuming then that the policy is to cover a period after the death of the heir in possession, the next question is—how long? As to that it will be noted that the periods prescribed in s. 18 of the 1882 Act do not apply. then there may be difficult questions to decide regarding the fixing of provisions to widow and children, and until these are fixed and charged the disentail will not be granted. If again the borrower will not be entitled to disentail without consent, the usual practice is to have a whole life policy on his life. For one thing it may be found that it is not in the creditor's interest to disentail; and in any case regard must be had to the periods prescribed by s. 18 of the 1882 Act, which shew that a period of one year after the death of the heir in possession will clearly be insufficient. Then it is necessary to determine what the succession may be supposed to be worth on the death of the heir in possession, and not to lend a larger sum than, on an actuarial ascertainment of the probability of life of the latter, will leave the creditor covered by that value on that event, taking the creditor's claim then to consist of (1) principal sum advanced, (2) compound interest thereon, (3) premiums of life insurance, and (4) compound interest thereon. Just as the value of the succession, if the borrower should succeed, must be sufficient to meet all these items, so the amount of the insurance will be fixed at such a sum as will do so also in the other contingency of the borrower not succeeding. The case of postponed securities is special, the point being that apparently the lender must see not only that he has sufficient insurance for the requirements of his own loan, but also that the prior loan is equally well protected. For it may very well end in the second lender requiring to take over the first loan, e.g. if the holder of it should threaten to sell the expectancy; and it might then be impossible to insure the life, and even if not, the security for premiums and interest thereon would be defective.

These transactions may take either of two forms:

- 1. There may be a bond for the principal sum advanced, made payable at the next term after the date of the bond, with obligations for interest, premiums, and compound interest on these respectively. Though the bond is so expressed, the security required, both as regards the estate and the insurance, is of course fixed on the assumption that the borrower may pay nothing so long as he and the heir in possession both live. There may be some doubt as to the compound interest clauses, and how to express them so as to give all that the creditor wishes.
- 2. The more common form is that of a post obit security, that is to say, the lender advances a certain sum and takes an obligation for a definite sum payable at the death of the heir in possession, with interest only after that date. The calculations are of course practically the same as above referred to, the sum to be repaid being fixed to cover principal, interest, premiums, and compound interest. The lender effects such insurance as he thinks proper, and himself pays the premium in addition to the sum advanced by him to the borrower. If the policy become payable, the lender will retain the whole benefit of it without any obligation to account, and this should be made express by separate agreement. In this form of transaction it will be seen that there is the element of speculation, at least from the point of view of the borrower, though from the lender's point of view that is neutralised by the principle of averages over many transactions. insurance part may be differently arranged in this way: the policy may be expressly made part of the security in the bond, in which case the whole sum to be repaid to the lender will be made payable on the death of the first deceaser of the borrower and the heir in possession, and the representatives of the borrower will be entitled to an accounting for the policy moneys on the footing that it was a security only.

Care must be taken to have the rights of parties in the policy moneys made quite clear, otherwise there is the risk of serious complications.¹ The insurable interest and the age or ages will be admitted.

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Turning now to the general legal aspect of the difficulty, as has been already stated, is that the borro and therefore no deed he may grant, though it may be register of sasines, will give infeftment to the grantee, of tantum et tale has not yet been carried so far as to of a trustee in bankruptcy with a security so situate stage of the Napier case some remarks were made who that view, but in the later stage a distinct opinion control by Lord M'Laren.

If and when the succession opens the title may be me of three persons, viz. (1) the heir who is the debtor, (2) the trustee in the debtor's sequestration.

- 1. The Debtor.—Of course if the borrower should estate, and if his title be completed, this subsequent if favour will validate by accretion the prior recording security.¹ Under certain circumstances procedure by be much better than procedure by service, for it can be much faster.
- 2. The Creditor.—The most direct way would be by s. 10 of the 1874 Act, but after the case of Lady Horit must be assumed that that procedure is not available course is to infeft the creditor upon (1) a title obtained, in name of the debtor, and (2) the transmission ab ant bond. The expeditious method of a clare constat is not these writs are still personal to the heir. Practically only is available. The creditor will expede a notarial own favour, proceeding on the service and the bond. It a mandate to the creditor to apply for service, there as why the creditor should not have the carriage of the process.
- 3. Trustee in Sequestration.—If, when the succession the title is completed, the debtor be sequestrated, it of the trustee to complete his own (the trustee's) title the security. If the sequestration precede the succession apparently must have a vesting order under s. 103 of Act, 1856.³ He is entitled to this, and the creditor have it qualified by any reference to his security.⁴

The question of competition has been here assumed a trustee in sequestration. But even apart from a borrower may have subsequently granted a second bone and the later creditor may, on the opening of the successive his title completed, thus again cutting out the first

¹ This at least is the commonly received opinion, but for a doubt in the case of an intervening and pending bankruptcy, see Bell, Com. 1, 738.

² 1900, 2 F. 1101.

³ Napier's Tr. v. D. 882.

⁴ Same case, 1899,

e are very serious risks; and the way in which they are generally ed to be met is by the immediate use of inhibition upon the nt of the transaction, in terms of a special consent to that mbodied in the bond. The inhibition derives its force from 7 of the Consolidation Act, 1868, which declares that no m shall apply to acquirenda;

always that, where such inhibition is used against a person or persons I thereafter succeed to any lands which at the date of recording the n or previous notice thereof, as the case may be, were destined to such a persons by a deed of entail or by a similar indefeasible title, then nat case such inhibition shall affect the said person or persons in so far ds the lands so destined, and to which he or they shall succeed as , but no further.

ect of this provision is, that the inhibition strikes at all future nd all future deeds which the granter was not, at the date inhibition, under obligation to grant. It is obvious, thereat this is not a perfect solution of the difficulty; for there the objection that there may be prior debts, and that the may have come under obligations to grant deeds, against which dibition will not protect. Of course if the debtor's title be ely completed, all will be well; but if that happen, no inhibition ired at all: the point is that if the inhibition is necessary, it no protection against the debts and deeds in question. Inquiry made as to the facts—whether there are any outstanding debts gations; but then the information may not be correct, and the ch as it is, must be recognised. It is a risk on title which cannot ated. Further, as to the limited effect of the inhibition in the f sequestration, it must be remembered that, under sec. 102 of akruptcy Act, "the right of the trustee shall not be challengeable ground of any prior inhibition, saving the effect which such ion may be entitled to in the ranking of the creditors." Assumen, that the lender fails to obtain a complete feudal title by on or by direct completion, the matter stands thus: The estate nder the sequestration. The trustee may sell. He must, however, fect to the inhibition. If there be no debt or deed exempt from ect of the inhibition as above explained, the lender's claim is the arge on the free proceeds of the sale. If there be any debts or gainst which the inhibition does not strike, it would appear that and the lender's claim will in the first place, pro forma, be ranked assu on the free proceeds of sale. The lender will draw his nd thus ascertained, but quoad ultra the whole free proceeds ll into the general estate; for those holding the prior debts and can have no right to claim any advantage, as against the general of creditors, from the lender's inhibition. The difficulty in the r case was the want of inhibition,

Another method of getting over the inherent difficulty of the want of infeftment in the borrower would be, to have a deed of propulsion in his favour by the heir in possession, reserving the latter's liferent. It is not known that this is often done for the purpose of these transactions, but it is apparently the only way of giving a perfect feudal title to the lender. As to government duty in cases of propulsion, see the Finance Act, 1900, s. 11.

The foregoing is all on the assumption that the borrower does ultimately succeed to the estate. In that event only does the difficulty arise. If, on the other hand, the borrower predeceases the heir in possession, the lender is paid out of the policy, and there is no difficulty. But there is a third case possible, namely, the heir in possession may disentail, in which case the value of the borrower's expectancy will then form the lender's security. This is specially referred to in sec. 13 of the Entail Act, 1882. That section introduces the principle of intimation to the heir in possession of securities granted by "the heir-apparent or other nearest heir." This introduces at once a new protection and a new risk. The protection is that, assuming the heir in possession does disentail, the lender, by virtue of his intimation, given immediately after the settlement of his loan, has a completed title to the compensation money, and the difficulty as to the title does not arise. The risk is that other lenders may have acquired preferences over the compensation money by prior intimation to the heir in possession. Inquiry will of course be made of the heir in possession on the point, but it does not appear that there is any duty on him to answer the inquiries, or that he would be responsible for an innocent mistake.

Land or Money held in Trust to Entail.—This special case has been dealt with on p. 443 as regards transactions with the beneficiary who would be heir in possession if an entail were executed. Even in that case there is a serious difficulty, but here the position is much worse. For one thing it is plain that inconvenience which may be occasioned to a mortgagee of a postponed heir cannot be allowed to delay the execution of the trust to entail if the trustees are ready to carry it out. But the most serious point is that while all these transactions with apparent heirs rest on inhibition, that appears to be incompetent in this instance. Suppose the trust is to entail certain known and definite lands. is the least unfavourable case, though even then it may be a question whether before an entail is executed the lands are "destined to such person by a deed of entail or by a similar indefeasible title." If again the trustees hold land which they may entail or which they may sell in order to buy and entail other land, then if they take the latter course it is clear that the inhibition is useless, because whether or not the land which is so sold was indefeasibly destined, it is certainly not the case

¹ See s. 157 of 1868 Act, printed on p. 451.

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that it is or remains land to which the inhibited person "shall succeed as aforesaid." Still clearer, if possible, is the case when the trustees hold land upon trust to sell and with the price to buy land to entail, or hold money upon trust to buy and entail land. There is then no land at all in existence at the date of the inhibition or no land to which the inhibited person can rely upon succeeding. The result is that in all these cases it is thought to be clear that inhibition is useless and that there is no security if an entail should come to be executed, except possibly when the trustees hold land upon trust to entail it in forma specifica. In that case and in all the other cases of this kind, if upon occasion it should be necessary to take the security for what it may be worth, (1) the deed will be intimated, (2) it will be recorded if a particular description be possible, and (3) inhibition will be used.

Having dealt with what may be called the leading principles, we now pass to other special points which require attention.

Fetters.—It is essential to see that the fetters are duly laid on and perfected, and that the heir in possession is possessing under the entail, and has duly referred to the fetters in his infeftment. For if not, the estate may be or become fee-simple in his person. If the entail was granted by testamentary trustees in pursuance of directions in a will, it is necessary to inquire, in addition, whether the will, on a sound construction, directed the execution of a strict entail; a flaw in the will may be fatal though in point of fact a strict entail has been executed (see p. 398). Further, in this connection, it will be seen that the fetters apply to the heir in possession. In particular, he is free (1) if he is institute and the fetters are directed against "heirs" only; (2) if under a "old" entail he was born on or after 1st August 1848; (3) if under a "new" entail he was born after the date of the entail; (4) if, after him, only heirs whatsoever are called.

Nature of Heir's Right.—In like manner, but from the other point of view, it is essential to ascertain that the borrower will on his succession be entitled to disentail without any consent, or otherwise to make proper allowances for the expense of purchasing the consents, but it will be impossible to calculate this except in the vaguest way.

Legitimacy, etc.—Further, as regards the borrower, there must be proof (1) of his legitimacy, (2) of his propinquity, and (3) that he truly is heir-apparent, i.e. that no nearer heir can come into existence.

Ages.—There must be proof of the ages of both the heir in possession and the heir-apparent.

Burdens on Fee.—These must be ascertained. A search will show so far, and see following notes.

Improvement Expenditure.—Regard must be had to the power of the heir in possession to charge improvement expenditure, past, current, and future: the whole by bond of annualrent at a rate not

¹ See note on p. 452.

exceeding £7, 2s. per cent. for twenty-five years, or three-fourths by permanent burden at interest not exceeding five per cent. But in the event dealt with in sec. 26 of the 1848 Act, the whole may be taken permanently out of the *corpus*; and see sec. 7 of the 1882 Act. As regards future expenditure it may be assumed that if incurred it will increase the rental, but as regards past expenditure the rental submitted may show the whole benefit of it.

Family Provisions.—As to existing provisions see p. 443. But further, regard must be had to the power of the heir in possession to grant provisions to husband or widow and children. If there are only the statutory powers, these are an annuity to surviving husband of one-half of free rents; an annuity to widow of one-third of free rents; and three years' free rents to children. The powers under the particular entail may be wider. If the borrower have granted or undertaken to grant provisions, these must be allowed for, even though they do not appear on the search, for being prior obligations they will not be struck at by the lender's inhibition.

Power to Disentail.—The power of the heir in possession to disentail must be kept in view. The consent of the heir-apparent may be dispensed with, and the Court will proceed to ascertain the value in money of the expectancy. But whether the consent be given or dispensed with, the lender, as assignee, "shall be entitled to appear at any time prior to such recording (i.e. of the instrument of disentail), and to demand that the value in money of such expectancy or interest shall be ascertained, and shall be entitled to a preference upon such value according to the date of the intimation of his assignation." 1 The chief points regarding the fixing of the compensation money are: (1) that the heir in possession is treated as fiar subject to the claim of the heir-apparent and other heirs if any who require to be dealt with. It is the value of the expectancy of the latter that is actuarially ascertained; and the estate belongs to the former, subject to payment of this ascertained value. The result might be very much more favourable for the heir-apparent and those claiming through him if he were treated as fiar burdened with a liferent in the heir in possession, and if accordingly the value of the expectancy were the whole estate minus the value of the liferent²; and (2) that in fixing the value it is not merely a matter of rental and ages: the actual facts of the particular case, such as health and habits, are taken into account.3

It is obvious, therefore, that if the heir-apparent should happen to be in a bad state of health at the time when the heir in possession presents a petition for disentail, the effect may be disastrous as regards the security; and yet the survivorship policy may yield nothing owing to

 ^{1 1882} Act, s. 13.
 2 De Virte v. Wilson, 1877, 5 R. 328; 1899, 1 F. 1194.
 M'Donald v. M'Donald, 1880, 7 R. (H. L.) 41.

the heir-apparent after all surviving the heir in possession. This is a risk on value which cannot be obviated.

Devolution (see p. 442).—These clauses may, and probably will, apply to the heir-apparent as well as to the heir in possession.

Irritancy (see p. 442).—The statutory protection there referred to, given to a lender to the heir in possession, is not extended to a lender to the heir-apparent or other heir, and the risk must be taken. One of the most common cases is the presence of a clause in the entail requiring the heirs to assume a certain name. See p. 400. Insurance is possible.

Prior Debts and Obligations (see p. 451).—Inquiry will be made, and a declaration should be taken from the borrower. There will also, of course, be a personal search. In particular the borrower's marriage contract should be seen in connection with the point referred to above under Family Provisions.

Government Duties.—The chief point is to determine the rate, which involves the question whether the heir-apparent will be dealt with as deriving succession from the present heir in possession or from the entailer.¹

The question here is whether the heir takes by "disposition" or by "devolution." If the former, the entailer is the "predecessor"; if the latter, the "predecessor" is the last heir in possession, i.e. the present heir in possession at the date of the loan. (1) If the heir is called nominatim he takes by disposition; (2) also if he is the first taker of a new class of heirs, e.g. to A. and his heirs male, whom failing to his heirs female, the first heir female coming in after heirs male takes by disposition; (3) all subsequent heirs female of A. take by devolution.

Searches.—In addition to ordinary property and personal searches there will be a search in the register of entails to show any instrument of disentail.

With reference to the terms of the deed and the completion of the transaction, the following points are noted, under reference to what has already been stated:—

Protection of Entail.—See p. 443.

Life Insurance.—If there are obligations for premiums, see p. 443.

Fire Insurance.—If the buildings are material to the security, it may be necessary for the lender to insure. There is no obligation on the heir in possession to do so; and even if he does in fact, the proceeds of the policy are his own private property free from the entail. He is not bound to rebuild; and even if he should do so, the new building would be a permanent improvement made by him, which he could charge against the estate.²

¹ Lord Saltoun, 1860, 22 D. (H. L.) 12. ² E. Morton, Petr., 1895, 3 S. L. T. No. Hanson's Death Duties, 4th ed. 568-574. 251.

The deed will contain the following special clauses:-

- (1) An assignation of all compensation money on disentail, etc.
- (2) An obligation not to consent to any disentail, sale, charge, or otherwise.
- (3) An obligation to complete title at once on death of heir in possession, and, without prejudice, a mandate to the lender to do so.
- (4) A similar obligation and mandate as to disentailing after succeeding.
 - (5) Consent to inhibition.

Immediately on settlement the lender will-

- (1) record the bond;
- (2) intimate to heir in possession;
- (3) inhibit debtor, and register the inhibition.

BOND AND DISPOSITION AND ASSIGNATION IN SECURITY BY HEIR-APPARENT OVER (1) EXPECTANCY AND (2) LIFE POLICY

I, A. [insert receipt and obligation for repayment as on p. 430, and after the interest clause add] And further, in the event of any half-yearly payment of interest not being punctually paid, the same shall accumulate by way of compound interest 1 at the said rate, with half-yearly rests at the terms of Whitsunday and Martinmas in each year: and I bind myself and my foresaids to pay such accumulated amount:

PREMIUMS

[Take in clause as to insurance, etc., A to B, p. 444-5]:

DISPOSITION IN SECURITY

And considering that I am heir of entail and entitled to succeed, and am heir-apparent, to the entailed lands and estate of X. and others hereinafter disponed, immediately upon the death of C., the heir of entail in possession, and that it is a condition of the said loan to me that I should grant the security hereinafter constituted: Therefore, in security of the obligations hereinbefore and hereinafter undertaken, I, as if I had already succeeded to and were already duly infeft in the said lands and estate, and then as now, and now as then, do hereby, in the first place, assign and dispone to and in favour of the said B. [creditor] and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, but always under the declarations hereinafter written, All and Whole [describe or refer to the subjects]; [G] Together with all right, title, expectancy, and interest, claim of right, property, and possession, petitory or possessory, vested and contingent, which I have or in any way may come to have to the said lands, estate, and others, or to any part thereof:

1 Instead of this express clause of compound interest (as to which see p. 10), an alternative is to stipulate for simple interest on the principal sum at such a rate as may be relied upon to cover the accumulation intended. In that case there will be a separate agreement setting forth the contract.

COMPENSATION MONEYS

As also any and all sum or sums of money or other considerations of whatever kind which may be or may become payable to me, or which I may have or acquire right to receive, by or from the said C., or by or from any other person or persons whomsoever, or which may be consigned in bank, or the payment of which may be secured to me in terms of the Entail Acts, in respect of my hereafter at any time giving, or having agreed or agreeing to give, my consent to the disentail or sale of the said lands, estate, and others, or of any part thereof, or to the charging of the same with debt or encumbrances, or to any deed, alteration, or thing, or in respect of my consent being dispensed with, together with all interest to accrue on such sum or sums or other considerations foresaid, with full power to the said B. and his foresaids to uplift, receive, and recover such sum or sums or other considerations hereby assigned, and to grant all necessary receipts and discharges therefor and all other deeds or writings, all which shall be valid and effectual to the receivers thereof: But, without prejudice to what is hereinbefore written, I hereby agree and bind myself not to give my consent to the said lands, estate, and others, or any part thereof, being disentailed or sold, or to any money being borrowed on the security thereof, or to any deed, alteration, or thing affecting the same, during the lifetime of the said C., unless I shall previously have obtained the express approval in writing of the said B.: And that all in real security to the said B. and his foresaids of the whole sums of money, principal, interest, interest thereon, yearly additional sums, interest thereon, penalties, expenses, and others before and after mentioned:

RESERVING THE ENTAIL

[Take in clauses protective of entail, C to D, p. 445-6]:

FORMAL CLAUSES

And I assign the rents, feu-duties, and casualties from and after the date of my succession to the said lands, estate, and others, but only so far as consistent with the entail or entails: And I assign the writs, and undertake on my succession to place them in the custody of the said B. or his foresaids, but only so far as consistent with the entail or entails: And I grant warrandice: And on default in payment of the said principal sum, interest, interest thereon, yearly additional sums, interest thereon, penalties, expenses, and others before and after written, or any of them or any part thereof, I grant power of sale of the said lands, estate, and others, including, without prejudice to the said generality, the said sum or sums of money or other considerations as aforesaid hereinbefore assigned, and my then rights and interests, vested and contingent, in and to the same and each of them, and that in the manner provided by the Titles to Land Consolidation (Scotland) Act, 1868, and any Acts amending the same, but nowise to any extent or effect inconsistent with the entail or entails subject as aforesaid:

As to Completion of Title, Disentail, etc.

And I oblige myself at my own expense to procure myself duly and lawfully served and infeft in the said lands, estate, and others, and further or otherwise

to do whatever may be necessary to complete my feudal title thereto, and that all within three months after the succession shall have opened to me, and thereupon forthwith to carry through and complete a disentail of the said lands, estate, and others, but that always without prejudice to the rights and powers of the said B. and his foresaids: And to enable the said B. and his foresaids to complete such feudal title in my person to the said lands, estate, and others, and also to disentail the same, I do hereby, without prejudice to any obligations herein contained, and also without prejudice to the rights and powers of the said B. and his foresaids, specially and irrevocably make and constitute the said B. and his foresaids procurators and commissioners for me, and in my name, but always at my expense, to procure me served and infeft in the said lands, estate, and others, and further or otherwise to do whatever may be necessary to complete my feudal title thereto on my succession, and that in terms of the entail or entails, or otherwise in any other character in which I may be entitled to succeed to the same according to the investitures of the said lands, estate, and others; and also for me and in my name, or in their own name but always at my expense, to present a petition or petitions to the competent Court for the disentail of the said lands, estate, and others, and to expede and record in the requisite registers an instrument or instruments of disentail of said lands, estate, and others, and to take such steps and carry through the whole procedure necessary for disentailing said lands, estate, and others, and generally everything thereanent to do in the same manner and as amply in all respects as I could do myself: And upon my title being completed to the said lands, estate, and others as aforesaid, I bind myself, whenever required, to grant at my expense a bond of corroboration of these presents, with a new disposition of the said lands, estate, and others, in security of the whole sums herein contained, principal, interest, interest thereon, yearly additional sums, interest thereon, penalties, expenses, and others before and after mentioned, but always so as not to infringe the entail or entails, if and so far as then subsisting [H]:

POLICY

[Take in assignation of policy and relative clauses, E to F, p. 447]:

Power of Redemption, etc.

And I reserve power of redemption of the said lands, estate, and others, and of the said policy of assurance, at any term of Whitsunday or Martinmas, on three months' notice in writing addressed to and received by the said B. or his foresaids, and that by payment or consignation in the said [bank] of the said principal sum, interest, interest thereon, yearly additional sums, interest thereon, penalties, expenses, and others before and after mentioned: And I oblige myself and my foresaids for the expenses which may be incurred by the said B. and his foresaids in exercise of the powers hereby conferred or implied or otherwise in consequence hereof, or in relation hereto, or to the premises in any manner of way, including the expenses of the whole procedure, writs, and securities hereinbefore referred to, and the expenses of assigning and discharging this and any corroborative security:

CONSENT TO INHIBITION

And I hereby specially consent and agree that the said B. and his foresaids shall be entitled, immediately upon the execution by me of these presents, and at any time thereafter, to raise, execute, and use letters of inhibition against me upon the personal obligations herein contained, and duly to record the same in the register of inhibitions and adjudications, and to renew the same, and that notwithstanding that the date of payment of the sums of money hereby contracted to be paid has not arrived, which it is hereby declared shall form no objection to such inhibition or any renewal thereof: And further, I bind myself and my foresaids, so long as any sum shall remain due under these presents, not to make any application to the Court of Session or other Court, nor to take any other steps, for having the said letters of inhibition and execution and registration thereof recalled or set aside, but the same shall remain in full force and effect until the said principal sum of , interest, interest thereon, yearly additional sums, interest thereon, penalties, and expenses shall be fully paid and discharged: And I consent to registration for preservation and execution.-In witness whereof.

POST OBIT BOND BY HEIR-APPARENT

I, A., considering that I am heir of entail next entitled to succeed and am heir-apparent to the entailed lands and estate of X., in the county of Y., with the teinds thereof and others, all as hereinafter described or referred to (and all hereinafter with the teinds included under the expression "the said lands, estate, and others"), immediately upon the death of C.: Further considering that B. has agreed to pay to me the sum of £ upon condition of my granting the personal obligation hereinafter written for payment to him on the death of the said C. of a capital sum of £ , free of all Government and other duties and whole charges and expenses whatever, with interest and penalty as after specified, and the other personal obligations hereinafter written, and the security therefor constituted by these presents: And now seeing that the said B. has instantly paid to me the said sum of £ of which I hereby acknowledge the receipt, and with which I declare myself fully satisfied, renouncing all exceptions to the contrary: Therefore I hereby bind myself, and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to make payment to the said B. of the said principal sum of £ , free of all Government and other duties and whole charges and expenses whatsoever, and that on the day of the death of the said C. and within the head office of the [bank] in [place], with a fifth part more of liquidate penalty in case of failure in the punctual payment thereof, with interest on the said principal sum of £ per centum per annum from the said date of payment the rate of during the not-payment of the said principal sum, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first of these terms which shall happen after the said date of payment for the interest due preceding said term, and the next term's payment thereof at the first term of Whitsunday or Martinmas following, and so forth half-yearly, termly, and proportionally thereafter, with a fifth part more of the interest due at each term of liquidate penalty in case of failure in the punctual payment thereof, and with interest at the rate of per centum per annum on each term's payment of interest from the date when same becomes payable till paid:

DISPOSITION IN SECURITY

And in security of all the obligations hereinbefore and hereinafter written, I, as if I had already succeeded to and were duly infeft in the said lands, estate, and others, and then as now, and now as then, do hereby assign and dispone to and in favour of the said B. and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, but always with and under the declarations hereinafter written, All and Whole [take in previous form, pp. 456-8, G to H, referring however always to " [being the sum to be repaid], interest, penalties, "principal sum of £ and expenses before and after mentioned]: And I reserve power of redemption of the said lands, estate, and others, but that only by payment of the [being the sum to be repaid], whether the redemption said sum of £ be before or after the death of the said C., and in the latter case with interest and penalties, and in any case with expenses: And I oblige myself and my foresaids for the sum of £50, or such other sum, more or less, as may be the amount of the expenses which may be incurred by the said B. and his foresaids in exercise of the powers hereby conferred or implied, or otherwise in consequence hereof or in relation hereto, or to the premises in any manner of way, including the expenses of the whole procedure, writs, and securities hereinbefore referred to, and the expenses of assigning and discharging this and any corroborative security [take in consent to inhibition, p. 459, referring, however, to "principal sum of £ [being the sum to be repaid], interest, penalties, and expenses"]: And I consent to registration for preservation and execution.-In witness whereof.

III. SECURITIES BY HEIRS-PRESUMPTIVE

Viewed as a practical matter of business the answer to any loan proposal on behalf of an heir presumptive must be in the negative. But there may be exceptional cases, and more especially there may be cases where what is intended is to take such security for an existing debt as the debtor is able to give, and therefore it is proper to deal briefly with the matter here.

An heir-presumptive from whom a security is taken may, or may not, be the nearest heir in existence at the time.

1. Not the Nearest Heir.—When the heir-presumptive is not the nearest heir the nearer heir may be the only heir whose consent is required to a disentail, or he may be entitled, if and when he succeeds, to disentail without any consents; and if that be so, it is obvious that there can be no security in lending to the remoter heir. But even if it be otherwise, there can be no reliance on the security, for the

reason that the protection given by sec. 13 of the 1882 Act (see p. 452) is limited to creditors of "the heir-apparent or other nearest heir," and does not extend to creditors of an heir who is not the nearest heir. If, however, in any case a security of this kind is to be taken, there ought to be a policy of assurance on the life of the debtor payable if he should predecease the survivor of the heir in possession and the nearest heir, or should die within say two years after the survivor's death. That is on the assumption that the heir-presumptive will on his succession be entitled to disentail without any consent; if not, then there must be a whole life policy. There ought also to be insurance against issue of the nearest heir. Then on the question of value it will be kept in view that, in the event of a disentail, the value of a postponed right of succession of this kind will probably work out at a very low figure, and that if on the other hand there should be no disentail, and if accordingly the debtor should succeed, he will no doubt come into the estate heavily burdened with at least two sets of family provisions.

2. The Nearest Heir.—If, again, the heir-presumptive be the nearest heir in existence at the date of the loan, there is the risk that a nearer heir may come into existence. The facts may, however, be such that the birth of a nearer heir is an impossibility; if not there must be insurance against the risk of issue, in addition to a survivorship policy on the life of the borrower against that of the heir in possession (or otherwise as explained on p. 448). This issue insurance would require to be made payable if the nearer heir comes into existence, whether he should or should not succeed; for (1) even if he should not succeed, he might leave issue who did; (2) even if he should predecease the heir in possession without leaving issue, still he might survive the presentation of a petition for disentail, and his consent only might be necessary; and (3) even if his were not the only consent necessary, he would be "the heir-apparent or nearest heir," and therefore the only heir to whose creditors sec. 13 of the 1882 Act has application, so that the borrower might be entitled to consent to the disentail without his creditor receiving any compensation money. But even with both these insurances the security must be very doubtful on the side of value. For example, if the heir in possession presents a petition for disentail. the expectancy may be valued at a very moderate sum on account of the risk of a nearer heir coming into existence, which is an end of the security so far as the estate is concerned, and then no nearer heir may ever come into existence after all, so that the issue insurance yields nothing.

IV. SECURITIES ON THE FEE

There are many debts and sums which the heir in possession is entitled to charge upon the fee, e.g. entailer's debts, estate duty, ¹ See p. 393.

improvement expenditure, and children's provisions.¹ Further, any heir in possession may borrow on the fee with the like consents as would have entitled him to disentail. This last power and the power to charge improvement expenditure are the only powers that need be referred to here.

GENERAL DEBT

The enabling sections are the 1848 Act, s. 4, and the 1882 Act, s. 4.

Mansion-house, etc.—It is not necessary that the mansion-house, offices, and policies be excepted from the security, though that may of course be made a condition of any consents, if any are necessary.

Power of Sale.—The only clause in the bond to which it is necessary to make special reference is the power of sale. In the 1853 Act (s. 23) it is provided that

every bond and disposition in security hereafter to be granted under the said recited Act (the 1848 Act) or under this Act may, in the option of the party upon whose application to the Court the same shall be executed, contain a power of sale in ordinary form.

But sec. 30 of the 1848 Act provides that

no creditor, acting under powers of sale contained in any bond and disposition in security, or other deed of security, affecting any entailed estate in Scotland, by virtue of this or any other Act, shall be entitled to sell such entailed estate, or any portion or portions thereof, in *manifest excess* of what is necessary or proper in order to payment and extinction of the debt, principal and interest and whole expenses appertaining thereto, for which such sale is made.

This last section is a distinct fetter on the creditor's powers and actions, and may under certain circumstances give rise to some trouble. Care will, however, be taken that the position is not made worse by a restriction in the power of sale itself. Interlocutors are sometimes seen under which the heir in possession is authorised "to grant a bond and disposition in security, including power of sale to the extent of the said sum of £10,000." This should not be accepted. The interlocutor need not refer to the power of sale at all; but if it does, it should be "a power of sale in ordinary form."

Statutory Protection.—The lender must satisfy himself that the proceedings have been regular, and that the provisions of the statutes and Acts of Sederunt have been complied with, unless two years have run from the date of the judgment, after which the bond and disposition in security

shall, as regards any third parties acting bond fide on the faith thereof, be no longer reducible on any ground of irregularity or non-compliance with the ¹ See p. 392.

provisions of this Act, but in respect of any such ground of challenge be final and conclusive.

This seems to be the result of sec. 29 of the 1882 Act.

BOND AND DISPOSITION IN SECURITY ON THE FEE FOR GENERAL DEBT

- I, A., heir of entail in possession of the entailed lands and estate of X. and others in the county of , in virtue and in exercise of the special power conferred on me by the Entail Acts, and by act and decree of the Lords of Council and Session, dated , and extracted an extract is delivered herewith), Grant me to have instantly borrowed and , which sum I, in virtue and in exercise received from B. the sum of £ of the special power foresaid, do hereby bind myself and the heirs of entail succeeding to me in the said entailed lands and estate, and also my own heirs, executors, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, to repay to the said B., his executors or assignees whomsoever, with a fifth part more [insert obligation for penalties and interest in ordinary form]: And in security of the personal obligation before written, I, in virtue and in exercise of the special power foresaid, dispone to and in favour of the said B. and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole [describe or refer to the property]: And that in real security [continue and complete as in ordinary form].
- a The obligation should always be taken in this form. Nor should the creditor agree to the insertion of any clause as to the order of liability of the heirs inter se. The heirs succeeding to the estate must necessarily, inter heredes, be liable in the first instance as taking the estate burdened with the debt; but these are matters with which the creditor has, and should take, no concern.

IMPROVEMENT EXPENDITURE

Nature of Improvements.—Sec. 3 of the 1875 Act contains a lengthy enumeration of what "improvements" include.

Limits of Expenditure.—As regards time, no improvements can be charged which were executed more than twenty years before the date of the petition.\(^1\) But the Court must be satisfied that executed improvements are "beneficial to the estate as at the date of the application to the extent of at least the sum authorised to be borrowed.\(^2\) This is obviously necessary, for otherwise the heir might be entitled to charge at their full initial cost improvements made long ago, the benefit of which has wholly or in great part disappeared before the date of the petition. The words "the sum authorised to be borrowed" are apparently ambiguous in connection with the power to charge three-fourths of the expenditure by permanent burden. There is no limit

¹ 1875 Act, s. 7. ² 1875 Act, s. 7 (1).

of amount beyond what is implied in the condition that the improvements must be "of a substantial nature and beneficial to the estate." It was otherwise under the Montgomery Act.

Limits of Charge.—The heir has his option to charge (1) the whole by bond of annualrent for twenty-five years from the date of the decree, or such part of that time as may be unexpired at the date of the bond, "at a rate not exceeding £7, 2s. per annum for every £100 so authorised to be borrowed"; or (2) three-fourths by permanent burden in the form of a bond and disposition in security.² The annualrent of £7, 2s. per cent. is calculated at 5 per cent. interest. This if sanctioned enables the heir to make a profit for himself, for an insurance company will give him more than £100 for a charge of £7, 2s. for twenty-five years. Accordingly the next heir may object that the rate is too high, and a lower rate may be fixed.³ Substantially the same point arises upon a petition to grant a permanent security at 5 per cent. interest.

Limits of Security.—(1) Mansion-house, etc.—In all cases the mansion-house, offices, and policies are excepted. But, of course, if wished, the heir in possession may convey his liferent of these in further security, with the usual clauses protective of the entail so far as the mansion-house, offices, and policies are concerned.

- (2) Arrears of Interest.—When the charge takes the form of a bond and disposition in security the creditor's remedy against the fee and rents of the estate is limited to the principal and two years' interest thereon and penalties, without prejudice to his personal claim for further arrears against the heir during whose possession they arose, and his representatives and separate estate.⁴
- (3) Arrears of Annualrent.—When the charge takes the form of a bond of annualrent the creditor's remedy against the rents of the estate is limited to two years' annualrent and interest thereon and penalties, without prejudice to his claim for further arrears against the heir during whose possession they arose, and his representatives and separate estate.⁵

Unfinished and Contemplated Improvements.—If the improvements are in course of execution or merely in contemplation, the loan is consigned "on a receipt payable to the orders of the Court"; the "order for consignation shall be set forth in the security and shall be obligatory on the lender," and as the improvements proceed the Court makes orders for payment out of the consigned fund.⁶

Expenses.—In fixing the amount to be borrowed the Court shall add to the improvements "the actual or estimated amount of the cost of the application and the proceedings therein, and of obtaining the

⁶ 1875 Act, s. 7 (8).



¹ 1875 Act, s. 8; 1882 Act, s. 4.

² 1882 Act, s. 6.

⁸ Murray Stewart, 1898, 36 S. L. R. 623.

^{4 1848} Act, ss. 18, 22; 1875 Act, ss. 8, 9

⁵ 1848 Act, s. 17.

loan, and granting security therefor." The whole of these expenses is charged in the case of a bond of annualrent, but only three-fourths in the case of a bond and disposition in security.²

Curator Bonis.—When the heir is insane it is not at all a certainty that the Court will allow the curator to charge expenditure which the heir had made: authority was refused in the case noted below.³

Legatee or Assignee.—When an heir in possession has executed improvements and has died without having charged the same upon the estate, "any person to whom such heir of entail may have expressly bequeathed, conveyed, or assigned such sums" may present a petition and have the succeeding heir ordained to grant a bond and disposition in security for the amount which the deceased heir might himself have charged 5 in that way, viz., three-fourths of expenditure and three-fourths of expenses.²

Substitution of Permanent Burden for Annualrent.—When in the first instance the whole expenditure has been charged by bond of annualrent, and the heir in possession has defrayed at least one-fourth of the capital, he may have a bond and disposition in security substituted for the balance of capital, but no part of the expenses of the substitution is chargeable.

Transfer to another Estate.—If two estates are entailed upon the same series of heirs, and one of them is disentailed, any charges upon it may, with consent of the creditor, be transferred to the other "to the extent of which such other estate might have been lawfully charged with such debt." 8

Form of Deed,—Narrative.—The only point to which it is necessary to refer specially is the reference in the deed to the petition, the procedure thereon, and the decree. It is very common to find these quoted and set out at great length; but it is submitted that this is both insufficient and (with the exception after noted) unnecessary. is of course the case that the deed is executed in virtue of a power, namely, the power conferred by the Court in the decree; therefore the deed must, as a matter of satisfactory drafting, expressly set out that it is granted in exercise of the power. But it is quite sufficient to refer in the briefest possible form to the decree and its import, and to say that the power is intended to be exercised. The exception is a consignation-order in the case of improvements in course of execution or in contemplation under sec. 7 (8) of the 1875 Act, which "shall be set forth in the security"; it may not be necessary, but it would certainly be imprudent to omit, to quote the order verbatim in the deed. As, with this exception, any long narrative or verbatim quotation

¹ 1875 Act, s. 7 (6).

² Leith v. L., 1888, 15 R. 944.

³ Macqueen v. Tod, 1899, 1 F. 1063.

⁴ Macroell, Petr., 1877, 4 R. 1112.

⁵ 1875 Act, s. 11.

^{6 1875} Act, s. 9; 1882 Act, s. 6 (4).

⁷ Stewart, Petr., 1886, 13 R. 568.

^{8 1882} Act, s. 10.

is unnecessary, so it is obviously insufficient; for no matter what may be put into the deed, it is no proof: the decree must be referred to. The practical conclusion is, to obtain delivery of an extract of the decree.

Power of Sale.
Statutory Protection. See p. 462.

SEARCHES -PRIOR SECURITIES

In all cases in which it is intended to affect the fee there will, of course, as in all other cases also, be full property searches and full personal searches against the heir in possession and any expectant heirs whose consents are required. In examining the searches the special point in connection with these transactions is, that regard must be had not only to prior charges on the fee, but also to all charges created by the heir in possession, though practically—in the meantime at least affecting only his life interest. For, in the first place, it is clear that so long as the borrower remains in possession of the estate, the latter securities will be the first charge on the rents. And in the second place, these securities will probably be in the form of dispositions of the fee with clauses reserving the entail but qualified as suggested on p. 443, and exemplified on p. 446. If, then, the estate should be disentailed, or (what is a more remote contingency), should be found not to be validly entailed, there seems no answer to the contention that the different securities will rank on the fee in the order of registration.

BOND AND DISPOSITION IN SECURITY ON THE FEE FOR IMPROVEMENT EXPENDITURE

I, A. [take in form, p. 463, to the words "And in security," and proceed] And in security of the personal obligation before written, I, in virtue and in exercise of the special power foresaid, dispone to and in favour of the said B. and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, but always with and under the exception after mentioned, All and Whole [describe or refer to the property]: But excepting from the lands above disponed the mansion-house, offices, and policies of the same: And that in real security [continue and complete as in ordinary form].

THE SAME, INCLUDING THE LIFE-INTEREST OF THE HEIR IN POSSESSION OF THE MANSION-HOUSE, ETC.

I, A. [take in preceding form to and including the words "by virtue hereof"], In the first place, All and Whole [describe or refer to the property], but excepting from the lands above disponed the mansion-house, offices, and policies of the same: And in the second place, but with and under the declarations after written, All and Whole the said mansion-house, offices, and

policies: But providing, as it is hereby provided and declared, that as the said mansion-house, offices, and policies are held under settlements of strict entail containing prohibitions against alienating or encumbering the same (or at least so far as the same are so held), and the said B. by acceptance hereof hereby agrees, that [take in clauses protective of entail, p. 445, altering "lands, estate, and others" to "mansion-house, offices, and policies," and at the end of the clauses add] and further, they apply to the said mansion-house, offices, and policies only, and are without prejudice to the security hereinbefore constituted over the fee of the remaining parts of the estate under the special power foresaid: And that in real security [continue and complete as in ordinary form.]

BOND AND DISPOSITION IN SECURITY FOR CONTEM-PLATED OR INCOMPLETE IMPROVEMENTS

I, A., heir of entail in possession of the entailed estate of X. and others in the county of , in virtue and in exercise of the special power conferred on me by the Entail Acts, and by act and decree of the Lords of Council and Session, dated , and extracted , proceeding upon inter alia an interlocutor of Lord , Ordinary, in the following terms [quote the "order for consignation"], of which act and decree an extract is herewith delivered: Grant me [proceed as in form last but one preceding].

BOND OF ANNUALRENT FOR IMPROVEMENTS

I, A., heir of entail in possession of the entailed estate of X. and others in , considering that by act and decree of the Lords of the county of , and extracted Council and Session, dated authorised to borrow the sum of £ on the security of the fee of the said entailed estate, except as after mentioned, and to grant a bond of annualrent in terms after written for an annualrent of £ , being at the rate , and that of £7, 2s. [or other less sum] per cent. on the said sum of £ during the period of twenty-five years after the said [date of decree], or during such part of the said period of twenty-five years as should remain unexpired at the date of these presents: And now seeing that, in virtue and in exercise of the special power conferred on me by the Entail Acts and by the said act and decree, I have instantly borrowed and received from B. the said sum of , of which I hereby acknowledge the receipt: Therefore, in virtue and in exercise of the said special power, I bind myself and the heirs of entail succeeding to me in the said entailed estate, and my other successors therein, to pay to the said B., his executors and assignees, an annualrent of during such part of the said period of twenty-five years as remains £ unexpired at the date of these presents, and that half-yearly at the terms of Whitsunday and Martinmas in each year by equal portions, beginning the first term's payment thereof at next for the proportion of annualrent then due, and the next term's payment thereof at the half-year preceding, and so forth half-yearly at the said two terms during

the said period, the proportion of the said annualrent corresponding to the period between the last term of Whitsunday or Martinmas falling within the said period and the last day of the period being payable on the said last mentioned day, with a fifth part more of each payment of the said annualrent in case of failure in the punctual payment thereof, and with interest on each payment of the said annualrent at the rate of five per cent. per annum from the date when the same falls due till paid: And in security of the personal obligation before written, I, in virtue and in exercise of the special power foresaid, dispone to the said B. and his foresaids not only All and Whole an annualrent of £ during the said period, and payable at the terms and with penalty and interest all as aforesaid, furth of All and Whole [describe or refer to the lands] or furth of any part thereof, and rents, feu-duties, and casualties of the same, excepting always the mansion-house, offices, and policies, but also All and Whole the said lands and others before described, both property and superiority, and the whole right, title, and interest, present and future, of me and my foresaids therein, excepting always the mansion-house, offices, and policies: And that in real security to the said B. and his foresaids of the said annualrents, penalties, and interest: And I assign the rents, feuduties, and casualties so far as necessary to meet the obligations hereby undertaken: And I assign the writs to the extent of supporting this security: And I grant warrandice: And I consent to registration for preservation and execution.—In witness whereof.

SECTION XXVIII

SECURITIES FOR FUTURE ADVANCES

1. CASH-CREDIT BONDS

THE difficulty here arises only when heritable security is constituted for the future advances, the difficulty arising out of the rule that an infeftment is good only for sums advanced at or before the date of the infeftment. To meet the convenience of commerce this rule has to a certain extent been modified by statute, and it may be satisfactory to quote the section in full:

It shall be lawful for any person possessed of lands or other heritable property, and desiring to pledge the same in security of any sums paid or balances arising, or which may arise, upon cash accounts or credits, or by way of relief to any persons who may become bound with him for the payment of such sums or balances, although paid or arising posterior to the date of the infeftment, to grant heritable securities accordingly . . . for infefting any bank or bankers or other persons who shall agree to give such cash accounts or credits, or for infefting such persons as shall become cautioners for him, or jointly bound with him, in such cash accounts or credits, provided always that the principal and interest which may become due upon such cash accounts or credits shall be limited to a certain definite sum to be specified in the security, such definite sum not exceeding the amount of the principal sum and three years' interest thereon at the rate of five pounds per centum, provided also that it shall be lawful for the person to whom any such cash account or credit is granted to operate upon the same by drawing out and paying in such sums from time to time as the parties shall settle between themselves, and that the sasines or infeftments taken upon such heritable securities shall be equally valid and effectual as if the whole sums advanced upon such cash account or credit had been paid prior to the date of the sasine or infeftment taken thereon, and that any such heritable security shall remain and subsist to the extent of the sum limited, or any lesser sum, until the cash account or credit is finally closed and the balance paid up and discharged, and the sasine or infeftment renounced.

BOND OF CASH CREDIT AND DISPOSITION IN SECURITY

I, A., considering that the X Company (which company and their assignees are referred to and included wherever the expression "the company" is used

throughout these presents) have agreed to allow me credit upon an account current or cash account, to be kept in my name in the books of the company, not exceeding £1000, upon my granting these presents, do therefore hereby bind myself, and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to make payment on demand at any time after three months from the date hereof to the company of the said sum of £1000, or such part or parts thereof as shall at any time be due upon the said cash account, with a fifth part more of liquidate penalty in case of failure in punctual payment, and together also with interest of the principal sum or sums which may be due on the said account from the time or respective times of the advance, as appearing in the stated account after mentioned, until the same shall be repaid, at the rate of per cent. per annum,1 or at such higher rate or rates as shall be charged by the company for the time upon their advances upon cash accounts, declaring that the company shall have power to fix and alter the rate of interest from time to time without notice given to me or my foresaids; and it is hereby agreed that the sums to be placed to the debit of the said cash account shall or may include not only all sums of money which shall be advanced or shall have been advanced by the company to me upon my receipts, drafts, or orders, but also all other advances of every kind which the company shall at any time make or become responsible for, or shall have made or become responsible for, to me or on my account or on my credit, and generally all sums which I shall at any time be owing or in any way liable for to the company, but without prejudice always to any other obligations and securities held or that may be held by the company for such advances, debts, and liabilities: And further declaring that a stated account, signed by the secretary of the company, shall be sufficient to ascertain and constitute a balance and charge against me and my foresaids, and that such a stated account shall sufficiently ascertain and fix the amount of interest chargeable on the said advances which shall have been made upon the said cash account as aforesaid, and that no suspension of a charge or threatened charge for payment of the balance so ascertained at the instance of me or my foresaids shall be passed except on consignation of the sums charged for or claimed by the company: And in security of the foregoing obligations I do hereby dispone to and in favour of the company, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole [description and burdens if necessary], And that in real security to the company of the payment of the said principal sum of ${\mathcal L}$ or such part or parts thereof as shall at any time be due upon the said cash account, with penalty and interest as aforesaid, but with and under the condition always, and it is hereby specially provided and declared, that the real security over the said subjects hereby constituted for the amount of the principal sum and interest which may become due on the said cash account shall be, and the same is hereby, restricted to the sum of £1150, being the amount of the said principal sum of £1000 and three years' interest thereon at the rate of five per centum per annum, but without prejudice to the

¹ In the case of a private lender say, day of December," and omit the other words as to interest.

company recovering any balance of principal, interest, and penalty in excess of the said sum of £1150 that may be due to them, under the personal obligations herein contained, or any other obligations or securities that may be held for the same: And I assign the rents: And I assign the writs: And I grant warrandice: And I reserve power of redemption without premonition: And I bind myself and my foresaids for the expenses of assigning and discharging this security: And on default in payment I grant power of sale: And I consent to registration for preservation and execution.—In witness whereof.

II. Ex facie ABSOLUTE DISPOSITION

This is one of the devices for overcoming the rule that heritable securities are good only for sums advanced at or prior to the creditor's infeftment, and the other rule that a security over heritable property must be for a definite sum. It is also used under such circumstances as those stated on p. 427, when there is a difficulty about the capacity to grant a bond and disposition in security.

Back-letters.—There may or may not be a back-letter. are risks both ways. If there is no back-letter, then the debtor runs a risk, namely, possible difficulty, or even impossibility, in proving the true nature of the transaction. And the creditor also runs the risk of questions being raised by the debtor as to whether a sale by the creditor, or his proceedings otherwise, have been in terms of what was agreed upon, or otherwise have been reasonable and prudent. On the other hand, if there is a back-letter granted by the creditor and delivered to the debtor, then the debtor may record it, and the effect of that as regards future advances is not at all clear, and may vary according to the terms of the document (see infra); and in this connection it is hardly necessary to point out that the creditor may have no knowledge of the recording. As to the form of the back-letter, the common practice appears to be to take a unilateral document from the creditor, to deliver the principal of it to the debtor, and to retain a copy. Apart even from the point as to the recording of the backletter, this form is not a good one. Notwithstanding that the disposition is ex facie absolute, it will often in practice be necessary, or at least desired, to refer to the other document, as showing the creditor's powers, the sufficiency of stamp duty, etc. But under the form referred to, the creditor holds nothing but a copy, and even if he obtains the principal, it is a document by himself only, bearing no evidence of the debtor's consent. It is therefore recommended that, at the least, the document should take the form of a minute of agreement signed by both parties. The best way, however, is either that, if the agreement is adopted, there should be one copy only, and that that should be retained by the creditor, or that the document should be unilateral. but should be signed by the debtor instead of by the creditor, and

should of course be delivered to and retained by the creditor. In this way the powers are under the hand of the debtor, and there is no possibility of any back-bond being recorded.

Advantages and Disadvantages.—Comparing the advantages and disadvantages of a security by way of absolute disposition with the ordinary bond and disposition in security from the point of view of creditor and debtor respectively, and omitting mere varieties in procedure, we may put it shortly thus:

CREDITOR

Advantages.

- 1. He may obtain a security in this way which he could not do even by a bond of cash credit, e.g. (a) uncertain sums, (b) questions of capacity to grant a personal obligation.
- 2. The procedure before a sale may be made (a) shorter, and (b) less expensive, e.g. private sale with less advertising or with none.

Disadvantages.

- 1. He is liable as vassal, including feu-duties, duplicands, and all the other prestations of the feu. But (1) as to composition, there is no personal liability: and further it does not appear that the infeftment of the ex facie absolute disponee is any reason for claiming composition instead of relief, or refusing a receipt in name of the disponer; (2) the ex facie absolute disponee is apparently not liable for stipend unless and until he enters into possession 1; and (3) probably the same as to local charges, e.g. causewaying, etc.² As to divestiture of the disponee, see the case cited.⁵
 - 2. He cannot poind the ground,4 which may be a serious loss.
 - 3. If he die intestate the benefit will pass to his heir.

DEBTOR

Disadvantages.

- 1. He may be exposed to the difficulty or impossibility of proving that it is a security only, and not a sale.
- 2. He will find it very difficult to find anyone to lend on a postponed security after the ex facie absolute disposition.
- 3. He is exposed, further, to the fraud of the disponee, who may deal with onerous bond fide third parties as if the property were his own, and dispositions, securities, and other deeds so granted by the creditor will be good to the receivers. But the debtor is not exposed to any risk by reason of the creditor's bankruptcy and sequestration.⁵ Nor in the ordinary case will any creditor or creditors of the ex facie
 - ¹ Jackson v. Cochrane, 1873, 11 M. 475.
- ² M'Intosh v. Mitchell Thomson, 1900, 8 S. L. T. No. 39.
- 3 Marshall's Trs. v. Macneill & Co., 1888, 15 R. 762.
- ⁴ Scot. Her. Sec. Co. v. Allan, 1876, 3 R. 333; Scot. Union and National Insurance Co. v. James, 1886, 13 R. 928.
- ⁵ Forbes' Trs. v. Macleod, 1898, 25 R. 1012.

absolute disponee be entitled to adjudge the property in security of debts due to them by the disponee, except subject to the qualification which affected it in the disponee's person. But it would be a different case if the disponee incurred debt on the representation that the property was his absolutely, and if the creditors in these debts proceeded to adjudge.

It is accordingly obvious that an ex facie absolute disposition should not be granted except in favour of a creditor of undoubted standing.

Extent of Security.—Various questions arise as to the extent of the creditor's security under an ex facie absolute disposition, according to the terms of the back-letter, whether it is recorded or not, and the amount due at the date of recording. Assuming the back-letter is not recorded the amount therein specified is not necessarily restrictive of the creditor's security unless there are distinctly taxative words in the document, and that is reasonable enough, for if the only advance when it is granted is £100, it is quite right that the deed should declare that the disposition is to be held in security of that sum; but that is no reason for holding that a subsequent further advance is not also to have the benefit of the security, although further advances are not referred to in the document.

If, again, the back-letter, though unrecorded, declared that the property was to be held in security of present and future advances up to the amount of a certain specified limit, it might more readily be held that anything beyond that (other than interest and other consequents) was not secured.

Another element is introduced when the back-letter is recorded. The authorities are not at all conclusive, but they appear to give ground for saying (1) that if the back-letter refers to all advances without limit, the amount will be fixed as at the date of recording; (2) that if there is a limit, and that has not been reached at the date of recording, the limit is reduced to the amount then advanced; and (3) that if the limit has been exceeded, the limit in the back-letter only is secured.¹

But from the point of view of the creditor the proper course in all these matters is plain enough. As regards recording, it should not be in the power of the debtor to record a back-letter (see p. 471), unless the creditor is content to hold the security for advances already made when he signs the document, having no intention of making, or at any rate of relying on this security for, any future advances. And as regards the terms of the back-letter, or any limit therein contained, no further advance should be made until the existing document is effectually cancelled and superseded by a new one which will put the creditor's whole advance in a satisfactory position.

Competition with Third Parties.—It is quite plain that A. cannot make advances to B. on the security of what he knows to be

¹ See the cases stated in some detail, and Security, 154 et seq. Anderson v. Somer-discussed, in Gloag and Irvine's Rights in ville & Co., 1898, 1 F. 90.



C.'s property. This is the basis of the judgment of the House of Lords in the Union Bank 1 case. One bank held an ex facie absolute disposition, on the security of which they had made certain advances. Then the debtor granted another ex facie absolute disposition to another bank, who intimated it to the first bank. Both banks then made advances. Held that the first bank's preference was limited to what was advanced by them before the intimation to them of the second bank's title. This suggests the further question whether the mere recording of a second disposition could be held to be intimation to the first disponee. It is thought to be clear that it could not; and the same with regard to the recording of (1) any other deed, e.g. a bond and disposition in security; (2) an adjudication; (3) inhibition. In the case of inhibition there is the further question whether even intimation of it to the first disponee will be effectual to prevent him claiming a preference for future advances as against the inhibitor; and it is thought that it would not.2

There remains the question of the effect of sequestration. It operates a transfer by adjudication, and it is a public fact without intimation. It would appear to follow that the preference under an ex facie absolute disposition granted by the bankrupt would be limited so as to exclude advances made after the sequestration, though bond fide in ignorance of it.

Applying these matters practically, the creditor, if it is a case of a few isolated loans, may at trifling expense have the property and personal searches continued, and if he finds any deed or diligence he will not make the proposed further loan. Indeed, it is to be observed that his position, after having got this information from a search, may be very different from what it would have been if he had not searched at all, for now he is charged with knowledge. And in the same way if he receives intimation, formal or informal, of any right or diligence in favour or at the instance of a third party, or has in any way knowledge of such, he will stop his advances.

Postponed Securities and Diligence.—Approaching the matter now from the other side, it not infrequently happens that it is necessary to make the debtor's reversionary or radical right available for new claims at the instance of other parties. "Nothing hinders him (the radical owner) . . . to grant other postponed securities, either in the same form or in any other." Assuming the new security is by deed it should contain an ordinary dispositive clause of the property, and also an assignation of the granter's reversionary or radical right and his right to require a reconveyance from the holder of the first dis-

⁴ Ritchie v. Scott, 1899, 1 F. 728; per Lord Kinnear at p. 736.



 ¹ Union Bank v. National Bank, 1885,
 13 R. 380; rev. 1886, 14 R. (H. L.) 1.
 2 Campbell's Trs. v. De Lisle's Exr., 1870,

² Campbell's Trs. v. De Liste's Exr., 1870, 9 M. 252; opinion contra, Graham Stewart, Diligence, 565.

³ Callum v. Goldie, 1885, 12 R. 1137.

position. It should be recorded, and also at once intimated to the first disponee. The sentence just quoted from Lord Kinnear has reference to cases where the radical owner was originally infeft, and occurs in a passage in which he contrasts that case with the contrary, i.e. where the title has been taken direct from some third party to the first lender. But even in the latter case it is quite clear that the reversionary right is an asset which may be made a fund of credit, and as a practical question it is not recommended that any difference should be made in the form of the second security or the modes of its completion from what is stated above as applicable to cases where the borrower has an infeftment, except, indeed, that there can be no reference to reconveyance.1 But of course no one will go on advancing money, or will advance money at all, on any such securities as an ordinary matter of investment. There may very well be questions between the two creditors as regards the extent of their respective preferences, notwithstanding the Union Bank case above quoted. For if the first disponee has notice of the second disposition, so vice versa, and the first disponee may also be allowed the benefit of the knowledge that the second disposition is not truly absolute but only in security, and that accordingly the property is still in the ownership of the common debtor.

If the new security is to be by diligence, both inhibition and adjudication should be used. In the adjudication the first disponee should be called as a party, or at least the process should be at once intimated to him.

Creditor's Succession.—The 1868 Act, by which heritable securities generally are made moveable in the succession of the creditor, excepts (interpretation clause) "absolute dispositions qualified by back bonds or letters." These last words suggest a question as to the nature of the succession if there is no back bond or letter, in which case, however, it is thought that the deed just partakes all the more of the nature of an absolute disposition; and besides, quære whether "back-bond" necessarily means a document, or whether the sense is not fully satisfied by the existence and admission of a bond (i.e. obligation or duty) to give back the property on repayment? But a different question may arise under a deed which shows in gremio that, as between the parties to it, it is a security only, but which is so framed that in its operative part and as regards all third parties it partakes of the nature of an absolute disposition. See such deeds figured in Bell's Commentaries, i. 725. It is difficult to express any opinion regarding such deeds without reference to the exact terms of any particular case, but it is submitted that though taken to "heirs," they ought to be held as moveable in the succession of the creditor. This view is stated on the ground that, after all, such a deed is not an absolute disposition at all, and that the creditor will draw his powers, not as inherent in the position of an absolute owner, but as donee of powers from the debtor,

¹ Ritchie v. Scott, 1899, 1 F. 728; per Lord Kinnear at p. 732.



though these may be very briefly conferred, and even by implication mainly.

In connection with this matter of succession, care is necessary to keep all the documents consistent with one another. Thus there may be, in addition to the ex facie absolute disposition, (1) a personal bond; (2) a bond and disposition in security, the absolute disposition constituting only part of the security; (3) a transfer, ex facie absolute or otherwise. of personal assets, e.g. a life policy, bank stock, etc.; and (4) a backletter. It seems to be quite clear that, whatever course is adopted, the documents should be taken either all to the heir or all to the executors. There appears no reason in principle why the ex facie absolute disposition should not be taken to "executors," of course without any mention of heirs. Such a deed would no doubt be an absolute disposition in the sense of the 1868 Act, but still it would be moveable quoad succession, for it would have been so even before 1868 in virtue of . its own terms. But, on the whole, this course is not recommended; and accordingly, assuming that the disposition is taken to "heirs," the bond and all other documents should be in the same terms, and expressly, in their case, excluding executors. It is submitted that, even though it is intended that the money secured should descend as personalty, this is the proper conveyancing, and that the succession should be regulated by testamentary instrument. Even if a will, in the ordinary sense, is not made, there may be a short document to the effect that, notwithstanding the terms of the deed, the creditor's will is, and he directs, that the money so secured shall on his death be considered part of his personal estate, and fall to those entitled to succeed to his personal estate, and in the proportions in which they are entitled.

Leases.—1. By Debtor.—There are two different grounds on which a lease by the debtor may be supported:—

- (1) Infeftment.—"The principle is that a security in this form, being merely a security after all in substance, although in form a disposition absolute, does not divest the granter even feudally." From which it follows that the debtor is, as regards the granting of leases, in the same position as if the security had taken the form of an ordinary bond and disposition in security. But to allow this to operate it is essential that the debtor shall have been infeft, so that it would not apply where the creditor's title takes the form of (1) a disposition direct in his favour from some third party, usually the party who is truly selling to the debtor, but who for convenience conveys direct to the lender; (2) an assignation to the lender by the debtor of an unrecorded conveyance held by the latter, on which and the assignation of it the former is then infeft.
- (2) Mandate, i.e. from the creditor. This may be express or implied. An express mandate will usually be found in the back-letter or other

 1 Ritchie v. Scott, 1899, 1 F. 728.

similar document if any. It may either be direct in so many words or indirect, e.g. a provision that after default the creditor may enter into possession and grant leases, which may fairly be classed as an express mandate to the debtor to grant leases until default. An implied mandate will usually be inferred if the debtor is allowed to remain in the administration of the estate as if he were proprietor. But this is on the assumption that the arrangement is not inconsistent with a mandate, e.g. if it shows that the real object is to maintain the debtor himself in the premises for the purpose of carrying on his business therein; if or so far as that is the case, the idea of mandate to let will probably be excluded. Further all such mandates whether express or implied will be assumed to be personal and intransmissible, and in particular will not pass to a trustee for creditors. And of course such a mandate is revocable. apparently even verbally. On the other hand, as regards all questions of mandate the distinction above taken as to the form of the feudal title has no application.

2. By Creditor.—As between the creditor and the debtor the former's power will depend on the back-letter, or other agreement or arrangement, failing which it would appear that the creditor has no power to lease until he enters into possession. But a tenant would probably be entitled to claim and retain possession on a lease which he had taken in reliance on the fact of the creditor's infeftment, at least if it were not proved that he knew it was a security only.

Realization.—The conditions which the creditor must observe before a sale will be regulated by the back-letter if any, e.g. notice, advertisement, public roup. Assuming no back-letter or no conditions expressed, the creditor may sell by private bargain, but he will undoubtedly be liable in damages to the debtor if he disregards the debtor's interests, and in view of this risk he cannot be advised to sell by private bargain without the debtor's consent, for it must always be easy to state a relevant case of damages in the event of a private sale. When nothing is prescribed there should be either the debtor's consent or reasonable notice and advertisement. Clearly however the procedure need not be analogous to that under the 1868 Act; thus, say three or four weeks' advertisement would undoubtedly be sufficient, and the notice may quite well run concurrently with the advertisement. Notice may be quite informal so long as distinct in terms and clearly proveable.

Terms of Sale and Disposition to Purchaser.—There are a number of important points:—The deed ought to be a simple absolute disposition, without referring to the fact that the seller's infeftment is truly only in security, a fact which the seller is under no duty to disclose.³ The seller may or may not be described as heritable proprietor. The debtor

¹ Baillie v Drew, 1884, 12 R. 199; Duncan v. Mitchell, 1893, 21 R. 87; Shrubb v. Clark, 1897, 5 S. L. T. No. 160.

³ Shrubb v. Clark, supra. ³ Park v. Alliance Her. Sec. Co., 1880, 7

ought not to sign the deed nor the articles of roup or missives or minute of sale, nor should his consent be referred to, nor should the purchaser concern himself as to whether the debtor has or has not consented. If the back-letter be recorded, or in any case if the purchaser knows of its existence, he ought to see that its conditions if any have been observed, but neither these matters nor the back-letter ought to be referred to in the deed. The missives ought to stipulate that the seller is not (1) to be liable for casualties, nor (2) to grant warrandice except from his own facts and deeds, he assigning the debtor's warrandice; and these points will be observed in the deed. The obligation for searches if any should be limited to deeds and diligence by and against the creditor, and this also may require to be dealt with in the missives.

Ex Facie Absolute Disposition

The only alterations on the form of ordinary disposition given on p. 319 will be—

- 1. The cause of granting will be stated to be "certain good and onerous causes and considerations."
- 2. After the obligation of relief of feu-duties, casualties, and public burdens may be added "now and in all time coming." But some will prefer to omit these words.

POSTPONED SECURITY

Whether the security be taken in the form of a second ex facie absolute deed or an express security, the following clause may be introduced. In the former case it will go in before the term of entry; in the latter case before the clause "And that in real security."

And whereas by disposition dated and recorded in on I disponed the said subjects to X. ex facie absolutely, but truly in security of a loan of £ [or advances which amount at present to not more than £], conform to back-letter granted by the said X. dated , I assign and dispone to the said [present lender] and his foresaids my radical or reversionary right, and my right to claim a reconveyance from the said X.

MINUTES OF AGREEMENT QUALIFYING EX FACIE ABSOLUTE DISPOSITIONS

1. Unspecified (But limited) Advances and Obligations

With reference to the exfacie absolute disposition granted by the said B. in favour of the said A., of even date with his signature hereto, of subjects in X. Street, Glasgow, it is hereby agreed as follows:—

First. Notwithstanding the ex facie absolute terms of the said disposition, the said A. hereby admits and declares that the said subjects are and shall be

1 See p. 283.

held by him and his heirs in security of payment of all sums advanced and to be advanced by the said A. or his foresaids to the said B. or on his account, and all accounts incurred and to be incurred by the said B. to the said A., and of payment of and relief from all obligations undertaken or that may be undertaken by the said A. on behalf of the said B., and of and from all feu-duties, ground-annuals, casualties, additional payments, rates, taxes, fire insurance premiums, repairs, improvements, expenses of management, and all other outgoings and expenses, with interest at per cent. per annum from the respective dates of disbursement till repaid, and for relief of all liabilities in respect of the said subjects; and further and generally, in security of all claims, present and future, of whatever nature, at the instance of the said A. or his foresaids against the said B. The said security shall be a continuing and covering security, but only to the amount of £

Second. The said A. or his foresaids shall be entitled to sell the said subjects at any time or times, in whole or in lots, by public roup or private bargain, without any notice to the said B. or his representatives, and without any demand of payment, and with or without advertisement, and at such price or prices as the said A. or his foresaids shall in their uncontrolled discretion think fit.

Third. On the purposes of the said disposition being fully satisfied the said A. or his foresaids shall reconvey the said subjects to the said B. or his representatives at his or their expense, and with warrandice from fact and deed only; and if the said A. or his foresaids shall have any funds in their hands, they shall pay same over to the said B. or his foresaids, but in either case only in exchange for a discharge of all intromissions and omissions, which also shall be granted at the expense of the said B. or his foresaids.—In witness whereof.

2. Specific Advance when there is also a Bond and Disposition in Security constituting another Part of the Security

With reference to the following deeds, namely, (first) bond and disposition in security for £2000 granted by the said B. in favour of the said A., executed by the former of even date with his subscription hereto; and (second) disposition by X. in favour of the said A., dated (the consideration money of £1000 therein expressed being part of and not in addition to the said sum of £2000), under which he is ex facie proprietor of the subjects known as Y. (hereinafter referred to as "the said subjects"), it is agreed as follows, namely:—

First. Notwithstanding the ex facie absolute terms of the said disposition, the said A. hereby admits and declares that the said subjects are and shall be held by him and his heirs in further security of the said principal sum of £2000, penalties, interest, premiums of insurance, and whole other obligations contained in the said bond and disposition in security, and also in security of payment to him and his foresaids of all feu-duties, ground-annuals, casualties, additional payments, rates, taxes, fire insurance premiums, repairs, improvements, expenses of management, and all other outgoings and expenses, with

¹ If unlimited, the deed cannot be adjudged duly stamped.

interest at per cent. per annum from the respective date of disbursement till repaid, and for relief of all liabilities which he and his foresaids may incur in respect of the said subjects and the title thereto, all as the same may be instructed by a certificate under the hand of himself or his foresaids, without the necessity of any vouchers.

Second. The said B. hereby agrees that whenever a case arises authorising the exercise of the power of sale under the said bond and disposition in security, and after notarial intimation, requisition, and protest thereunder shall have been given with reference to the security thereby constituted, and such notice shall have expired, the said A. and his foresaids shall ipso facto and without any other intimation, requisition, protest or notice, or procedure of any kind, be entitled to sell the said subjects, and that either along with their other securities or separately, in whole or in lots, and for such price or prices, and on such conditions, as they may think fit, but only by public roup, and after advertisement as is required in the case of ordinary heritable securities.

Third. The said B. hereby binds himself and his heirs, executors, and representatives whomsoever, without the benefit of discussion, to repay to the said A. and his foresaids all sums which may be disbursed by them, and to relieve them of all liabilities, all as before referred to and to be ascertained as aforesaid, and he agrees that the said A. and his foresaids shall not be compellable to accept repayment of the sums due under the said bond and disposition in security unless and until the sums due under these presents are at the same time paid.—In witness whereof.

3. Specific Advance, embodying Personal Obligation therefor and for Consequents

Whereas the said A. has instantly lent to the said B. the sum of £ on the security of the tenement 1, 3, and 5 Dundee Street, Edinburgh, with solum, ground attached, and pertinents (hereinafter referred to as "the said subjects"):

And whereas the security has been constituted by a disposition ex facie absolute granted by the said B. in favour of the said A. signed by him of even date with his signature hereto:

And whereas it is necessary that these presents should be entered into with reference to the said loan and security: Therefore it is hereby agreed as follows, namely:—

Bond

First. The said B. binds himself, his heirs, executors, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, to repay the said sum of £ to the said A., his heirs (excluding executors) or his assignees, at the term of [insert personal obligation for principal, interest, and penalties, as on p. 430]: But with reference to the said rate of interest on the loan, it is agreed that, provided the interest is punctually paid, and provided the said principal sum is repaid when required, subject to article second hereof, and provided all the other obligations herein contained are duly fulfilled, the rate of interest shall be modified to per cent. per annum.

Endurance

Second. Notwithstanding the term of payment above expressed, the said A. agrees that, provided the interest is punctually paid and all the other obligations are duly fulfilled, then the loan shall not be called up for payment at an earlier term than

Security

Third. Notwithstanding the ex facie absolute terms of the said disposition, the said A. hereby admits and declares that the same and the said subjects are and shall be held by him in security of the said loan of \pounds , penalties, interest, premiums of fire insurance as after mentioned, interest thereon, and expenses as after mentioned, and in security of implement of the other obligations hereby undertaken by the said B.

Relief

Fourth. The said B. binds himself and his foresaids to relieve the said A. and his foresaids of all feu-duties, ground-annuals, casualties, additional payments, rates, taxes, repairs, improvements, expenses of management, and all outgoings and expenses, and all liabilities in connection with the said subjects, security, and title, and to repay all sums which they may advance for any of these purposes, with interest at per cent. per annum from the respective dates of disbursement till paid—all as the same may be instructed by a certificate under the hand of the said A. or his foresaids, without the necessity of vouchers.

Fire Insurance

Fifth. The said A. and his foresaids, if they think fit, may effect and maintain (but without any obligation on them to effect or, if effected, to maintain) in their own names an insurance of the said subjects against loss by fire to the respective extents of \pounds of principal and \pounds on rents; and the said B. binds himself and his foresaids, so long as any sum shall remain due under these presents, to repay to the said A. and his foresaids the amount of the annual premium of insurance disbursed by them for the upkeep of the said insurance, with interest thereon at the rate of per cent. per annum from the respective dates of advance till repaid.

Power of Sale

Sixth. The said B. grants power of sale in the same terms and to the same effect as if the said security had been constituted by bond and disposition in security in ordinary form, except only that the demand of payment may be by letter signed by the said A. or his foresaids or his or their agents, addressed to the said B. or his foresaids at his or their last known address, and a copy thereof with a certificate of postage by the sender shall be sufficient evidence of such demand.

[Or alternatively as on p. 479.]

Power of Redemption

Seventh. The said B. reserves power of redemption by payment of the said sum of £, penalties, interest, premiums, interest thereon, and expenses, and on implement of the other obligations herein contained, but that only at the term of or at any subsequent term of Whitsunday or Martinmas, and only after three months' written notice addressed to the said A. or his foresaids. On redemption being duly made in terms hereof, the said A. or his foresaids shall execute a conveyance of the said subjects in favour of the said B., his heirs and assignees or nominees, at his or their expense, and with warrandice from fact and deed only.

Expenses

Eighth. The said B. binds himself and his foresaids for the expenses which may be incurred by the said A. in enforcing or endeavouring to enforce the obligations hereby undertaken, or in exercise of the powers hereby conferred, or otherwise in consequence of or in relation to these presents and the said disposition, or in relation to the premises in any manner of way, and for the expenses of transferring and discharging the said obligation and security.

Lastly. Both parties consent to registration hereof for preservation and execution.—In witness whereof.

RECONVEYANCE BY EX FACIE ABSOLUTE DISPONEE

I, A., for certain good causes and considerations, do hereby dispone to B. and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole the piece of ground forming lot 10 on the feuing plan of the lands of X., in the county of Edinburgh, with the houses now erected thereon known as 1, 2, and 3 Y. Crescent, Edinburgh, with the pertinents, the said piece of ground being the subjects particularly described in the feu-charter granted by Z. in favour of the said B., dated the , and recorded in the division of the general register of sasines for the county of Edinburgh on the both days of : But always with and under the burdens, conditions, etc., specified in the said feu-charter, dated and recorded as aforesaid: With entry at the date hereof: And I assign the writs: And I assign the rents: Declaring that the said B, and his foresaids shall be bound, as by acceptance [or execution] hereof he binds himself and his foresaids, to free and relieve me and my successors of all feu-duties [ground-annuals], casualties, and public burdens, and of all other payments and all liability and responsibility in connection with the said subjects as well before as after the said term of entry: And I grant warrandice from my own facts and deeds only.-In witness whereof.

SECTION XXIX

BONDS OF RELIEF

Purposes.—The purposes for which a bond of relief may be taken are at least three, namely:

- 1. To prove Caution.—If ex facie of the principal document of debt the cautioner is a principal debtor, it is proper that he should have a written admission by the true debtor of what the true relation between them is.
- 2. To compel Relief.—It is known that valuable opinions had been given to the effect that a cautioner is not entitled to be relieved at any time at his pleasure, but only after he has paid, or is called upon to pay, or if the principal is vergens ad inopiam. But this view has been negatived in a case in which the question may be said to have arisen in a pure shape, that is to say, the obligation was gratuitous and indefinite as to time; the cautioner had neither paid nor been required to do so; and the principal debtor was solvent. The debtor was allowed a month to make arrangements. But it is obvious that the result may be different if it be proved that any consideration was received by the cautioner, and that much trouble may be caused by an averment to that effect. The obligation of relief will be so expressed as to give the cautioner a certain absolute and immediate right to be relieved, and it will authorise summary diligence.
- 3. To give Security.—If the creditor holds security constituted by the true debtor, and if the latter has no additional security to give, the cautioner will often be safe enough in relying on his right to an assignation of the security if he should be called upon to pay. But that will not always be so, for (1) the principal deed may contain clauses enabling the creditor to release security, in whole or in part, without relieving the cautioner; and (2) there may be expenses which the principal deed will not cover. There may also be questions as to whether the creditor is entitled to hold the security for other claims; but that question will be the same, apparently, whether there is a bond of relief or not.

Cash-Credits.—There is a difficulty regarding bonds of relief to

1 Doig v. Lawrie, 1903, 5 F. 295.

cautioners on cash-credits where it is intended that the bond of relief should be secured over heritage. The Act 19 & 20 Vict. c. 91, s. 7, refers to obligations of relief as well as to the cash-credits themselves (see p. 469). But if the security in favour of the cautioner is thus limited, i.e. to the amount of the credit and three years' interest at five per cent., it may be insufficient to secure the cautioner, for of course his personal obligation under the cash-credit bond will not be so limited. In these cases, and other cases of relief from future claims, it may be preferred to take an ex facie absolute disposition.

OBLIGATION OF RELIEF IN SHORTEST FORM

To

[Place and date.]

I admit that though you have along with me signed an obligation, dated , in favour of the X. Bank, for advances up to £ , you have done so only as cautioner for me, and I am the only true debtor: And I agree to relieve you of the said obligation at any time on demand by you at your pleasure.—In witness whereof.

Stamp, 6d.

ANOTHER SHORT FORM

I, A., considering that B. and myself have signed a cash-credit bond, , in favour of the X. Bank, for a credit of £500 to be allowed by the Bank on an account to be kept in my name, but that he has done so only as cautioner for me, and that I am the only true debtor, do hereby undertake to relieve the said B. and his representatives of the said obligation at any time on demand at his or their pleasure, and for that purpose I bind myself and my heirs, executors, and representatives whomsoever, without the benefit of discussion, to pay to the said B. or his foresaids the sum of £600 within the head office in of the said Bank at any time on demand as aforesaid, for which sum he and his foresaids shall be bound to account to me and my foresaids, after deducting all sums for which he or they may be liable under the said cash-credit bond, and all expenses anyway incurred or to be incurred in connection with his said obligation, with interest at the rate of five per cent. per annum on all sums disbursed by him until repaid: And I consent to registration hereof for preservation and execution.—In witness whereof.

Stamp, 15s.

BOND OF RELIEF AND DISPOSITION IN SECURITY (FIXED LOAN)

I, A., considering that B., along with me, has signed a bond for £1000 and consequents in favour of C., dated : That notwithstanding the terms of the said bond I have received the whole amount of the loan and am. the only true debtor therein, the said B. being truly only cautioner for me,

and that accordingly it is proper that I should grant this bond of relief: Therefore I hereby bind myself and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to free and relieve the said B., and his heirs, executors, and representatives whomsoever, of and from the whole obligations contained in the said bond, and all loss, damage, and expense which he or his foresaids have incurred or may incur through the same: And for that purpose I bind myself and my foresaids, at next, or at any time thereafter, on demand of the said B. or his foresaids, to make payment to the said C., or his heirs, executors, or assignees, of the said principal sum of £1000, with the interest due thereon at the time of payment, in terms of the bond, and liquidate penalties if incurred, and all other sums then due thereunder, and to deliver up to the said B. or his foresaids the said bond to be cancelled, and a formal discharge thereof: Or otherwise, in the option of the said B. or his foresaids, and whether he or they shall or shall not have paid the sums due under the said bond, or any part thereof, I bind myself and my foresaids to make payment to him or his foresaids, at the said term of next, or at any time thereafter, on demand, of the said principal sum of £1000, with interest, penalties, and other sums as aforesaid, all which sums and interest shall be applied by the said B. or his foresaids in paying up the amounts due under the said bond, or in recouping themselves pro tanto for all sums paid by them thereunder, or shall be applied to both of these purposes, according to the circumstances and in the option of the said B. or his foresaids: And further, as separate obligations from any and all of the obligations hereinbefore contained, and in addition thereto, I bind myself and my foresaids, (first) in the event of the said B. or his foresaids making any payment or incurring any expense under or in respect of the said bond, to pay interest thereon at the rate of five per cent. per annum compounded and accumulated with half-yearly rests at the terms of Whitsunday and Martinmas in each year from the respective dates of disbursements until repaid, and (second) in any event to pay to the said B. and his foresaids the additional sum of £100 on demand, which shall be applied by them to their more complete indemnification in the matter of expenses as before and after mentioned and otherwise, subject to the right of myself and my foresaids to an accounting therefor [Fire insurance if wished]: And in security of all the personal obligations hereinbefore written, I dispone to and in favour of the said B. and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole [description and burdens]. And that in real security to the said B. and his foresaids of relief and payment as aforesaid: And I assign the rents: And I assign the writs, and have delivered those in my possession: And I grant warrandice: And I reserve power of redemption on relief and payment as aforesaid, and fulfilment of all the obligations herein contained, and that without premonition: And on default in relief or payment as aforesaid, or in punctual implement of any obligation herein contained, I grant power of sale: And without prejudice to or by the other obligations herein contained, I bind myself and my foresaids to pay and to relieve the said B. and his foresaids of all expenses which may be incurred by him or them in any manner of way in

connection with or in relation to the said bond and these presents, including, without prejudice to the said generality, all expenses of and in connection with obtaining advice as to the relations, rights, and obligations of parties, and the course of action to be adopted from time to time, and of all actions, negotiations, and proceedings, judicial or otherwise, and all extrajudicial as well as judicial expenses, and the expense of all assignations and discharges: And I consent to registration hereof for preservation and execution.—In witness whereof.

Stamp, £1, 7s. 6d.

BOND OF RELIEF AND DISPOSITION IN SECURITY (CASH CREDIT)

I, A., considering that B. and myself have signed a cash-credit bond, dated , in favour of the X. Bank, for a credit of £1000 to be allowed by the Bank on an account current to be kept in my name, but that he has done so only as cautioner for me, and that I am the only true debtor therein, and that it is accordingly proper that this bond of relief and disposition in security should be granted: Therefore I [proceed as above, with the necessary verbal alterations; but the clause beginning, And that in real security, will run as follows]:—

And that in real security to the said B. and his foresaids of relief and payment as aforesaid, but with and under the condition always, as it is hereby specially provided and declared, that the real security over the said subjects hereby constituted for relief of the sums contained in the said cash-credit bond shall be, and the same is hereby, restricted to the sum of £1150, being the amount of the said principal sum of £1000 and three years' interest thereon at the rate of five per cent. per annum, but without prejudice to the full effect of the personal obligations herein contained, and also without prejudice to the security hereby constituted over the said subjects for sums other than and additional to the sums contained in the said cash-credit bond [aud also without prejudice to the other security hereby constituted].

If other security, such as a policy of life assurance, is assigned, there will be the necessary obligation for the maintenance thereof; and if there is also heritable security, then, in order to give a good charge thereon for the premiums and extra premiums, there will be inserted an obligation for a fixed annual sum, subject to accounting; all which will be expressly secured. See p. 444.

SECTION XXX

EXCLUSION OF EXECUTORS AND REMOVAL OF EXCLUSION

the exclusion of executors in securities is almost unknown except uses like those referred to on pp. 476, 556, minutes of exclusion of removal of exclusion are little known in practice. The exclusion recutors may be effected in any of the following ways:—

- . In gremio of the bond, by the obligation to repay being taken about of the lender "and his heirs (excluding executors) and nees."
- In gremio of any deed of assignation or bequest of the security, he same being assigned or bequeathed to the new holder "and beirs (excluding executors) and assignees." In this case the exon, if intended, must be expressed even though executors already a expressly excluded. See below.
- n both of these cases a destination to "heirs," but not expressly luding executors," will not have the effect of excluding them; but purse the destination ought to be to "executors" if they are ided.
- . When the holder of the security, whether the original creditor or who has derived right, has a recorded title, then by a separate ate also recorded.
- When the creditor's immediate title, whether consisting of the (in the case of the original creditor) or an assignation or other (in the case of a subsequent creditor), has not been recorded, by a minute endorsed on the immediate title and recorded it.
- It would appear that if the original bond has been recorded, is nothing to prevent any subsequent holder, though unregistered, excluding executors by a *separate* recorded minute; but it will afer in that case to proceed as in the immediately preceding graph.
- . Of course a special destination in the bond, or in any assignation, has practically the effect of excluding executors.

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REMOVAL OF EXCLUSION

- 1. By minute of removal recorded. This is always a separate document, whether it is made by the original or any other creditor, and whether the bond or other title has or has not been recorded.
- 2. By the holder "assigning, conveying, or bequeathing such security to himself or to any other person without expressing or repeating such exclusion." A destination to "heirs," but without expressly "excluding executors," would be sufficient under this method to remove the exclusion; but of course the destination ought to be to "executors."

On all these cases of exclusion and removal of exclusion the two important questions are: (1) how far they extend, and (2) when they take effect.

Extent of Exclusion.—The Act provides, "where executors shall be excluded, in the security or by minute recorded as aforesaid, the security shall continue to be heritable as regards the succession of the creditor for the time holding such heritable security until the exclusion of executors shall be removed" in one or other of the two methods above mentioned. From this it is plain that the exclusion is not limited to the succession of the creditor who dictates the exclusion. On the other hand, as above stated, the exclusion vanishes if, on any assignation, conveyance, or bequest of the security, it is not expressly repeated. This, however, leaves two cases of transmission beyond the immediate succession of the creditor who dictates the exclusion, namely, (1) intestate succession ad infinitum, and (2) adjudication. In the former case it is clear that the exclusion will apply all through, so that the security shall descend from heir in heritage to heir in heritage. The latter case—adjudication—is not at all so clear, but it is thought that unless the decree repeats the exclusion, it is removed. No doubt the party from whom the security is adjudged does not grant the adjudication; but it is simply a judicial assignation, and as regards it, as much as ordinary assignations, it is the new holder who dictates the terms. Of course, if the security is adjudged to the pursuer and his executors, cadit quastio; the only question is when the adjudication is simply to the pursuer or to him and his heirs, and for the reasons stated it is submitted that in either of these cases the exclusion is removed. This is confirmed by the concluding words of sec. 129 of the 1868 Act (sec. 65 of the 1874 Act).

Extent of Removal of Exclusion.—Once the exclusion is effectually removed, it never revives. The removal is absolute. If another exclusion is desired, it must be reconstituted expressly.

Date of taking Effect.—(1) Exclusion: (a) In bond: from the date of delivery; (b) deed of transfer: delivery; (c) bequest: a morte testatoris; (d) minute: recording.

(2) Removal of exclusion: (a) in deed of transfer: delivery; (b) bequest: a morte testatoris; (c) minute: recording.

MINUTE OF EXCLUSION BY ORIGINAL HOLDER OF RECORDED BOND

I, A., hereby exclude executors from the bond and disposition in security, dated , and recorded in the division of the general register of sasines for the county of on , for the sum of \mathcal{L} granted by B. in my favour.—In witness whereof.

MINUTE OF EXCLUSION BY ORIGINAL HOLDER OF UNRECORDED BOND (ANNEXED TO BOND)

I, A., hereby exclude executors from the within bond and disposition in security.—In witness whereof.

MINUTE OF EXCLUSION BY ASSIGNEE, ETC., HOLDING RECORDED ASSIGNATION

I, A., hereby exclude executors from the assignation granted by B. in my favour, dated , and recorded in the division of the general register of sasines for the county of on , whereby I acquired right to the bond and disposition in security granted by C. in favour of the said B. for \pounds , dated , and recorded in the said division of the said register on .—In witness whereof.

MINUTE OF EXCLUSION BY ASSIGNEE, ETC., HOLDING RECORDED NOTARIAL INSTRUMENT

I, A., hereby exclude executors from my title to the bond and disposition in security granted by C. in favour of B. for \pounds , dated , and recorded in the division of the general register of sasines for the county of on , my title thereto being a notarial instrument in my favour recorded in the said division of the said register on .— In witness whereof.

MINUTE OF EXCLUSION BY ASSIGNEE, ETC., WITH UNRECORDED TITLE

I, A., hereby exclude executors from the within assignation [or notarial instrument, or whatever may be A.'s immediate title].—In witness whereof.

MINUTE OF REMOVAL OF EXCLUSION, THE EXCLUSION HAVING BEEN CONTAINED IN OR ENDORSED ON THE ROND

I, A., hereby remove the exclusion of executors contained in [or endorsed on] the bond and disposition in security for £ 'granted by B. in my favour, dated , and recorded in the division of the general register of sasines for on .—In witness whereof.

MINUTE OF REMOVAL OF EXCLUSION, THE EXCLUSION HAVING BEEN CONTAINED IN OR ENDORSED ON AN ASSIGNATION

I, A., hereby remove the exclusion of executors contained in [or endorsed on] the assignation granted by B. in my favour, dated , and recorded in the division of the general register of sasines for the county of on , whereby I acquired right to the bond and disposition in security for £ granted by C. in favour of the said B, dated , and recorded in the said division of the said register on .—In witness whereof.

MINUTE OF REMOVAL OF EXCLUSION, THE EXCLUSION HAVING BEEN CONTAINED IN A SEPARATE MINUTE

I, A., hereby remove the exclusion of executors contained in the minute of exclusion of executors granted by me, dated , and recorded in the division of the general register of sasines for the county of on , having reference to the bond and disposition in security for \pounds granted by B. in my favour [or in favour of C.], dated , and recorded in the said division of the said register on .—In witness whereof.

MINUTE OF REMOVAL OF EXCLUSION BY AN ASSIGNEE, EXECUTORS HAVING BEEN EXCLUDED IN BOTH BOND AND ASSIGNATION

I, A., hereby remove the exclusion of executors contained in (first) the bond and disposition in security for £1000 granted by B. in favour of C., dated , and recorded in the division of the general register of sasines for the county of , on , and (second) the assignation thereof granted by the said C. in my favour, dated , and recorded in the said division of the said register on .—In witness whereof.

Note.—In this case it appears to be sufficient to remove the exclusion from the assignation only. But as the Act provides that the exclusion in the bond remains in force until removed by minute or by a transfer "without expressing or repeating such exclusion," it is suggested that the above form be employed.

SECTION XXXI

REAL BURDENS FOR MONEY

necessary to distinguish the matters dealt with in this chapter (1) what may more accurately be described as real conditions of or other grants, though these should imply the payment of money; 2) ordinary securities for money, such as bonds and dispositions in ity. On the other hand, this chapter does not embrace the whole ct of burdens for money by reservation, e.g. ground-annuals are with elsewhere. At the same time "real burdens" has a suffily definite and defined application, and to it the present chapter is ed.

Constitution

the initial and fundamental point always is, whether the sum of by in question has been effectually created a real burden so as to the *property* and secure a preference over it, or whether it has left as a mere personal obligation on the debtor. The essentials of 1 burden are usually stated thus:

- . Definite amount.
- . Creditor specified.
- Intention expressed to affect the property and not merely the once.
- . The burden must be contained in the dispositive clause.
- . Publication in the register of sasines.
- Vith reference to these points certain remarks in amplification are sary.
- Amount.—While the amount must be definite if it is the case of oper money obligation, that does not prevent a good security for obligation ad factum præstandum. This was held to cover an ation to transfer a certain amount of stock, though that could be only by payment of money, and the amount of money was not fied.
- reditor.—While the rule is that the creditor must be named e infeftment, a real burden has been sustained in favour of the ren (unnamed) of named persons.

² Erskine v. Wright, 1846, 8 D. 863.

ell, Prin , s. 919. dmonstone v. Seton, 1888, 16 R. 1. Intention expressed to affect Property.—The words "real burden" are not necessary; nor are any set words essential; nor are clauses irritant or resolutive. But it is fatal if all that is said comes to this only—that the debt is to be a burden on the disponee and his heirs. A declaration that the property was conveyed under burden of payment of the money by the disponee, "his heirs and singular successors," or "his heirs and disponees," would probably be sufficient. And as to a declaration that the disponee shall pay a sum of money "out of or from" specified heritage, see the case noted, in which opinions were given that a real burden was not created, but in which the form of the words quoted was weakened by their being coupled with a declaration that the money should be paid by the disponee "or his heirs."

Burden in Dispositive Clause.—It appears to be quite settled that this is an essential.³ Why it should be, if the intention to create a real burden be clear and properly expressed, it is impossible to say. And what is the dispositive clause? Apparently the real burden should be introduced immediately after the description and before the reference to subsisting burdens, etc. It is further suggested that a reference to the real burden should be introduced before the description, and thus in gremio of the dispositive clause; thus: "I dispone to the said B. heritably and irredeemably, but always with and under the real burden in my favour (or in favour of C.) hereinafter expressed, All and Whole."

Publication in Sasine Register.—The matter of most importance in this connection is the effect of a general disposition of lands under a real burden thereby sought to be created. It is now decided that this, followed by a notarial instrument in which the particular lands are described and the real burden set out, is a competent mode of creating a real burden.⁴ The creditor's right is completed by the debtor's infeftment, assuming that the real burden is thereby published on record. No warrant of registration is required on the creditor's behalf. Nor does it appear that it matters though the original creditor is dead when the debtor takes infeftment.

TRANSMISSION inter vivos

The matter of principle in this connection is, that a real burden is not a feudal estate in the creditor's person.⁵ Prior to 1874 the mode of transfer was by assignation intimated to the debtor. But by sec. 30 of the 1874 Act recording in the register of sasines is made the criterion "in competition with third parties," i.e. as regards any "deed, instrument, or writing executed or dated after the commencement of this

⁵ Bell, *Prin.*, s. 923.



¹ Bell, *Prin.*, s. 919.

² Davidson v. Dalziel, 1881, 8 R. 990.

³ Bell, Prin., s. 920; Lord Shand in Courie v. C.'s. Trs., 1893, 20 R. (H. L.) 81.

⁴ Cowie, supra.

Act." So that an assignation granted before the Act might be validly completed after the Act by intimation to the debtor, without recording. It would further appear that a valid title may still be completed to a real burden, even "in competition with third parties," by recording an assignation granted by a prior assignee, though his own title should not have been recorded, assuming, at least, that the assignation contains a deduction of title. This rests on the grounds that the burden is not a feudal estate; that a recorded title is not feudal infeftment; and that the elementary rules of feudal conveyancing do not apply.¹

Inquiries of the Debtor. See p. 544.—But whatever may be the law in the case of ordinary securities, in this respect real burdens are in quite a special position. The reason, briefly, is that until 1874 intimation to the debtor was the only means of completing transferences; therefore inquiry of the debtor was the only way in which an intending assignee could ascertain how the title stood; and while this has been so far altered by the 1874 Act, that alteration is partial only, thus leaving the old law still in force to a certain extent. The special point is:

What is the Effect of an UNRECORDED Deed of Restriction or Discharge?—The provisions of sec. 30 of the 1874 Act are two, namely:

- 1. That any assignation, restriction, or discharge may be recorded.
- 2. That no assignation dated after the Act shall be effectual against third parties unless recorded.

The distinction is here very clearly drawn between (1) assignations, and (2) restrictions and discharges. It appears impossible to contend that deeds of restriction and discharge will not be effectual, even against third parties, though unrecorded. Inquiry must therefore be made of the debtor, though, as pointed out on p. 544, that will not bind postponed creditors.

TRANSMISSION ON DEATH

Intestate Succession.—Before 1st January 1869 real burdens were heritable as regards the creditor's succession. Whether sec. 117 of the 1868 Act extended to real burdens so as (with the qualifications therein expressed) to make them moveable in the creditor's succession, may admit of doubt. This doubt is removed by sec. 30 of the 1874 Act, which applies sec. 117 of the 1868 Act to real burdens, excepting ground-annuals, whether redeemable or irredeemable, and of course excepting cases where executors are excluded. This provision of the 1874 Act does not appear to have any retrospective effect; and in view of its presence in that Act (and the definition of heritable security in sec. 3 of the Act), it would now be difficult to say that the 1868 Act had the same effect, i.e. that the provision of the 1874 Act was unnecessary. It would therefore appear that in a succession opening between

¹ Cf. Baillie v. Laidlaw, 1821, 1 S. 108.

1st January 1869 and 1st October 1874 a real burden would be heritable in the creditor's succession.¹

Title.—Prior to the 1874 Act the heir's title was a general service and nothing else. Now the executor will (or may; see infra) expede a notarial instrument following on the will in cases of testacy, and on the testament-dative in cases of intestacy.

NOTARIAL INSTRUMENTS

In the matter of completing titles real burdens are, by sec. 30 of the 1874 Act, assimilated to "heritable securities constituted . . . by infeftment in favour of the creditor." But the difficulty is, that real burdens do not require, or admit of, infeftment in favour of the creditor, and it will be observed that the Act does not speak of other securities constituted by infeftment: it recognises that in real burdens there is no infeftment, though there may be a recorded title. This distinction of principle is tested in a very practical detail when it comes to be a matter of expeding a notarial instrument. In the ordinary case the creditor in a bond holds the bond and can produce it to the notary. But it may be taken that the creditor in a real burden never holds the writ vouching the original creation of the burden, namely, the debtor's infeftment in the property. This, then, is a difficulty in notarial instruments, and accordingly sec. 30 of the 1874 Act goes on to provide

that where a real burden upon land shall have been assigned, conveyed, or transferred by any deed, instrument, or writing which has entered the appropriate register of sasines, it shall not be necessary to produce to the notary public expeding any notarial instrument applicable to such real burden, or to set forth in such notarial instrument as a warrant thereof, the deed, instrument, or writing, constituting the said real burden, but it shall be sufficient to produce to him, and to specify shortly in such notarial instrument, the deed, instrument, or writing, or the deeds, instruments, or writings, whereby the said real burden shall have been assigned, conveyed, or transferred, and which, or one or more of which, if there are more than one, shall have entered the appropriate register of sasines.

With reference to this enactment, it is necessary to understand to what cases it does, and to what it does not, apply.

1. Certainly inapplicable.—Where there has been no recorded writ with reference to the real burden other than the original constitution thereof, namely, the debtor's infettment, the provision in terms does not apply. Therefore in that case the deed of constitution must be produced to the notary and set out in any notarial instrument, i.e. the first notarial instrument, and being the only recorded writ after the constitution.

¹ Cf. Peterkin v. Harvey and ors., 1902, 9 S. L. T. No. 370.



- 2. Certainly applicable.—When, subsequent to the constitution of the real burden, any deed of transmission of it has been recorded, the enactment applies, and in any notarial instrument it is *not* necessary to produce or set forth the deed of constitution. But the point which, it has been suggested, is
- 3. Doubtful, is whether a notarial instrument is a document of transmission in the sense of the section. Suppose that the only recorded writs are (1) the deed of constitution, the original creditor being A.; and (2) a notarial instrument in favour of B., A.'s successor. B. dies, and his executor, C., is to complete his title by notarial instrument: must the deed of constitution be produced? The ground of the doubt is that it is suggested that a notarial instrument, i.e. B.'s notarial instrument, is not aptly described as a "deed, instrument, or writing" whereby the said real burden has been "assigned, conveyed, or transferred." is submitted that there is no ground for this doubt; for (1) in the interpretation of "instrument" given in the 1868 Act (adopted in the 1874 Act), the only words which occur are "notarial instruments" and other "instruments" of that kind; (2) the notarial instrument is part of the act of complete transference; and (3) in any case there must have been some deed or writ of transmission on which the first notarial instrument proceeded, and that deed or writ may quite accurately be said to have "entered the appropriate register of sasines" by and through the first notarial instrument.

But, as regards all these questions, it is to be remembered that an extract of the disposition can always be procured, and it is quite sufficient for production to the notary (1868 Act, s. 3, "deed").

Further, it is suggested that notarial instruments are really rarely necessary in dealing with real burdens. Take the ordinary case of testamentary trustees: why should they go upon the register? In the usual case there will be no risk of "competition with third parties"; and even if they come to assign the burden, the view is suggested that a recorded title is not essential. It is assumed that the testator held a recorded title; and that being so, it is submitted that an assignation by the trustees, containing a deduction of their title, will, on being duly recorded, give the assignee a perfect and complete title. See Baillie, p. 493.

It has been suggested that a notarial instrument is always necessary to complete the title of the first assignee from the original creditor. This is on the ground that it is not clear that the original creditor has himself a completed title on record, or whether he is not merely in the position of the holder of an unrecorded bond and disposition in security. It is submitted that there is no ground whatever for this doubt. The original creditor has by the debtor's (proprietor's) infeftment a title as fully completed as the nature of the right admits of, and an assignation by him may safely be recorded de plano.

It has further been suggested, on the strength of the concluding

enactment in sec. 30 of the 1874 Act, that in all cases of notarial instruments dealing with real burdens, it is necessary to set out all the deeds of transmission from the original constitution. But there is no reason to doubt that in the case of say testamentary trustees, where the testator held an unrecorded assignation, the trustees would be entitled to proceed by an instrument on the lines of Sched. MM of the 1868 Act, producing only (1) the assignation, and (2) the will. But to support this it appears necessary that the granter of the assignation should have had a recorded title.

RESTRICTION

Deeds of restriction of securities for real burdens are in practice little known, but there is no reason at all, so far as form is concerned, why they should not be required and granted, and special reference is made to these deeds in sec. 30 of the 1874 Act.

EXTINCTION

Premonition.—1. By Debtor.—Whatever the law may have been before 1874, it is now clear, under sec. 30 of the 1874 Act, that the period of notice and subsequent procedure will be the same as when a debtor redeems under an ordinary heritable security. Of course the term of payment, express or implied, must be past.

2. By Creditor.—This is not quite so clear. The 1868 Act, in the case of ordinary securities, provides a period of notice, but that is purely as a preliminary to a sale. Now, in the common case, there is no power of sale attached to a real burden. This does seem to be a difficulty; but it is submitted that it would be held that the creditor is bound to give three months' notice (not necessarily for a term) before proceeding to enforce principal. Note in this connection that the clause creating the real burden ought always to state the term of payment. Assuming that there is no personal obligation, the notice would be given to the owner of the property only. If there is a personal bond, summary diligence or action may be available.

Creditor's Title.—Suppose A. is the original creditor; he dies; his executor obtains confirmation, including the real burden: is that a sufficient title to grant a discharge, or must he expede a notarial instrument? It is clear on principle, and on the terms of sec. 30 of the 1874 Act, and appears to be generally admitted, that in all questions with the debtor (e.g. restriction and discharge) a recorded title is not necessary. Of course, if the debtor has any doubt as to the possibility of the existence of recorded assignations, he will make a search.

The discharge or deed of restriction should at once be recorded. As to whether that is strictly necessary, see p. 493; but of course no risk should be run.

CREDITOR'S REMEDIES

- 1. Personal Obligation.—There ought always to be a personal bond if the circumstances admit of it. Even without a bond it is conceived that the deed may be expressed so as to infer liability on the original disponee. And as regards interest it appears that each proprietor, as intromitting with the rents, will be liable for the interest during the period of his possession.
- 2. Maills and Duties.—The creditor is not entitled to enter into possession unless he has an express clause to that effect or a power of sale.¹ But as to ground annuals, see p. 263.
- 3. Poinding the Ground.—This is the distinctive remedy for a debitum fundi. As to the limitation of this remedy as against a trustee in bankruptcy and for the form of summons, see pp. 512, 503.
- 4. Sale.—(1) Express Power.—There may be an express power of sale attached to the real burden; if not, of course this power is not implied.
- (2) Sequestration.—A sale may be effected by the medium of a trustee in sequestration, but only if the creditor holds the personal obligation of the proprietor.
- (3) Ranking and Sale.—This may be competent, but only if (a) the creditor (or a creditor) is in possession, and (b) the annual charges on the property exceed the income.
- 5. Adjudication.—This will give the creditor a title of possession, and on declarator of the expiry of the legal he will obtain an absolute title. If there is no personal obligation by the proprietor, the adjudication will be preceded by a pointing of the ground.

ADVANTAGES AND DISADVANTAGES

So far as one can see, the only advantage in the general case attached to a real burden is, that it necessarily ranks first on the disponee's title if it is completed with due regard to the burden. Thus if, on a sale, a part of the price is to remain a burden on the property, and if this is carried out by means of a real burden in the disposition, and it is recorded at full length, it is clear that the burden will be the first charge on the property, notwithstanding, e.g., a bond which the purchaser may have granted in anticipation, and which may have been recorded before the recording of the disposition. If, on the other hand, the unpaid part of the price had taken the form of an ordinary heritable security, it would have ranked after the first recorded bond. But of course this should never happen, and a complete search would prevent it.

Again, there may be cases in which it would not correctly express

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the rights of parties that there should be any obligation, and yet the one party should have the security and the other the reversion. A real burden will exactly meet that case.

Further, it may happen that the disponee is not competent to grant a personal obligation, e.g. a married woman or a minor. The expedient of a real burden will so far get over this difficulty, and allow a real security to be constituted.

But in all ordinary cases it is strongly recommended that the creditor should have an ordinary bond (or bond of annuity, as the case may be) and disposition in security. This is what has been done in the modern remodelling of the form of contracts of ground-annual. The gains are obvious. The creditor has (a) a proper personal obligation, which he may enforce by summary diligence, and on which he may sequestrate; (b) an active title, on which he may enter into possession; and (c) a power of sale, under which he may realise at his own hand. Real burdens often owe their origin to directions in wills, under which trustees are to dispone to A. under a real burden in favour of B. But there is no reason whatever why, even in this case, the direction should not be that the trustees shall see that A. grants to B. an ordinary heritable security in the desired terms, and so as to form the first charge. If the real burden is to be for payment of an annuity, the will should declare it alimentary, and direct that it be created in favour of trustees for the annuitant (see p. 22).

FORMS OF CONSTITUTION

As the constitution of a real burden is from its nature almost always only an incident in another deed, it is not convenient to give forms at this place (see p. 328, and note points on pp. 491-2).

FORMS OF TRANSMISSION, RESTRICTION, AND EXTINCTION ASSIGNATION BY THE ORIGINAL CREDITOR

- I, A., in consideration of the sum of £ now paid to me by B., do hereby assign and dispone to and in favour of the said B., and his executors and assignees whomsoever, the real burden for the sum of £ reserved 1 in my favour in the disposition granted by me $[or\ by\ C.]$ in favour of D., dated , and recorded as after mentioned: Together with the said sum of £ and interest from ; Which real burden is by the said disposition constituted over All and Whole $[description\ or\ reference\ ^2]$, all as specified and described in the said disposition recorded in the division of the general register of sasines for on .—In witness whereof.
- ¹ Reservation.—If the disposition was not by A., say "constituted" instead of "reserved."
- ² Description.—It goes without saying that the full description in the disposition need not be repeated. Indeed the view is submitted that the property is immaterial for the purpose of an assignation. It is to be kept in view that

the creditor is not infeft. At the same time insert a statutory reference at least, or a very brief actual identification.

Conditions and Burdens in Titles.—It appears quite unnecessary to make any reference to these, notwithstanding any clauses in the titles. This is in no sense a transmission of the property.

Warrandice.—It is not usual to insert any obligation of warrandice in an assignation of a heritable security. But there the assignation usually proceeds on a calling up of the loan by the creditor from the debtor; and it is proper enough that the creditor should not, because the debtor wishes to take an assignation, incur any obligation which a simple discharge would not have implied. Here, however, the transaction may be more of the nature of an ordinary sale, in which case a clause of warrandice seems strictly appropriate. It is thought it ought to be absolute warrandice.

Recording.—The assignation, it is submitted, should simply be recorded de plano (see p. 495).

ASSIGNATION BY THE ORIGINAL CREDITOR, ASSIGNING ALSO A PERSONAL BOND

- I, A., in consideration of the sum of \mathcal{L} now paid to me by B., do hereby assign and dispone to and in favour of the said B., and his executors and assignees whomsoever, (first) a personal bond granted by D. in my ¹ favour for the sum of \mathcal{L} , dated, and (second) the real burden for the said sum of \mathcal{L} [proceed as on p. 498].
- ¹ If not original creditor, say in favour of E., and at end deduce title thus: To which bond and real burden I acquired right conform to assignation granted by the said E. in my favour, dated , and recorded . See notes, supra.

PARTIAL ASSIGNATION BY AN ASSIGNEE OF ANNUITY SECURED AS A REAL BURDEN

I, A., in consideration of the sum of £ now paid to me by B., do hereby assign and dispone to and in favour of the said B., and his executors and assignees whomsoever, but only to the extent and effect after specified, the real burden for the annuity or yearly sum of £ during the lifetime of F., constituted in favour of the said F. in the disposition granted by C. and others, the testamentary trustees of D., in favour of E., dated recorded as after mentioned: Together with the said annuity itself; Which real burden is by the said disposition constituted over All and Whole [description or reference], all as specified and described in the said disposition recorded in the division of the general register of sasines for the county of : But declaring that these presents do and shall assign on the said real burden and annuity only to the extent of the yearly sum of , with the interest thereof and penalty corresponding thereto, the first payment to be received by the said B. being that which will become for the half-year to that term, and to the effect due at the term of of giving to the said B. and his foresaids, as in right of the said real burden

and annuity to the extent to which the same are hereby assigned, a security and preference pari passu¹ with the security and preference held by me and my successors as in right of the remainder of the said real burden and annuity: To which real burden and annuity I acquired right conform to assignation by the said F. in my favour, dated , and recorded in the said division of the general register of sasines on , which assignation is retained by me, but I bind myself and my foresaids to make the same forthcoming to the said B. and his foresaids on all necessary occasions on the usual terms.—In witness whereof.

¹ Ranking.—If the assignee is to be preferred or postponed to the assigner, alter this clause accordingly (see p. 549).

NOTARIAL INSTRUMENT IN FAVOUR OF TESTAMENTARY TRUSTEES AND GENERAL DISPONEES OF THE ORIGINAL CREDITOR

there was, on behalf of A., B., and C., and the survivors At and survivor of them, as trustees and trustee of D., acting under his trust disposition and settlement after mentioned, presented to me, notary public subscribing, a disposition 1 granted by the said D. in favour of E., dated , and recorded in the division of the general register of sasines for the county of , by which disposition the said D. on disponed to the said E., All and Whole [description or reference]: But always with and under the real lien and burden in favour of the said D. of the sum payable at the term of , and with interest and penalty of as therein specified for otherwise set out the burden as in the disposition, but the clauses as to interest and penalty may be cut down as here indicated]: As also there was presented to me an extract of a general trust disposition and , and registered in the settlement granted by the said D., and dated Books of Council and Session on , by which general trust disposition and settlement the said D. conveyed to the said A., B., and C., and the survivors and survivor of them, as trustees, the whole means and estate, heritable and moveable, which should belong to him at the time of his death, but in trust always for the purposes specified in the said general trust disposition and settlement, in which general conveyance was included the said real burden, the said D. being then vest therein as aforesaid.—Whereupon, etc.

¹ Deed of constitution must in this case be produced, but an extract will do (see p. 495).

Personal Bond.—Even though there is a separate personal bond, it is not at all necessary to make any reference to it in the instrument.

Necessity of any Instrument.—As to this, see p. 495.

NOTARIAL INSTRUMENT IN FAVOUR OF TESTAMENTARY TRUSTEES AND GENERAL DISPONEES, WHERE TESTATOR ACQUIRED THROUGH A SERIES OF RECORDED TRANS-MISSIONS

At there was, on behalf of A., B., and C., and the survivors and survivor of them, as trustees and trustee of D., acting under his trust disposi-

tion and settlement after mentioned, presented to me, notary public subscribing, the following series of writs by which the said D. acquired right to the real , with interest and penalties, reserved in burden for the sum of £ favour of E., in the disposition granted by the said E. in favour of F., dated , and recorded in the division of the general register of sasines for the county of , by which disposition the said real burden was constituted by reservation over All and Whole [description or reference], and which series of writs is as follows, namely, (first) assignation granted by the said E. in favour of G., dated , and recorded in the said division of the said register on ; (second) assignation granted by the said G. in favour of H., dated , and recorded in the said division of the said register on ; and (third) assignation granted by the said H. in favour of the said D., dated , and recorded in the said division of the said register on : As also there was presented to me an extract of a general trust disposition and settlement [proceed as on p. 500].

Original disposition need not be produced seeing that there are recorded transmissions. For this purpose it would be sufficient that the testator had a recorded title, or, indeed, that any one of the transmissions had been recorded (see p. 494).

NOTARIAL INSTRUMENT IN FAVOUR OF TESTAMENTARY TRUSTEES AND GENERAL DISPONEES, WHERE THE TESTATOR HELD AN UNRECORDED ASSIGNATION

At there was, on behalf of A., B., and C., and the survivors and survivor of them, as trustees and trustee of D., acting under his trust disposition and settlement after mentioned, presented to me, notary public subscribing, an assignation of the real burden after mentioned granted by F. in favour of the said D., and dated , by which assignation the said F. assigned to the said D. a real burden reserved in favour of E. in the disposition granted by him in favour of G., dated , and recorded in the division of the general register of sasines for the county of on , for the sum of £ , with interest and penalty, and which by the said disposition was constituted a real burden over All and Whole [description or reference]: As also there was presented to me an extract of a general trust disposition and settlement [as on p. 500, to end].

Productions.—It will be observed (1) that the writ by which F. acquired right is not presented; and (2) though thus no recorded deed is produced intervening between the constitution of the burden and the present instrument, the deed of constitution is not presented (see p. 496). It is submitted that there is no doubt that the form is sufficient. The non-production of the assignation E. to F., and the want of any reference to it, are exactly in terms of Sched. MM to the 1868 Act; and as regards the non-production of the disposition, the concluding enactment of sec. 30 of the 1874 Act is subject to the ruling enactment earlier in the same section, which applies to real burdens the forms applicable to ordinary securities: it means that, even though in the case of ordinary securities the original bond would require to be produced,

it shall not in certain cases be necessary to produce the disposition. But it will be observed that this form is limited to the case of the testator having held an unrecorded assignation.

NOTARIAL INSTRUMENT IN FAVOUR OF AN EXECUTOR-DATIVE OF THE ORIGINAL CREDITOR

- there was, on behalf of A.,1 the executor of the late B., Αt presented to me, notary public subscribing, a disposition granted by the said B., in favour of C., dated , and recorded in the division of the general register of sasines for the county of , by which disposition the said B. disponed to the said C. All and Whole [description or reference], but always with and under the real burden in favour of the said B. of the sum of £ , payable at the term of , and with interest and penalty as therein specified: As also there was presented to me testamentdative 2 of the said deceased B., expede before the sheriff of , and dated , whereby the said A. was ordained and confirmed executorat dative of the said deceased B., whereby the said A., as executor-dative foresaid, acquired right to the said real burden.-Whereupon, etc.
- ¹ Survivorship.—If more than one executor, say "A. and B. and the survivor as executors and executor."
- ² Contents of Confirmation.—The confirmation should specifically set out (1) the personal bond, if any, and (2) the real burden under reference to the disposition. But it is not necessary to mention the bond in the instrument.

Deceased not Original Creditor.—If the deceased was a derivative creditor, then—

- (1) If he held a recorded title, it is unnecessary to present to the notary the disposition constituting the real burden, but all the transmissions must be produced (see p. 494).
 - (2) If he held an unrecorded assignation, see last form.

DEED OF RESTRICTION—NO PART PAID

I, A., considering that B. has requested me to release the subjects hereinafter described from the security hereinafter specified, but without any consideration having been paid to me therefor, do hereby declare to be redeemed and disburdened of the security by way of real burden constituted in my favour for the sum of £ and interest, by the disposition dated , and recorded in the division of the general register of sasines for the county of on , granted by C. in favour of the said B., All and Whole: And I restrict the security thereby constituted to the subjects contained in the said disposition other than those hereby disburdened.—In witness whereof.

Personal bond, if any, need not be referred to at all.

PARTIAL DISCHARGE AND DEED OF RESTRICTION, INCLUDING PERSONAL BOND

I, A., in consideration of the sum of £500 now paid to me by B., do hereby, in the first place, discharge, but only to the extent after specified,

- (1) a personal bond dated , granted by the said B. in my favour for the sum of £1000; and (second) the real burden for the said sum of £1000 constituted by reservation 1 in my favour in the disposition granted by me in favour of the said B., dated , and recorded in the division of the general register of sasines for the county of presents do and shall discharge the said bond and real burden only to the extent of the said principal sum of £500 now paid to me as aforesaid, and of the interest thereon and penalties corresponding thereto: In the second place, I declare to be redeemed and disburdened of the security constituted as aforesaid by way of real burden, and that absolutely and to the full extent of the said sum of £1000, interest and penalties, All and Whole [the part to be let out 2]: And, in the third place, I declare to be redeemed and disburdened of the said security, but only to the extent of the said sum of £500 now paid to me as aforesaid, and of the interest thereof and penalties corresponding thereto, All and Whole [whole subjects 8], all as specified and described in the said disposition, dated and recorded as aforesaid, other than the said part thereof hereinbefore described and absolutely disburdened as aforesaid.—In witness whereof.
- ¹ Reservation.—If the burden was constituted in favour of some one other than the granter of the disposition, omit "by reservation."
- ² Part absolutely disburdened.—This will be carefully identified by full description, unless it is articulately described in the disposition.
- ³ Remainder of Security-subjects. Describe briefly or refer to whole subjects, unless the remainder is articulately described in the disposition, in which case it only will be referred to.

Stamp.—6d. per cent. on £1000 = 5s. (see p. 598).

DISCHARGE IN FULL, INCLUDING PERSONAL BOND

I, A., in consideration of the sum of \pounds now paid to me by B., do hereby discharge (1) a personal bond dated , granted by the said B. in my favour for the sum of \pounds , and all interest due thereon; and (2) the real burden for the said sum of \pounds , constituted by reservation in my favour in the disposition granted by me in favour of the said B., dated , and recorded in the division of the general register of sasines for the county of on : And I declare to be redeemed and disburdened thereof All and Whole , all as specified and described in the said disposition dated and recorded as aforesaid.—In witness whereof.

SUMMONS OF POINDING THE GROUND AND FOR PAYMENT OF ANNUITY

Edward the Seventh, etc.—Whereas it is humbly meant and shown to us by our lovite, A., pursuer, against B., being the proprietor of the lands and others hereinafter mentioned, and also against C. and D., tenants and possessors of the said lands and others, defenders, in terms of the condescendence and note of pleas in law hereunto annexed. Therefore (first) it Ought and Should

Herefore, etc.

be Decerned and Ordained by decree of the Lords of our Council and Session that our letters be directed at the instance of the pursuer against the said defenders to messengers at arms, our sheriffs in that part, charging them conjunctly and severally to pass, and in our name and authority search for, seek, fence, arrest, apprise, compel, poind, and distrain all and sundry the readiest moveable goods, gear, effects, corns, cattle, horses, sheep, insight plenishing, and others whatsoever of the said B., C., and D. poindable or distrainable, being or which shall happen to be within or upon the grounds of the lands and others following, and which are described and contained in the disposition and notarial instruments after mentioned, viz., All and Whole [mention, not describe, the lands], all in the county of , as the same are particularly described in the disposition granted by X. in favour of the , and in the four notarial instruments defender the said B., dated following thereon in favour of the defender the said B., all recorded in the division of the general register of sasines for the county of , but in so far as relates to the said tenants to the amount only of the rents which may be due and payable by each of them respectively at the time or from time to time for each of their respective possessions of the said lands and others or parts thereof, the terms of payment of said rents being first come and bygone, and make payment thereof to the pursuer to the amount of £157, being the sum due to the pursuer as at the term of Whitsunday 1904, in respect of the annuity of £100, created a real burden in favour of the pursuer in terms of the said disposition and notarial instruments, with interest at the rate of 5 per cent. per annum on £107, being part thereof, from 1st December 1903 till paid, and on £50, being the balance thereof, from the said term of Whitsunday 1904 till paid, and to see the pursuer satisfied and paid the same; and (second) the defender, the said B., Ought and Should be Decerned and Ordained by decree foresaid to make payment to the pursuer of the said sum of £157 and interest as aforesaid. And further, in any event the defender, the said B., and also such of the other defenders as shall appear and oppose, ought and should (expenses).—Our Will is

CONDESCENDENCE

- 1. The defender is infeft in the lands of (name them) in the county of , described or referred to in the summons under disposition granted by X. in favour of the said defender, dated , and four notarial instruments following thereon in his favour, all recorded in the division of the general register of sasines for the county of .
- 2. The defender's said infeftments are expressly with and under burden of payment from the rents or proceeds of the said lands to the pursuer of a free yearly annuity of £100, payable by equal portions at Whitsunday and Martinmas in each year, during the pursuer's life, with interest on each term's payment at the rate of 5 per cent. per annum from the time it falls due till paid, which annuity is by the said disposition and notarial instruments declared to be a real lien and burden on the said lands.
- 3. The annuity was paid to the term of Martinmas 1901. Since that date only one payment, viz., £100, has been received on account of arrears and

t. That payment on account was received by the pursuer on 1st ber 1903. The amount of arrears of annuity due at that date aftering the said payment on account was £107. Since that date a further arly payment of the annuity, viz., £50, has become due, viz., at Whit-1904. These two sums together amount to £157, being the sum ned in the summons. That sum is still unpaid. It is made up as

:						
902.			A	nnuity.	Interest at 5 per cen	t.
itsunday.	For half year to this	term		£50	•••	
rtinmas. 1903.	Do.	•	•	50		
itsunday.	Do.			50	•••	
rtinmas.	Do.	•		50	•••	
			d	E200	(say) £7	
903.					, .,	
	rived on account . hich was applied	£100				
To e	extinguish interest £7	7				
On a	ecount of annuity 93	3				
		£100		93	7	
			ė	£107		
1904.						
hitsunday.	For half year to this	term		50		
	As in the sur	nmons		£157		

The defenders other than the said B. are tenants of the said lands as

Cenants.			Possession.				Y	Yearly Rent.		
C.		16.7			Greenbank				£200	
D,	*	4			Haughs .				100	

The defender, the said B., has uplifted the rents of the said lands for riod during which the annuity is in arrear as aforesaid. He is thus sally liable for the annuity. He has been repeatedly called upon to payment, but as he refuses or at least delays to do so, the present action sen rendered necessary.

PLEAS IN LAW

The arrears of annuity and interest specified in the summons being due npaid, and the same being duly constituted a *debitum fundi* upon the therein described or referred to, the pursuer is entitled to decree and ters of poinding the ground in terms of the first conclusion of the ons.

The defender the said B. having incurred liability as an intromitter, ursuer is entitled to decree in terms of the second conclusion of the cons.—In respect whereof.

SECTION XXXII

ENFORCEMENT OF HERITABLE SECURITIES

THE remedies open to the holder of an ordinary bond and disposition in security are:

1. Personal diligence.

4. Sale.

2. Entering into possession.

5. Adjudication.

3. Poinding the ground.
6. Foreclosure.

I. PERSONAL DILIGENCE

It is common to say that the creditor must give three months' notice before calling up a heritable security. This has reference to the provision in sec. 119 of the 1868 Act. That, however, deals only with a sale by the creditor of the security-subjects under a power of sale in the bond. It has no relation to the enforcement of the personal obligation. That may be enforced on a six days' charge, assuming the bond contains a consent to registration for execution in ordinary form, or if it does not, an ordinary action for payment may be brought at any time. Nor is it any objection to this procedure that a formal schedule of intimation, requisition, and protest has been served, and that the period of three months therein referred to is still current. As to the cases in which summary diligence is competent, and the methods and forms, see p. 38 et seq.

II. ENTERING INTO POSSESSION

The usual manner in which the creditor enters into possession of the property is by an action of mails and duties (see the Heritable Securities Act, 1894, ss. 3-7). This action is not necessary to give the creditor a preference over the rents in competition with a mere assignee or arrester of the rents, though the assignment or arrestment be intimated or used before the infeftment on the bond, assuming, that is, that the heritable creditor actually interpels the tenants before they pay to the arrester or assignee.² If it were otherwise, no one could

M'Whirter v. M'Culloch's Trs., 1887,
 2 Cf. Stevenson and ors. v. Dawson, 1896,
 14 R. 918; M'Nab v. Clarke, 1889, 16 R. '23 R. 496.
 610.

lend on the faith of the records; he would also need to make inquiries of all the tenants as to whether there were any assignations or arrestments. But the tenants are entitled to pay their rents to the proprietor until they are interpelled by the bondholder. The 1894 Act provides a form of preliminary notice to be given to the tenants after the action has been brought but before decree has been obtained. It is (or was) not uncommon to enter into possession by consent of the debtor without a decree of maills and duties; but, looking to the terms of sec. 3 and Sched. B., and having regard to the power of leasing (see below), it is recommended that the decree should be taken.

When Competent.—It is thought not to be necessary that interest should be in arrear, or that default should have been made in payment of principal. This appears to follow clearly from the case noted, which shows that while the rents are a material part of the security, the creditor has no effective nexus upon them without a decree of mails and duties. There the proprietor's factors were allowed to retain the rents against the creditor in satisfaction of a debt due by the proprietor to them. But if there has been no default, it may end in the pursuer not getting expenses. The action may be commenced after the sequestration of the debtor; in that case the trustee will also be called.

To whom Competent.—The action is available only to ex facie encumbrancers and only to some of them. It is not available to the following:—

- 1. The holder of a disposition ex facie absolute, though truly in security.² He does not need it: his remedy is to sequestrate for rent.
- 2. The superior cannot use this remedy to recover his feu-duties.³ The reason is that he is excluded by his own grant, and he cannot thus oust the vassal. But he may poind the ground.
- 3. From which last case it follows that the holder of a security over an estate of superiority is equally with his author excluded from this remedy.⁴

But the holder of a ground annual in the modern form may sue an action of maills and duties,⁵ differing in this respect from the holder of a mere real burden (see p. 497).

Pari passu Creditors.—The appropriate course is that they should enter into joint possession. In that case they may sue in one summons. But if one of two pari passu creditors will not move, it is clear that the other may sue alone. Of course the former may step in with a decree of his own at any time he pleases. But so long as he does not do so, the position of the one pari passu creditor in possession is not quite clear. The position is distinguished from that of a

¹ Stevenson and ors. v. Dawson, 1896, 28 R. 496.

Scottish Herit. Sec. Co. v. Allan, 1876,
 R. 333; per Inglis, L.P., at p. 340.

³ Prudential Insurance Co. v. Cheyne, 1884, 11 R. 871.

⁴ Nelson's Trs. v. Tod, 1896, 23 R. 1000.

⁵ Somerville v. Johnston, 1899, 1 F. 726.

postponed creditor in possession by the fact that the security-deeds probably contain what is in effect a contract by the two creditors inter se that they shall rank equally on the subjects and the rents. Even, therefore, though the other make no claim of any kind at the time, or cannot be found, the creditor in possession appears entitled and bound to provide for the pari passu ranking, to which end he should, if necessary, consign in the name of the other creditor sums equal to those credited to himself, and on the same dates. If this view be correct and is to be admitted, it would be proper that reference should be made in the summons and decree to the pari passu ranking.

Postponed creditors have of course a title to bring the action. Indeed, it is a very common arrangement for a prior creditor to allow a postponed creditor to enter into possession under an arrangement that the free balance of rents shall be applied primo loco to the interest to become due to the former, or sometimes under an absolute undertaking by the postponed creditor that so long as he remains in possession he will pay the prior interest. This saves the prior creditor all the trouble and risks of management, and also the inconvenience of perhaps being compelled to accept repayment of principal in small instalments (see p. 510). But of course, on the other hand, if the security for the first bond be at all doubtful, it will not do to allow the postponed bond to be paid first, which may be the result of this arrangement. And in any case the prior creditor must be satisfied that the postponed creditor may be trusted to keep the properties in good repair.

Proprietor in Personal Occupation.—If the proprietor (whether he be personally liable for the debt or not) be in personal occupation of the property, or any part of it, it is clear that he cannot be made to pay rent for his own property.¹ The course is to eject him under sec. 5. of the 1894 Act. Formerly an action of removing in the Court of Session was necessary. But ejection is not competent unless

such proprietor has made default in the punctual payment of the interest due under the security, or in due payment of the principal after formal requisition.

These words are not very clearly applicable to the case of the proprietor not being personally liable for the debt.

PETITION OF MAILLS AND DUTIES

In the sheriff Court of

at

A., pursuer, against B., defender.

The above-named pursuer submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court—

¹ Smith's Trs. v. Chalmers, 1890, 17 R. 1088.

To grant a decree against the above-named defender, finding and declaring that the pursuer has right to the rents, mails, and duties of the subjects and others specified in the bond and disposition in security granted by the defender in favour of the pursuer, dated , and recorded in the division of the general register of sasines for the county of on for granted by , dated in favour of C. , and recorded in , to which the pursuer has on acquired right by transmission], or at least so much of the said rents, maills, and duties as will satisfy and pay the pursuer the principal , with interest at the rate of per centum per annum from , liquidate penalty, and termly failures, all as specified and contained in the said bond and disposition in security, dated and recorded as aforesaid, and to find the defender liable in expenses, and to decern therefor.

CONDESCENDENCE

- 1. The pursuer holds a bond and disposition in security for £ granted by the defender in his favour, dated , and recorded [or granted by in favour of C., dated , and recorded , to which he has acquired right conform to]. The bond is [or and transmissions are] produced herewith.
- 2. [If defender is not the granter of the bond] The defender is proprietor of the property disponed in security under the said bond and disposition in security.
- 3. The following is a rental of the property disponed in security under the said bond and disposition in security:—

Property. Tenants. Rent.

4. Interest is in arrear from , and as the defender refuses or at least delays to pay the debt, the present action has been rendered necessary.

PLEA IN LAW

The pursuer, in respect of the real security constituted under the said bond and disposition in security over the property therein specified, is entitled to decree in terms of the prayer of the petition.

In respect whereof.

SUMMONS OF MAILLS AND DUTIES

EDWARD VII., &c.—Whereas it is humbly meant and shewn to us by our lovite, A., pursuer, against B., defender, in terms of the condescendence and note of plea in law hereunto annexed: Therefore it Ought and Should be Found and Declared, by decree of the Lords of our Council and Session, that the pursuer has right to the rents, maills, and duties [as in preceding form, to prayer for expenses]: And the defender Ought and Should be Decerned and Ordained by decree foresaid to make payment to the pursuer of the sum of £20, or

such other sum, more or less, as may be modified by our said Lords, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland used and observed in the like cases, as is alleged.—Our Will is Herefore, etc.

Condescendence and plea as above.

In the Court of Session the summons is to be "in common form, with the necessary alterations consequent upon the provisions of this Act" (1894 Act, s. 3). This can only be a declarator, for there can be no decree for payment of rent against the tenants, seeing that the action is to be brought "without calling the tenants."

It may, in certain cases, be more economical to proceed in the Court of Session. But if the lands are in more than one county, sec. 15 makes the process competent in the Sheriff Court of either or any of the counties.

Power to Lease.—Any creditor in possession may grant a lease for not exceeding seven years. If more is desired, the sheriff may sanction thirty-one years in minerals and twenty-one years in all other cases.¹ It will be safe to assume that the section is limited to creditors in possession under decree of maills and duties. It does not appear clear that the proprietor's consent will warrant a lease beyond the seven years without the authority of the sheriff, for sec. 7 provides for intimation to the other heritable creditors when application is made for the extended authority. The petition must apply to particular specified "proposed tenant or tenants." Accordingly, either no contract for lease must be made until the sheriff's authority has been obtained, or any contract must be made subject to authority being obtained.

Rules of Accounting.—The main question is, in what instalments is the creditor bound to impute any balance of rents to the principal of his debt? Is he to balance accounts yearly or half-yearly, and whatever the credit balance may be, must it be thereupon imputed So far as is known there is no authority either way.2 to principal? But it must be kept in view as at least a possibility that this very strict principle of accounting may be enforced; and in any case all sums unapplied will be kept in bank at interest. Compare the case of partial sales (p. 518), and the English rules as stated in Prideaux's Precedents, i. 513, and Snell's Equity, 310. If, on the other hand, there be a debit balance even without charging the interest on the bond, it appears clear that the default and the penalty clauses will entitle the creditor to interest on the deficiency, being truly additional advances by him, and it is thought that he is entitled to annual rests; but neither of these points is at all clear as regards arrears of interest on the bond or a general debit balance so far as arising from the debiting of the interest. When the creditor is in possession upon default an ordinary conditional modi-

^{1 1894} Act, ss. 6, 7.

fication of the interest flies off, and the creditor is entitled to take the higher rate in the bond even though the rent be sufficient to pay it on the term day.¹

Another question of accounting arises where different parties are entitled to the interest and capital respectively of the debt. Suppose possession is first taken, and that a sale ultimately follows, and that the net rents and net price are not sufficient to pay both principal and interest, where does the loss fall? It has been held that the whole returns from the security are to be massed; then by calculation you ascertain the sum which, invested at four per cent. compound interest, would have accumulated to the actual total sum received; the sum so ascertained is capital, and the remainder is income. Quære whether the calculation should go back to the date of the investment or to the date of first default. If the rate truly stipulated to be paid were less that four per cent., no doubt the lesser rate would be taken; and allowance would require to be made for equalising interest on sums actually paid to the liferenter in the meantime.

PETITION FOR POWER TO LEASE

In the Sheriff Court of

яt.

A., pursuer, against B., proprietor of the subjects hereinafter referred to, and the following persons who are called as holding securities over the said subjects, namely, C., D., and E., defenders.

The above-named pursuer submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court—

To pronounce a decree granting warrant to the pursuer, as heritable creditor in possession of the subjects after referred to [or of the lands of X., of which the subjects after referred to form part], to let the same [or the subjects after referred to] as follows, namely, (first) the farm of Y. to F. for nineteen years at the rent of £, all as the said farm is described in, and on the terms and conditions specified in, the draft lease No. of process; and (second) the house and shop No. King Street, Glasgow, to Z., for ten years at the rent of £, on the terms and conditions specified in the draft lease No. of process; and to decern: And to find such of the defenders as may appear to oppose the prayer of this petition liable in expenses, or to do further or otherwise in the premises as to the Court may seem fit.

CONDESCENDENCE

- 1. The pursuer is in possession of the subjects now proposed to be let, conform to decree of maills and duties obtained in this Court in a petition at his instance against the defender B., dated , and extracted .
- 2. The defender B. is the proprietor of the said subjects. The defenders

 1 Harvie's Trs. v. M'Leod, 1900, 16
 2 Dempster's Trs. v. D., 1898, 35 S. L. R.
 S. L. Rev. 15.
 657 (Lord Pearson).

- C., D., and E. are, so far as known to the pursuer, the only other heritable creditors.
- 3. The present lease of the farm of Y. expires at . The present tenant has intimated that he is then to remove. The pursuer has advertised the farm. The highest offer which he has obtained is that of F. He offers a rent of \pounds for a nineteen years' lease. The pursuer has made inquiries, and he is of opinion that F. will prove a suitable tenant for the farm. The present rent is \pounds .
- 4. The house and shop No. King Street, Glasgow, are at present unlet. They are in very bad condition. Z. has offered to accept them as they stand, and to execute necessary repairs as specified in the draft lease No. of process, provided he obtains a lease for ten years. He offers the rent of \pounds . The pursuer has been advised by O., house agent, Glasgow, who strongly recommends the acceptance of the offer.
- 5. Under these circumstances the pursuer presents this application under sec. 7 of the Heritable Securities (Scotland) Act, 1894.

PLEA IN LAW

The leases proposed being expedient for the beneficial occupation of the subjects, the pursuer is, in terms of sec. 7 of the Heritable Securities (Scotland) Act, 1894, entitled to decree in terms of the prayer of the petition.

In respect whereof.

III. Poinding the Ground

This is the diligence by which moveables on the ground of the security-subjects are attached, or rather by which the creditor's preference over them is made effectual.1 It is of great importance when the proprietor has moveable property on the ground; for in the case of tenants' effects, they are liable only to the extent of their rents. is no bar that the creditor has entered into possession.2 There must be infeftment under the bond, though, that being so, an assignee, himself uninfeft, may bring the action.3 As against a trustee in sequestration no poinding of the ground not carried into execution by sale sixty days before the date of the sequestration is available, except to the extent of the interest for the half-year current at the date of the sequestration and one year previous, if so much be due, to which effect the creditor may poind even after sequestration.4 This diligence is not competent to the holder of an ex facie absolute disposition 5 nor to the holder of a security over a recorded long lease.6 A form of summons, proceeding on a real burden for an annuity, is given on p. 503.

- Ld. Pres. Inglis in Athole Hydro. Co.
 Scot. Prov. Ass. Co., 1886, 13 R. 818.
 - ² Henderson v. Wallace, 1875, 2 R. 272.
 - ³ Tweedie v. Beattie, 1836, 14 S. 337.
 - 4 Bank. Act, 1856, s. 118; 1874 Act, s.
- 55; 42 & 43 Vict. c. 40, s. 3; 50 & 51 Vict. c. 69, s. 2.
- ⁵ Scot. Heritable Sec. Co. v. Allan, 1876, 3 R. 333.
 - ⁶ Luke v. Wallace, 1896, 23 R. 634,

IV. SALE

There are four ways in which, according to circumstances, a creditor can secure that the property be brought to sale. These are: (1) a sale by himself under a power of sale in the bond, (2) sale on an ex facie absolute title, see p. 477, (3) an action of ranking and sale, and (4) sequestration of the debtor's estate under the bankruptcy statutes, and a sale by the trustee. The third and fourth of these methods are available though it should happen that, owing to some mistake, the bond does not contain a power of sale. The third is hampered with various restrictions; is almost unknown; and, beyond being mentioned, need not be further referred to. The fourth method—sequestration—will of course not be available unless the debtor is subject to the jurisdiction of the Scots bankruptcy law; and, further, it will not be available to the end of securing a sale if the proprietor of the property is not personally liable for the debt. The method of realisation under sequestration is distinguished by three features which may, under certain circumstances, be considered advantages, namely, (1) the probability of greater despatch, (2) the competency of a sale by private bargain with certain consents (see p. 299), but without consent of the debtor, and (3) the power of the creditor to purchase (p. 301).

SALE UNDER EXPRESS POWER

The regulating statutes are: the 1868 Act, ss. 119, 121, 122, 123; the 1874 Act, s. 48; and the 1894 Act, ss. 14, 16.

Bar.—As to the power of trustee and creditors in the debtor's sequestration to forestall the creditor and prevent him selling at his own hand, see p. 299.

Notice.—The creditor gives three months' notice. It is usual to say that it is not necessary that the notice should be given for a term of Whitsunday or Martinmas. In a sense that is so, but at the same time it rests rather upon a misapprehension. It is true that the creditor need not call up his loan for repayment at one of these terms, but, as has been seen (p. 506), he does not need to give any period of three months, or any notice at all beyond a six days' charge. The point is, that the schedule of intimation under sec. 119 of the 1868 Act is directed not properly to the calling up of the loan at all, but to the sale of the property on failure in payment. This is brought out very clearly by the terms both of the section and of the schedule (FF, No. 2). section says nothing about it being competent to the creditor to call up the loan on three months' notice, which indeed would be absurd, seeing that he can call it up on a summary charge. What it says is, that if the debtor fail to pay within three months after a demand, the creditor may sell. And the schedule is clearer still. It contains two distinct and separate statements, namely, (1) that payment is now required of

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the debt, and (2) that if payment be not made within three months, the creditor may sell. This is a clear demand for immediate payment, the result of which would appear to be that the debtor could force the creditor to accept immediate repayment, with interest to date of payment only. This is not the view commonly acted on, and it is possible that the practice might be held to modify the debtor's right in this respect. But at any rate it cannot admit of doubt that the creditor must accept repayment if tendered on the day which completes the period of three months from the date of the notice, with interest to that date only, whether it be a term-day or not.

To whom?—Notice must be given to (1) those liable for the debt, whether personally or in a representative capacity, and (2) the proprietor or proprietors of the property or any part of it.1 The former, though not owners, are interested to see that there is no deficit; and the latter, though not personally liable, are of course interested when it comes to be a matter of selling their property; and any surplus is theirs. Other bondholders are not entitled to notice, nor are holders of dispositions ex facie absolute but really in security.1 While that may be the law, it is not apparent how the selling creditor is necessarily to know that a disposition ex facie absolute is not what it purports to be, and accordingly it will be safer to give notice to the holders of these documents. Obviously that raises the question of how the selling creditor is to know who is the true owner, so as to secure that he shall receive notice, though ex facie divested on the records. The deeds, if available, will probably give a fairly good indication of what the facts are; and reference may be made to the valuation roll. Just as a true disponee should receive notice, so should a feuar, if it should happen that anyone has been found to take a feu not authorised by the terms of the bond nor sanctioned by the bondholder. It is obvious that, in order to give the creditor information on all these questions, it is necessary that the search should be brought down to cover the date of the notice. equally clear that once the creditor has given the notice or notices required and sufficient as at the date of giving notice, he cannot be bound to give notice to any subsequent purchaser. For if that were so, the result would be that a creditor might be prevented from ever bringing the property to sale at all; all that would be required would be a succession of sales by the proprietors after the successive notices and before a sale by the creditor. Pupillarity, minority, or legal incapacity does not affect the validity of the notice; but, if there are tutors, curators, or curators bonis, notice will be given to wards and guardians both.

Address unknown.—The 1894 Act (s. 16) provides for three separate cases, which, however, seem to resolve themselves into one case, namely, wherever "the creditor cannot ascertain the address of the person . . . entitled to receive intimation." The creditor may

1 Stewart v. Brown, 1882, 10 R. 192.

then apply to the sheriff "for warrant to intimate . . . to the debtor" edictally, "in such form and addressed to such person or persons by name or in his or their representative character, or as the sheriff may . . . prescribe." These last words may be intended to refer only to details of edictal intimation, but they may equally be read so as to authorise the sheriff to order intimation by advertisement or otherwise.

Sale by Assignee, etc.—The schedule of intimation prescribed in s. 119 sch. FF (2) of the 1868 Act expressly contemplates the case of the sale being carried through, not by the creditor who gives the intimation, but by "the person or persons who may then be in right of" the bond. This, it will be observed, is not in any way limited, and is wide enough to cover successors by whatever title, whether mortis causa or inter vivos. Further, while s. 119 refers to the "grantee," that term is by s. 3 interpreted to include heirs and assignees, legal as well as voluntary, executors, and representatives. In the case of assignation it is not necessary that it should make any mention of the service of the schedule or assign any right in respect of it, the benefit of the service passing automatically and inherently by the ordinary form of assignation. Further, there appears to be no ground for doubting the right of a partial assignee to proceed with the sale.

Acceptance of, or Dispensing with, Notice.—Neither is recommended. The procedure should follow strictly the statutory lines. Any intervention of the debtor brings in a new set of considerations. is thought that the debtor cannot, as against a postponed bondholder, authorise a prior bondholder to sell by private bargain, or to sell by public roup on four weeks' advertisement instead of six.1 Again, even though there be no postponed bondholder, it seems clear that if the bondholder sell by private bargain, or by public roup after less than the statutory notice, or less than the statutory advertisement, on the strength of a dispensation from the debtor, the effect is, as it were, to postdate the bondholder's infeftment, and to make it essential to have clear searches covering not only the infeftment on the bond but the debtor's dispensation or mandate, if not indeed the sale itself. Even accepting intimation instead of allowing it to be served in the statutory manner is to be deprecated. The debtor himself could not object, and the purchaser would be bound by the articles of roup; but a third party with an interest existing at the date of the sale would, it is thought, be entitled to object successfully.2

Advertisement.—There must be advertisement "once weekly for at least six weeks subsequent to the expiry of the said three months." One would naturally read these words to mean that it is sufficient if the advertisement appears in each of six separate weeks, the first insertion being after the expiry of the three months. It is not pro-

But see dicta by Lord Shand in Stewart
 Edington v. King, 1903, 10 S. L. T. No.
 Brown, 1882, 10 R. 192.
 Edington v. King, 1903, 10 S. L. T. No.
 Glasg.)

vided that the first insertion must be forty two days prior to the sale. But it has been so decided. This usually means that there must be seven advertisements instead of six. If the sale be adjourned on account of the upset price not being offered, there must be three weeks' advertisement, with twenty-one days between the first insertion and the re-exposure, and so on every such adjournment. Observe, however, that a sale on three weeks' advertisement is permitted only in the case of an adjourned sale, and that is not the case if there is a sale but the purchaser fails to carry it through. In that case there must be six weeks' advertisement for the next exposure, but the original notice holds.2 It further appears that there must be no period of seven days without advertisement³; that is to say, there is to be advertisement in the period of seven days immediately preceding the sale, and in each period of seven days before that up to the required The case in which this was held was not under the statute, but the wording was not apparently distinguishable in this respect, viz., "once weekly for at least one month."

The advertisement must appear in (1) a newspaper published in Edinburgh or Glasgow, and (2) a newspaper published in the county in which the property is situated, and if none, then in the next or a neighbouring county. What is a neighbouring county as distinct from the next, i.e. an adjoining county, it is not easy to say, nor probably is it now necessary. If the property is in more than one county, though lying together and forming one property only, it is necessary that besides being advertised in an Edinburgh or Glasgow paper, it shall be advertised in a paper published in each of the counties. In the case of property in Mid-Lothian advertisement in one Edinburgh paper is sufficient, for then you have advertised in a paper published in Edinburgh and in the county where the property is situated. For this purpose the erection of certain towns into counties of cities is to be disregarded.

The advertisement must state "the time and place of sale." This, it is thought, means that the hour as well as the day must be specified, just as the particular place, and not merely the town, must be stated; but at the same time it will be observed that in dealing with an adjourned sale the statute requires the advertisement to state the "day of sale." These particulars are all that the statute prescribes as to the contents of the advertisement. But of course it must be properly framed in all respects. It must identify the property: one would not be safe to sell or to buy anything beyond what was distinctly set forth in the advertisement, e.g. an advertisement of "a building area," or other general words of that kind, in a certain street would probably not be sufficient.

990.

Ferguson v. Rodger, 1895, 22 R. 643.
 Howard v. Richmond's Trs., 1890, 17 R.

³ Nisbet v. Cairns, 1864, 2 M. 863. ⁴ Walter's Tr. v. O'Mara, 1902, 9 S. L. T. No. 335.

According to the general rule in sales by auction in Scotland, there will be an upset price, and this will be specified. It is not necessary that it should be stated that the sale is under the power contained in a security. There must be no material change in the advertisement. For instance, it would be fatal to alter "the time of sale" or even "the place of sale," for those are statutory. In the same way, if something be missed out of the description in the advertisement at first, it will not do to put it right in the remainder of the statutory number of insertions. In that case the whole of the property would not have been advertised as required by the statute.

Articles of Roup.—For form, see p. 175. The following matters may be referred to:—

- 1. Fair Conditions.—The creditor is not entitled to sell at any price which will clear off his debt; he must do justice to the property.¹ In the same way he must not introduce unnecessarily prejudicial conditions of sale. See generally the case cited,² which referred to a sale by an ex facie absolute disponee, but in which it was clearly indicated that an ex facie encumbrancer might be more strictly dealt with. The same case taken along with Howard, supra, shews that interdict or damages, and not reduction, is the proper remedy.
- 2. Assignation of Debt in Fortification.—The points to be alluded to are brought out in the form on p. 556. If the creditor have been in possession the debt may be partially extinguished from rents, and he must be careful not to put himself in the position of assigning more than is due. If his debt be not fully paid out of the price, and if the debt include arrears of interest, etc., the creditor ought to retain to himself so much of the principal in the bond as is equal to the net unpaid balance. If the property sold is only part of the security, the corroborative assignation must be limited to what is sold (p. 557).
- 3. Caution or Deposit.—It would appear that if the seller should dispense with implement by the purchaser of an obligation in the articles to find caution or to make a partial deposit, he does so at his own risk.
- 4. Consignation of Surplus.—The bank must be specified in the articles. Delay.—The statute does not limit any time within which the property must be brought to sale either on a first exposure or on reexposures. But the circumstances may be such as to infer abandonment of the notice. In one case a sale was held good when the interval between the notice and ultimate sale was six years, and between the sale and the last preceding exposure three years.³ It was also

Beveridge v. Wilson, 1829, 7 S. 279;
 Bell v. Gordon, 1838, 16 S. 657; Wilson v.
 Stirling, 1843, 8 D. 1261; Kerr v.
 M'Arthur's Trs., 1848, 11 D. 301;
 Lucas v. Gardner, 1876, 4 R. 194; Stewart

v. Brown, 1882, 10 R. 192; Shrubb v. Clark, 1897, 5 S. L. T. No. 160.

² Park v. Alliance Her. Sec. Co., 1880, 7 R. 546.

³ Howard v. Richmond's Trs., 1890, 17 R. 990.

indicated there that the debtor's proper remedy is by interdict, and that, if he allow the sale to proceed, he cannot attack the purchaser or his title, his remedy then being only in damages against the selling creditor.

Place of Sale.—The exposure may be in Edinburgh or Glasgow, or at the head burgh of the county within which the property "or the chief part thereof" is situated, or at the parliamentary or police burgh, "whether within or without the county," nearest to the property "or the chief part thereof." It is not at all clear what is the "chief part" of a property, and certainly the place of sale should never be chosen so as to involve the construction of these words.

Partial Sale.—The Act expressly anthorises the creditor to sell "in whole or in lots." This does not mean that all the property must be offered for sale in one or more lots. It is quite open to the creditor to limit the exposure to part of the property, and the part may be put up as one lot, or in two or more. In that case the remainder may be put up afterwards on the one original notice of requisition, but of course on six weeks' advertisement. On a partial sale the creditor must at once apply the free balance of price to his debt, principal included if there is sufficient price. The English rule is the same (see Prideaux's Precedents, i. 514).

Combined Sale.—Several different matters fall to be considered under this head. Thus, if the bond is granted by liferenter and fiar of the property, it is obvious that the creditor will proceed to sell just in the ordinary way. But if the facts are that the same creditor holds one bond for one debt over the liferent, and another bond for another debt over the fee, the position is entirely different. Each security is entirely distinct from the other, and must be kept distinct. be in the interest of the creditor to unite the two and sell the property singly, but that course is not open to him under the powers in the deeds. The liferent and fee must be sold separately, to the disparagement of both; and there must be two separate accountings. A somewhat middle case is found when the creditor holds two bonds for separate debts: (1) by liferenter and fiar, and (2) by the liferenter or fiar only. In that case the first catholic security enables the creditor to obtain the full value of the property by selling it as one undivided asset. once sold, the accounting is complicated by the fact that, while both liferent and fee are liable to meet the first debt, either liferent or fee, as the case may be, enjoys immunity from the second debt. over pro indiviso shares of the same property or over adjoining subjects, the real value of which depends on their being enjoyed in unity, present similar complications. Another case is the sale by a creditor who has been in possession, and who, to make the most of his security, has supplied furniture so as to let the house furnished. In that case it will usually be found that the furniture will sell to most advantage if the

purchaser of the house is required, by the conditions of sale, to take the furniture at valuation. This will save the expense of removal and sale, and will secure its full value instead of a forced realisation. But it is equally clear that it is ultra vires of the creditor to introduce this condition. He is bound to do the best for the property, and is not entitled to clog the sale of it with a hampering condition requiring the purchaser to take and pay for a houseful of furniture which he may not want.

Consignation.—If there is any surplus, it is consigned in the bank specified in the articles of roup "in the joint names of the seller and purchaser, for behoof of the party or parties having best right thereto." The terms of consignation are not altered by the Consignations Act, 1895.¹ Before ascertaining the surplus there are deducted (1) the seller's debt, with interest; (2) expenses with reference to possession, if the creditor has been in possession; (3) expenses of sale; and (4) previous encumbrances, and expense of discharging same. It has been suggested by Lord Young that a sale by a creditor can be carried through only on the footing of all prior securities being discharged.² With deference it is submitted that this is doubtful. Obviously it may be a great saving of expense if the prior securities could be taken over by the purchaser. But it is quite clear that in that case the debtor's obligations must be discharged by the creditors. His property being taken, he must be freed of the debt to the extent of the price.

Sec. 123 of the 1868 Act provides that

upon consignation of the surplus of the price, if any be, as aforesaid, the disposition by the creditor to the purchaser shall have the effect of completely disencumbering the lands and others sold of all securities and diligences posterior to the security of such creditor, as well as of the security and diligence of such creditor himself.

It thus appears that due consignation is a matter of first-class importance, and affects the purchaser's title. Proof of the consignation should therefore be preserved, and also evidence that the proper sums were consigned. But what is to be done with the money after consignation? It does not appear that either seller or purchaser is bound to interfere. They may leave "the party or parties having best right thereto" to vindicate their claim. An action of multiplepoinding would be competent and suitable. If there be no dispute, a petition by the party entitled is a competent and convenient course.\forall At the same time the money is often uplifted and paid over to a postponed bondholder without any judicial proceedings, but this is at the risk of the parties. In any case it is imperative that the money be consigned in terms of the statute; how long it may remain so is quite another matter.

No Surplus.—It was not until 1874 that provision was made for

¹ Antrobus, Petr., 1896, 23 R. 1032.

² Adair's Trs. v. Rankin, 1895, 22 R. 975.

the case of there being no surplus. Under sec. 48 of the 1874 Act a notarial certificate of no surplus may be expede and recorded. A question is sometimes raised whether this certificate is necessary. It is sometimes argued that under the 1868 Act the disposition clears the record, coupled with consignation of the surplus, "if any be," and that accordingly, if there be no surplus, the disposition has that effect by itself alone. But that begs the question, which is, how is the fact of no surplus to be certified? Accordingly, it is thought to be clear that in all ordinary cases there must be a statutory certificate. An exception is furnished by certain cases under sec. 8 of the Heritable Securities Act, 1894 (see p. 526).

SCHEDULE OF INTIMATION, REQUISITION, AND PROTEST

I, A., procurator for B., in whose favour the bond and disposition in security after mentioned was granted, do hereby give notice to you, C., that payment is now required of the sum of £ , being the principal sum due under the bond and disposition in security, dated , and recorded in the division of the general register of sasines for the county of , granted by you, C., in favour of the said B., and of the sum of £ , being the interest due at present on the said principal sum, with such further sum of interest as shall accrue on the said principal sum till paid: And I further give you notice that if, at the expiry of the period of three months from the date hereof, the sums, principal and interest and liquidate penalty incurred and to be incurred, of which payment is now required, shall not be paid in terms of the said bond and disposition in security, then the said B., or the person or persons who may then be in right of the said bond and disposition in security, may proceed to sell the lands and others [or subjects] thereby conveyed, in the manner provided by the Titles to Land Consolidation (Scotland) Act, 1868, and with all powers and privileges conferred on or competent to creditors under bonds and dispositions in security by that Act.—This I do at on the day of and in presence of D., notary public, and E. and F., witnesses to the premises, called and required, and hereto with me subscribing.

E., witness.

F., witness.

A.

This does not require to be signed by the notary, and does not require a stamp. A copy is made, and on that copy a 1s. stamp is impressed or affixed, and the notary writes the following certificate, which should be holograph:—

I certify that what is above written is a true copy.

D., Notary Public.

When the notice has to be served on more parties than one, one certificate in the following terms is sufficient:—

I certify that what is above written is a true copy, and I further certify that a similar demand has been intimated to the following persons, namely,

(first) to Y., at (second) to Z., at

on on before these witnesses before these witnesses.

, and

D., Notary Public.

There is no clear warrant for holding that the notary's certificate must be holograph, but that is the general practice and it should be followed.

SCHEDULE AT INSTANCE OF ASSIGNEE

I, A., procurator for B., now in right of the bond and disposition in security after mentioned, do hereby give notice to you, C., that payment is now required of the sum of \pounds , being the principal sum due under the bond and disposition in security, dated , and recorded in the division of the general register of sasines for the county of on , granted by you [or X.] in favour of Y., to which the said B. has now right by various transmissions, and of the sum of \pounds , being the interest [as on p. 520, to end].

SCHEDULE WHERE THE LOAN IS PARTLY REPAID

I, A., procurator for B., in whose favour the bond and disposition in security after mentioned was granted, do hereby give notice to you, C., that , being the balance remainpayment is now required of the sum of £ contained in the bond and disposition ing due of the principal sum of £ in security, dated , and recorded in the division of the general register , granted by you, C. [or X.], in of sasines for the county of on favour of the said B., and of the sum of £ , being the interest due at present on the said balance of principal, with such further sum of interest as shall accrue on the said principal sum of \mathcal{L} [balance] till paid: And I further give you notice that if, at the expiry of the period of three months from the date hereof, the sums, principal and interest and liquidate penalty incurred and to be incurred, of which payment is now required, shall not be paid in terms of the said bond and disposition in security, then the said B., or the person or persons who may then be in right of the said bond and disposition in security to the extent foresaid, may proceed to sell [as on p. 520, to end].

SCHEDULE AT INSTANCE OF PARTIAL ASSIGNEE

I, A., procurator for B., now in right of the bond and disposition in security after mentioned to the extent after specified, do hereby give notice to you, C., that payment is now required of the sum of £ , being part of the principal sum of £ contained in the bond and disposition in security, dated , and recorded in the division of the general register of sasines for the county of , granted by you, C. [or X.], in on favour of Y., to which bond and disposition in security, to the extent foresaid, the said B. has now right by various transmissions, and of the sum of £ , being the interest due at present on the said principal sum of £ [B.'s part], with such further sum of interest as shall accrue on the

said principal sum of £ [B.'s part] till paid: And I further give you notice [as on p. 521, to end].

For articles of roup by bondholder, see p. 175. For disposition following on sale, see p. 331.

CERTIFICATE OF NO SURPLUS

I, A., notary public, with reference to the sale of All and Whole [describe or refer], which sale took place at upon the at the instance of B., in virtue of the power of sale contained in a bond and disposition in security for the sum of £ , with interest and penalties corresponding thereto, dated , and recorded in the division of the general register of sasines for , granted by C. in on favour of the said B., do hereby certify that there has been submitted to me a statement of the intromissions of the said B. with the price of the said lands, subscribed as authentic by the said B. [or by D., agent of the said B. on his behalf], from which it appears that no surplus remains for consignation in bank in terms of the 122nd and 123rd sections of the Titles to Land Consolidation (Scotland) Act, 1868, and I make this certificate in terms of the Conveyancing (Scotland) Act, 1874.—In witness whereof.

Stamp, 5s.

It is suggested that the statement of intromissions should not be made, as it were, a step in the title nor inserted in any inventory of Indeed it is not at all clear that the purchaser is entitled to access to it, much less custody of it.

Sale by pari passu Bondholder.—Until the Act of 1894, though the holder of a pari passu security had a right to exercise the power of sale, he could not compel his co-creditor ranking pari passu with him to discharge his security for less than full payment.1 This has been altered by sec. 11 of the 1894 Act. The sheriff may, on the application of a pari passu bondholder, grant warrant to sell "if in his opinion it is reasonable and expedient that such sale should take place," and the property is disencumbered "in the same way and as fully as if the creditors therein were by agreement carrying through said sale." The defender in the petition is the pari passu creditor: the debtor is not called, as he has no interest (unless, indeed, the expenses of the petition are to be taken out of the price). The sheriff may "authorise both or either of the parties or some other person to carry through the sale; and . . . to grant a conveyance." But whatever may be done in that respect, the power under which alone the property can be sold, as against the debtor, is that contained in a bond on which due intimation has followed under sec. 119 of the 1868 Act. Sec. 11 of the 1894 Act further provides that "the expenses of and connected with the sale" (which may include the expenses of the petition, s. 12) "shall be payable preferably out of the price . . ., and the balance ¹ Nicholson's Trs. v. M'Laughlin, 1891, 19 R. 49.

... shall be paid to the creditors in the securities charged upon the lands according to their just rights and preferences." But this cannot possibly affect *prior* creditors. The Act provides no machinery for freeing the lands of prior securities, and the holders of these cannot be forced to discharge their bonds except on full payment.

As to the combined operation of secs. 8 and 11 of the 1894 Act, so that a *pari passu* creditor may force the hand of his co-creditor and at the same time himself acquire the property absolutely, see p. 527.

As to jurisdiction and review, see p. 528.

PETITION BY PARI PASSU BONDHOLDER

The petition of A., pursuer, against B., defender.

The above-named pursuer submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court—

To grant warrant to sell All and Whole [description or reference], and to order a sale of the said subjects, under the power of sale contained in the bond and disposition in security for the sum of £ granted by C. in favour of the pursuer, dated , and recorded in the division of the general register of sasines for the county of ; to fix the upset price; to on authorise the pursuer to carry through the sale; upon payment or consignation of the price to authorise the pursuer to grant a converance and disencumber the said subjects of the said security and of the pari passu security held by the defender, namely, the granted by the bond and disposition in security for £ , and recorded in said C. in favour of the defender, dated the said division of the register of sasines on , and that in the same way and as fully as if the pursuer and defender were by agreement carrying through such sale; to fix the time and conditions of sale; to order that the expenses of and connected with the sale shall be payable preferably out of the price, and that the balance of the price [after payment of prior securities] shall be paid to the pursuer and defender in proportion to the amounts due to them respectively under their said pari passu securities; and to decern; and to find the defender liable in expenses in the event of his appearing to oppose this application; or to do further or otherwise in the premises as to the Court may seem right.

CONDESCENDENCE

1. The pursuer holds a bond and disposition in security for £ granted by C. in his favour, dated , and recorded in the division of the general register of sasines for the county of on . The defender also holds a bond and disposition in security for £ granted by the said C. in his favour, dated , and recorded in the said division of the register of sasines on . The two securities rank $pari\ passu$ on the subjects after mentioned.

- 2. The property subject to the bonds is [describe it popularly e.g.] the lauded estate of X. in the county of Y. , extending to acres or thereabouts, and yielding a gross rental of £ [or the tenement No. 10 Young Street, Perth, containing sixteen small houses, yielding a gross rental of £ and a net rental of about £ , or the villa known as Craiglea, No. Grange Road, Edinburgh, let at £ per annum, with a feu-duty of £].
- 3. There is no other security on the said subjects so far as known to the pursuer [or, So far as known to the pursuer, the only other securities over the said subjects are (1) a bond for \pounds in favour of D., ranking prior to the said pari passu securities, and (2) a bond for \pounds in favour of E., ranking after said securities].
- 4. The pursuer desires to sell the said subjects, but he is unable to obtain the defender's consent to a sale; and accordingly he presents this petition under sec. 11 of the Heritable Securities (Scotland) Act, 1894.

PLEA IN LAW

The pursuer holding a security ranking pari passu with the security held by the defender, and being desirous to sell the property over which these securities extend, but unable to obtain the defender's consent, he is, in terms of sec. 11 of the Heritable Securities (Scotland) Act, 1894, entitled to a decree in terms of the prayer of the petition.

For disposition to purchaser, see p. 332.

V. ADJUDICATION

Prior to 1894 this was the way in which a creditor could acquire an absolute title. It is still competent. But as it takes ten years to give an absolute title, it will now no doubt be little resorted to, in view of the more expeditious procedure under the 1894 Act, which is next referred to.

VI. FORECLOSURE

There are considerable differences between the procedure under the 1894 Act and the English foreclosure, but as we have no separate term "foreclosure" is convenient, and sufficiently marks what is referred to. The procedure is:

Exposure (after requisition and advertisement in the usual way) at a price not exceeding the amount due under the bond and under any prior and pari passu securities, but not including the expenses attending the exposure or prior exposures. This matter of upset price is attended with a little difficulty in cases where the exact amount of the selling creditor's debt is open to dispute, and he desires to become the owner. If he fixes the upset too low, it may be bid, and he will lose the property, for of course at this first exposure he may not bid. If, on the other hand, he fixes it higher, he runs the risk of it being found that the price exceeds the debt, in which case the whole procedure is open to challenge

as not having been in accordance with the statute, or at least the surplus would be payable to the debtor.

Further, this regulation as to upset price seems to imply and necessitate that the *whole* security-subjects remaining under the bond shall be dealt with together and in one lot. The sections say nothing about a part, and they do refer to "a price," which is in marked contrast to the 1868 Act, which expressly refers to exposure in whole or in lots. But further, it appears impossible to fulfil the condition of the 1894 Act as to upset price without exposing all at one time. For if part only be put up, how is it to appear that the upset price *plus* the value of the unexposed part does not exceed the debt?

It is proper to refer to the matter of advertisement in this connection. In some of the Sheriff Courts it has been laid down that, prior to the petition, there must have been six weeks' advertisement at a price not exceeding the debt. It naturally sometimes happens that in the first instance the creditor, being desirous of obtaining the best price, and without any reference to the 1894 Act at all, exposes the security-subjects, after six weeks' advertisement, at a price above the debt; there is no sale; he then re-exposes at a price under the debt, and after three weeks' advertisement; there is again no sale; whereupon he presents a petition under sec. 8. Under these circumstances it has been held that the advertisement is insufficient in respect that there has not been six weeks' advertisement (as on an original exposure under the 1868 Act), at a price not exceeding the debt, in terms of sec. 8 of the 1894 Act.

Petition.—Failing a sale the creditor presents a petition to the sheriff for a decree forfeiting the right of redemption, and declaring the creditor to be absolute proprietor at a price named, i.e. the price at which the property was exposed. Though the sheriff has an option as after mentioned, no reference is made to this option in the prayer of the petition.

Petition by Attorney.—The case cited 1 shews that an attorney or factor and commissioner may be entitled to present the petition without a specific clause to that effect in the deed under which he acts. But it also reminds one that in settling with two or more constituents the attorney will require to have their joint consent to the value as at which the property is to be made over to either or any of them exclusively, if that be intended.

Defenders.—The following will be called: (1) the granter or his representatives, (2) the proprietors, and (3) all other creditors, whether prior, *pari passu*, or postponed. In order to ascertain who these are the search should be brought down to date.

Remit.—It is usual for the sheriff to remit to a man of business to enquire into the facts and examine the titles, and whether the procedure has been regular and in terms of the Act.

¹ Dunn v. Mowat's Trs., 1901, 8 S. L. T. No. 285.

Decree may be granted in terms of the prayer, which, being recorded, disencumbers the property of all securities and diligences posterior to the security of the purchasing creditor.

Re-exposure.—Or, instead of granting decree, the sheriff may order re-exposure at a price fixed by him; the creditor may then bid and purchase in terms of the Act, and without any authority to that effect from the sheriff. If he purchases, he may obtain decree "to the effect foresaid," or he may grant a disposition to himself. The ordinary rules as to advertising adjourned sales will apply to the re-exposure ordered by the sheriff. If there is a re-exposure, the creditor must bid and purchase if he wishes to take the property. He cannot adjourn the sale again and ask decree from the sheriff as at the last upset, i.e. the reexposure upset. If he were to make that mistake, the whole proceedings might be abortive, or perhaps the sheriff would again order a re-exposure. The price at which the creditor takes the property is the price at the re-exposure,—the sheriff's upset if there is no other bidder, and the creditor's highest bid if there is competition and he is successful. As between taking decree and granting a disposition there is not much to choose, now that it is decided that the decree as much as the disposition is liable to ad valorem stamp duty as on a sale.1 The decree will probably be the cheaper method. If the disposition is granted, evidence of the sheriff's order for re-exposure will be preserved with the titles. Disposition or decree will of course be recorded.

Surplus.—It will be observed that sec. 8 directs that if, without ordering any re-exposure, the sheriff grants decree in terms of the petition, the decree when recorded is to clear the record of posterior securities and diligences, without saying anything about a certificate of no surplus being recorded. That is right enough, for in that case it is impossible that there could be any surplus, seeing that the upset is not to exceed the selling creditor's security and prior and pari passu securities, and there must have been no bid or otherwise there would have been a sale and therefore no petition. But if a re-exposure is ordered, though the upset will then no doubt be reduced, it is impossible to say what may be the result of competition: there may be a surplus. Sec. 9 deals with the case of "a sale being carried through" under sec. 8, and provides for consignation of the surplus or a certificate of no surplus, either of which is to clear the record; and it is not stated expressly that this provision as to the certificate is not to extend to the case of a decree granted by the sheriff without any re-exposure. that event, however, the certificate appears to be clearly unnecessary in respect of the express terms of sec. 8, which, as already stated, are conformable to the necessity of the case.2

The personal obligation of the debtor is preserved for any unpaid

¹ Inl. Rev. v. Tod, 1898, 25 R. (H. L.)
² Kohler, Scotsman, 29 March 1899 (Lord 29.

balance; this includes the expenses of exposures, though these are not to be reckoned in fixing the first upset under sec. 8; and the sheriff "may award expenses or may direct that the expenses be treated as part of the expenses of the sale" (s. 12). If there is no surplus, it is immaterial which of these courses is taken with the expenses. But if there is a surplus, it is better in the creditor's interest to have them treated as expenses of sale, rather than that he should get a formal decree therefor against the debtor. But even in the latter case, it appears not doubtful that the creditor can charge these expenses upon the price as against postponed encumbrances, as being expenses properly incurred and secured under the penalty clause.

Pari passu Creditor.—That this procedure is available to a pari passu creditor is express in terms of sec. 8, which refers to "securities ranking pari passu with the exposer's security." But secs. 8 and 9, taken by themselves, contain nothing to clear the record of the pari passu bonds. To reach the effect of giving one of the pari passu creditors an absolute title to the property free from the other pari passu bond or bonds, requires the force of secs. 8, 9, and 11, and two separate. and partly concurrent, petitions under secs. 8 and 11 respectively. And even then, to reach this result, it is essential that the sheriff should be willing in the petition under sec. 11 (which would be first presented) to fix, either at once or ultimately, an upset price which would comply with the conditions of sec. 8 in that respect; and further, it appears necessary that under sec. 11 he should not appoint anyone other than the petitioning creditor to carry through the sale. In this case the proper procedure appears to be a disposition by the selling creditor in favour of himself as purchaser, and not a decree. The difference is as regards the clearing of the record of the pari passu debt. sec. 8 the decree has the effect of clearing the record only of postponed securities and diligences; and sec. 11, which gives the machinery for releasing the property from the pari passu security, says nothing about decrees.

Stamp.—The decree or disposition requires the ordinary conveyance on sale stamp duty.¹

Title indefeasible.—Sec. 10 of the Act is in the following terms:—

No purchaser from the creditor or other successor in title in the lands shall be under any duty to inquire into the regularity of the proceedings under which such creditor has acquired right to the lands held under his security by virtue of the provisions contained herein, or be affected by any irregularity therein, without prejudice to any competent claim of damages against such creditor.

On this enactment see the cases noted below.2 In the second of these

Inl. Rev. v. Tod, 1898, 25 R. (H. L.)
 Sutherland v. Standard Ass. Co., 1902,
 F. 957; M'Donald v. Winkler, 1903, 10
 L. T. No. 353.

it was held to cover defects in the schedule calling up the loan and in the advertisements, though these are not "proceedings 1 by virtue of the provisions contained herein" in the sense that they were not introduced by the statute. But it was indicated that if "something more than an irregularity" were to occur, the section might not cover it. It gives no protection to the petitioning creditor or anyone acquiring from him on a gratuitous title; but it would protect the holder of a security granted by him after obtaining his decree.

Jurisdiction.—Sec. 15 reads:

The sheriff of the county in which the lands held in security, or part thereof, are situate, or where lands are situate in more counties than one, the sheriff of any of such counties, shall have jurisdiction in all cases instituted under or in connection with this Act, whatever the value of the lands may be.

This is somewhat peculiarly expressed, seeing that lands which have only "a part thereof" in any county must necessarily be "situate in more counties than one." The former expression is of course intended to apply to an undivided property lying across a county boundary, while the latter is intended to apply to two or more separate properties in different counties.

Review.—Sec. 12 provides:

The interlocutor of the sheriff who pronounces any order or decree shall be final and not subject to review, except (1) as to questions of title, and (2) where the principal sum due under the heritable security exceeds £1000.

It appears from this that if the sheriff-substitute makes the order, there is no appeal to the sheriff-depute, except in the excepted cases.

Of these excepted cases the first is title. This would cover, e.g., questions as to whether the petitioner's security had ever been duly constituted, whether it had not been extinguished, whether it had been duly transmitted to him, and (under sec. 11) whether the defender's security, instead of merely pari passu with, was not really preferable to, the pursuer's security.

The second excepted case is the £1000 limit. This is principal only, and as at the date of the petition. Thus there may be large arrears of interest, bringing the total over £1000, or the principal may originally have been over £1000; but if this principal be, at the date of the petition reduced to £1000 or under, review is excluded. This is really an extraordinary limit. In the first place, it is difficult to apply it to sec. 11. In that case is it the pursuer's debt, or the defender's debt, or the total of the debts due to the defenders if more than one, or pursuer's and defender's debts together, or the appellant's debt? With much doubt it is suggested that the total of the principal of the pari passu debts should be taken. But further, the effect under sec. 12 is that if the

¹ But see the contrary indicated in Sutherland, supra.

property is worth £10,000 and the principal of the pursuer's debt is £900, review is excluded; whereas if the value of the property is £100 and the principal of the pursuer's debt £1050, an appeal is competent. That this contrast between the "sum due under the heritable security" and "the value of the lands" is quite in contemplation, is apparent on a comparison of secs. 12 and 15.

Infeftment.—It appears clear that the obtaining and recording of the decree will not give a feudalised title to the property unless the person on whose behalf the extract is recorded already stands infeft under the bond. Thus if A. obtains a bond, never records it, obtains a decree, and records the decree, he has not a recorded title to the property. This is more apt to happen in practice in the case of trustees, and especially when a trust title has been completed to the bond, but additional trustees have since been assumed and their title has not been completed. Then all the trustees obtain a decree and record it. Under these circumstances it is submitted that the trustees cannot convey the property unless at least one of the trustees who were infeft in the bond be surviving and acting; and further, that the title requires to be granted by the trustee or trustees so infeft, as well, of course, as by a quorum of the whole trustees.

Reference to Burdens.—The statutory form says, "but subject always to the burdens and conditions contained or referred to in the said bond and disposition in security." This expressly contemplates a mere reference to the bond for the burdens, though it also contains only a reference. This is not in terms of sec. 32 of the 1874 Act, which requires that the reference shall be to a deed in which the burdens "are set forth at full length." If desired it is easy enough to make the prayer comply exactly with the 1874 Act by simply not omitting, but repeating verbatim in the prayer, that part of the bond which deals with burdens. But no doubt is felt of the sufficiency of a mere reference to the reference in the bond without any other or further reference. For (1) this is in terms authorised by the 1894 Act, and (2) on a construction of sec. 8 of that Act and the schedule, the view appears to be that the disposition in the bond is the creditor's only disposition, the effect of the decree being simply to extinguish the right of redemption and convert a redeemable into an irredeemable title.

PETITION BY BONDHOLDER TO ACQUIRE ABSOLUTE PROPERTY

In the Sheriff Court of the sheriffdom of at

The petition of A., pursuer, against B., defender.

The above-named pursuer submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court—

To find and declare that the pursuer, as heritable creditor under the bond and disposition in security aftermentioned, exposed the subjects under

the said bond and disposition in security to public sale at a price not exceeding the amount due under the said bond and disposition in security, excluding the expenses attending the exposure [and prior exposures] and failed to find a purchaser, and to grant a decree against the defender, finding and declaring that he has forfeited the right of redemption reserved in the bond and disposition in security for granted by the defender in favour of the pursuer, dated and recorded in the division of the general register of sasines for the county of , and that on the said right is extinguished as from and after the date of the decree to follow hereon, and that the pursuer has right to and is vested in, as absolute proprietor thereof, the following subjects, being the subjects described in the said bond and disposition in security, namely, All and Whole [description as in the bond, with necessary verbal alterations only, and if necessary add: but subject always to the burdens and conditions specified or referred to in the said bond and disposition in security], and that at the price of [being the last upset]; and to direct that the expenses incurred and to be incurred by the pursuer in connection with this application and the proceedings to follow hereon be treated as expenses of sale, and to decern; to grant warrant to record the decree to be extracted hereon in the said division of the register of sasines; and to find the defender liable in expenses in the event of his appearing to oppose this application; or to do further or other-. wise in the premises as to the Court may seem right.

CONDESCENDENCE

- 1. The pursuer holds a bond and disposition in security for \pounds granted by the defender in his favour, dated , and recorded in the division of the general register of sasines for the county of on . Interest is due on the debt from . The bond is produced herewith.
- 2. The security constituted by the bond consists of shops and houses in

 . There is herewith produced an advertisement of the subjects which gives details, and reference is made thereto.
- 3. So far as known to the pursuer there is no other creditor secured on the said subjects either before or after the pursuer's bond.
- 4. The pursuer called up his bond on , on which date the requisite statutory notice was given to the defender. A copy of the schedule of intimation, with notarial certificate thereon, is produced herewith.
- 5. Payment not having been made, the statutory advertisements were given. A certificate by the publishers of the newspaper, dated, is produced herewith.
- 6. In terms of the advertisement the security-subjects were exposed for sale within on , at the upset price of £ , which upset did not exceed the amount due under the said security, exclusive of the expenses attending the exposure. No person offered for the subjects and the sale was adjourned. The articles of roup, with minute of adjournment annexed, are herewith produced.

7. Under the circumstances above set forth the pursuer makes the present application in terms of sec. 8 of the Heritable Securities (Scotland) Act, 1894.

PLEA IN LAW

The pursuer having exposed for sale under his security the subjects held in security, at a price not exceeding the amount due under the said security (exclusive of the expenses attending the exposure), and having failed to find a purchaser, he is, in terms of sec. 8 of the Heritable Securities (Scotland) Act, 1894, entitled to decree in terms of the prayer of the petition.

In respect whereof.

THE SAME, CALLING PRIOR AND POSTPONED CREDITORS

The petition of A., pursuer, against B., and also against the following persons, who are called for their interest as holders of securities over the subjects referred to in the prayer of this petition, namely, (1) C., (2) D., and (3) E., defenders.

The above-named pursuer submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court—

To grant a decree against the defender B., finding [as on p. 529, to the concluding prayer for expenses, which will run] and to find such of the defenders as may appear to oppose this petition liable in expenses; or to do further or otherwise as to the Court may seem right.

CONDESCENDENCE

[Articles 1 and 2 as on p. 530.]

3. So far as known to the pursuer the only creditors besides himself secured over the said subjects are the defenders, C., D., and E., whose debts are as follows:—

C.						£1000
D.			•		•	500
E.				•		500
						£2000

The first and second of these are preferable, and the third is postponed, to the pursuer's security.

4 and 5 [as on p. 530].

6 [as on p. 530, omitting "which upset did not exceed," etc.].

7. At the date of the said exposure the amount due to the pursuer under his bond included:

	Princi	ipal		•	•			•		£1500
	Inter	est	•	•	•		•		•	75
adding	thereto	the	nref	erable	debt	a dna	to th	e defe	nders	£1575
adding	C.		-							£1000
	D.	•					•	•	•	500
gives a	total as	at :	that	date o	f.					£3075

from which it appears that the upset price of £2800 did not exceed the amount due under the pursuer's security and prior securities, exclusive of the expenses attending the exposure.

8 [7 on p. 531].

Plea in law as on p. 531, inserting after "the said security" the words "and prior securities."

VARIATIONS

1. SALE BY DEBTOR.

Defenders: Both debtor and new proprietor; also other creditors, if any. Prayer.

To grant a decree against the defenders, finding and declaring that they and each of them have forfeited the right of redemption reserved in the bond and disposition in security for £ granted by the defender B., etc. . . . ; and to find the defenders liable in expenses in the event of their appearing, etc.

Condescendence.

Insert an additional article:

- 3. The defender C. acquired the subjects from the defender B. conform to disposition dated , and recorded in the said division of the general register of sasines on .
 - 2. DEBTOR BANKRUPT.

Defenders: B. [the debtor] and C., trustee on the sequestrated estate of the said B., conform to act and warrant by the sheriff of , dated at on ; also other creditors, if any.

Prayer as above.

3. DEBTOR DEAD TESTATE.

Defenders: (1) B. and C., the trustees of D. [the debtor] acting under his trust disposition and settlement dated , and registered ; (2) E., the heir-at-law of the said D.; (3) F., the widow of the said D.; (4) other creditors, if any.

Prayer.—To grant a decree against the defenders finding and declaring that they and each of them, and the estate and representatives of the said D., have forfeited the right of redemption reserved in the bond and disposition in security for £ granted by the said D., etc.

Condescendence.—Insert additional article—

- 2. The said D. died on . The defenders B. and C. are his testamentary trustees. [If it be the case, add: They have made up their title to the subjects after mentioned, conform to notarial instrument recorded in the said division of the register of sasines on .] The defenders E. and F. are the heir-at-law and widow respectively of the said D.
 - 4. DEBTOR DEAD INTESTATE.

Defenders: (1) B., the heir-at-law of C. [the debtor], (2) D., the widow of the said C., (3) E., his executor, and (4) other creditors, if any.

Prayer as in preceding variation.

descendence.—Additional article:—2. The said C. died on fender B. is his heir-at-law [and if the case, add: and he has made up to the subjects after mentioned, conform to extract decree of special granted by the sheriff of , dated , and recorded in the vision of the register of sasines on]. The defender D. is the of the said C. The defender E. is his executor, conform to redisposition by bondholder in his own favour, see p. 332.

SECTION XXXIII

BONDS OF CORROBORATION

THE circumstances under which bonds of corroboration are most commonly granted are:

- 1. When the original obligant is dead, and the obligation of his successors, generally his heir or legatee succeeding to the special property charged with the debt, is to be given. The deceased debtor's general representatives will probably require a discharge of his personal obligation. They are not in safety to distribute his estate without a discharge. But the course of action between the creditor and the successor in the property may be such as to free the general representatives.
- 2. When the original obligant has ceased to be proprietor, and the obligation of his disponee is to be given. Both of these cases are affected by sec. 47 of the 1874 Act, which is dealt with below.
- 3. When the original obligant is an individual, and a firm is subsequently formed, or when there is a change in the constitution of the obliging firm. As to whether the new firm might not be liable without any bond of corroboration, see p. 93. This case may be only a special instance of case 2.
- 4. When the septennial limitation of cautionary obligations would otherwise shortly take effect. As to the operation of the septennial limitation with reference to bonds of corroboration, see the cases noted.² It appears clear that if both principal and cautioner sign the bond of corroboration, the limitation will operate, and even though there are separate deeds if they mutually refer to each other.

The foregoing are all cases in which nothing more is required than a mere corroborative personal obligation, without any new constitution of the security, if any, whether over heritable or moveable estate or both. But in the following cases it is, in addition, necessary to have a new constitution of the security:—

5. When there is any defect in, or doubt as to the validity of, the

Mags. of St Andrews v. Forbes, 1893,
 Tait v. Wilson, 1836, 15 S. 221; Mon-31 S. L. R. 225; N. Albion, etc., Co. v. teith v. Pattison, 1841, 4 D. 161.
 M'Bean's c.b., 1893, 21 R. 90.

original real security; or even it may be in the personal obligations contained in the original deed.

- 6. When interest is in arrear and is to be accumulated with principal.
- 7. When the obligations as appearing on the face of the bond are to be increased, e.g. if three per cent. interest is in the original security, and it is to be raised to four per cent.
- 8. When on the occasion of a further loan being given over additional security-subjects, or under other circumstances, it is desired to have a catholic security for both loans over both properties.
- 9. When a heritable security has been in force for nearly forty years without having been in any way dealt with on the record, which, it goes without saying, is not common. Under these circumstances the results may be twofold, namely, (1) the obligant is in all probability dead and his estate distributed, and (2) there is at least the possibility of some one dealing with the property in reliance on a forty years' search, which soon would not disclose the bond. Accordingly, it will be proper to take a bond of corroboration and disposition in security. This case, however, differs entirely from Nos. 5 to 8, the difference being that under them additional money is to be secured on the lands, or at least an additional or better security is to be obtained, while in this case all that is wanted is a mere notice on the record to save possible misunderstanding on the part of third parties.

Accordingly in Nos. 5 to 8 it is hardly necessary to point out that clear property and personal searches must be obtained covering the recording of the corroborative deed.

Ultra vires obligation.—An ordinary company formed for the purpose of building, or lending on the security of heritable property, has no power to guarantee prior securities affecting properties in which it has a postponed interest, whether the attempted guarantee extend to principal¹ or to interest only,² and even though some consideration, e.g., time and power of management, be obtained in exchange. Of course this will depend on the company's constitution, but the cases cited shew that the transaction will not be saved by a power to lend on postponed securities, or to do acts incidental to building and lending on heritable security, nor by the fact that the company might competently have taken over the prior security in question.

Section 47 of 1874 Act.—"Subject to the limitation hereinbefore provided as to the liability of an heir for the debts of his ancestor (1) an heritable security for money (2), duly constituted upon an estate in land (5), shall, together with any personal obligation to pay principal, interest, and penalty, contained in the deed or instrument whereby the security is constituted (4), transmit (6) against any person taking such estate (6),

Shiell's Trz. v. Scot. Prop. Invest. Soc.,
 Life Association v. Cal. Her. Sec. Co.,
 1884, 12 R. (H. L.) 14.
 1886, 13 R. 750.

by succession, gift, or bequest, or by conveyance when ⁽ⁿ⁾ an agreement to that effect ^(e) appears ^(e) in gremio of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his ancestor or author, without the necessity of a bond of corroboration or other deed or procedure, and the personal obligation may be enforced against such person by summary diligence or otherwise in the same manner as against the original debtor. A warrant to charge may be applied for and validly granted in the bill chamber or in a sheriff court in the form set forth in Sch. K. hereto annexed or in a similar form, and all diligence may thereafter proceed against the party in common form. A discharge of the personal obligation of the original or any subsequent debtor, whether granted before or after the commencement of this Act, shall not, where the debt still exists, prejudice the security on the estate or the obligation as hereby made transmissible against the existing proprietor."

(1) Quantum lucratus.—The opening words of the section refer to sec. 12, which, inter alia, enacts,

An heir shall not be liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds.

A universal legatee has the benefit of this restriction, and from the same case it would appear to extend to everyone who takes on death whether by operation of law or by deed. This is a strong reason against resting satisfied with the statutory liability in the case of anyone except an inter vivos disponee (and even to that there are exceptions, as stated below). For it is obvious that troublesome questions may arise as to the extent to which the successor has truly been lucratus; and indeed it is difficult to see how summary diligence is practically safe to proceed at all on a liability clogged with an indeterminate condition of this kind. Under these circumstances a bond of corroboration should be taken, or at least an admission by the successor, addressed to the creditor, that he has been lucratus to an extent beyond the creditor's bond and all if any prior and pari passu charges.

- (2) "Security for Money."—Therefore in the case of obligations ad factum præstandum it appears that there must be a bond of corroboration.
- (3) "Estate in Land."—Therefore when the security is personal property (other than other heritable securities and real burdens), there must be a bond of corroboration.
- (4) "Whereby the security is constituted."—One would have expected this to run "to pay the principal interest and penalty thereby secured." But as the section stands it seems to follow that it operates to impose personal liability only when the personal obligation is contained in the deed which creates the security. This is often not the case, and when not, a bond of corroboration is necessary.

¹ Welch's Exr. v. Edinburgh Life Ass. Co., 1896, 23 R. 772.

- (5) "Transmit."—Notwithstanding this word the testator's estate or the disponer is not liberated. Not only so, but in his bankruptcy the creditor is entitled to rank without deducting the security, as the property does not remain estate of the bankrupt.\(^1\) It seems quite clear that the successor is never liable unless his ancestor was, e.g. if the ancestor was a disponee without a sufficient agreement, or a married woman who joined with her husband in burdening her property for his debt, or any other granter of a cautionary security—in all these cases it appears clear that the section does not apply to the heir who succeeds to the property, even though the obligation be contained in the deed "whereby the security is constituted."
- (6) "Taking such estate."—This raises the question of the position of parties who take less than the whole security subjects, e.g. (1) a partial legatee, or (2) joint pro indiviso legatees or even disponees. No question can arise as to the heritable security, for, of course, every part of the property is burdened with the whole debt, and the part of the section which says that the heritable security shall transmit appears to be superfluous. But what about the personal obligation in these two Is a legatee of part of the property personally liable under the Act for the whole debt (even assuming that the value of his part exceeds the whole debt) or for any part of it? It would rather appear that he is not, as not having taken "such estate." Then are pro indiviso legatees or (when the in gremio agreement is silent on the point) pro indiviso disponees liable jointly and severally or only jointly? It is thought that they are not jointly and severally liable. These again are cases in which a bond of corroboration should still be required.
- (7) "When an agreement," etc.—There seems little doubt that the agreement is intended to be required only in the case of conveyances. But this is not quite workable, for "gifts" of heritable property can hardly be carried out without a conveyance by the donor or by some one by his direction; and if the distinction be between onerous and gratuitous conveyances, it is obvious that a transaction which imports an obligation by the disponee to relieve the disponer of a debt, while it may be a benefit to the disponee, is still not entirely gratuitous. "Bequests" also may be carried out by general or even special dispositions. Whenever, therefore, the new proprietor's title is by deed, a bond of corroboration should be required unless the deed contain a satisfactory agreement.
- (8) "Agreement to that effect," i.e., for the transmission of the obligation and security, though, as the latter transmits of necessity, it is strictly sufficient that the "agreement" refer to the obligation.² But a clause declaring that the property is disponed under burden of a bond

University of Glasgow v. Ywill's Tr.,
 Wright's Trs. v. M'Laren, 1891, 18 R.
 9 R. 643.
 841.

is not an agreement in the sense of this section,1 nor (so it has been decided 2) is a clause of that kind coupled with an undertaking by the disponee to relieve the disponer of the debt. Note that the former of these clauses by itself alone does not even as between disponer and disponee create an obligation of relief by the disponee; it merely saves the disponer from being liable under his warrandice. Carrick's judgment is in conformity with old and modern cases,3 where no statutory aid was present, but the statute must have some force, and in order to create liability to the creditor it cannot under the Act be necessary to insert clauses which would have produced that effect even without the Act, for which reason it is thought that Carrick's case requires reconsideration, and probably the Act should be allowed the effect of making the disponee liable to the creditor in all cases in which it is clear that he becomes liable to the disponer. Indeed, there may be a separate question whether that is not the effect at any rate and even without the aid of the Act. For assuming that the disponer is liable to the creditor, an asset of the disponer's estate is his right of indemnity against the disponee, and that may be made available at the instance of the creditor, though there may be complications in the disponer's bankruptcy. But, of course, this is a different kind of liability from what is contemplated under the section, viz., liability under the bond and enforceable by summary diligence. It is not a solemnity that the disponee shall sign the deed containing the agreement, but certainly he ought to do so, for otherwise great trouble and risk may be incurred if he disputes having ever consented to become bound.4 When he has not signed the deed a bond of corroboration should be required, or at any rate an admission of liability which may, e.g., be made a clause in any memorandum stating terms for the continuance of the loan, which in that case will be signed by the proprietor himself, and attested.

It is not necessary that the creditor should know of the agreement, much less sign it.⁵

Forms.—The form of clause of agreement which is recommended will be found on p. 326 and forms of minutes for summary diligence on p. 41. But having regard to the exact terms of s. 47, it seems clear that the form on p. 326 gives much more than can be regarded as essential. It is to be observed that the section says that if a certain agreement be inserted, then not only shall it have effect, but also certain other things shall follow. Thus under a clause like the following, after the exception from the warrandice,

and the said B. by his signature hereto agrees that the said heritable security

¹ Ritchie and Sturrock v. Dullatur Feuing Co., 1881, 9 R. 358.

² Carrick, etc. v. Rodger, Watt & Paul, 1881, 9 R. 242; doubted in Wright, supra.

³ Kippen v. Stewart, 1852, 14 D. 588;

Reid v. Lamond, 1857, 19 D. 265; Henderson v. Stubbs, 1894, 22 R. 51.

⁴ Shiells, Appel., 1902, 10 S. L. T. No. 79.

⁵ Wright, supra.

shall, together with the personal obligation to pay principal, interest, and penalty contained in the said bond and disposition in security transmit against him,

it cannot be disputed that this would be a good agreement, as the terms of the section would make the disponee personally liable to the creditor, and to relieve the disponer, and subject to summary diligence.

(9) "Appears in gremio."—It would seem that it is enough that the agreement is referred to, and that it need not necessarily be contained, in the conveyance.

BOND OF CORROBORATION BY AN HEIR

I, A., considering that I am now the proprietor of the lands and estate of X. in the county of Perth, having succeeded thereto as heir to my father, Y.: That the said estate is burdened with a bond and disposition in security for the sum of £1000, granted by the said Y. in favour of Z., dated and recorded in the division of the general register of sasines for the county of Perth on : That the said bond and disposition in security still remains in force, and is now held by B.; and that I have been requested and have agreed to grant these presents: Therefore, without prejudice to the said bond and disposition in security, but in corroboration thereof et accumulando jura juribus, I bind myself and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to repay the said sum of £1000 to the said B., and his executors or assignees whomsoever, at the term of next [state year] within [place of payment], with a fifth part more of liquidate penalty in case of failure, and the interest of the said principal sum at the rate of per centum per annum from the last [insert year] to the said term of payment, and halfterm of yearly, termly, and proportionally thereafter during the not-payment of the said principal sum, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said next for the half-year preceding that date, interest at the term of and the next term's payment thereof at following, and so forth half-yearly, termly, and proportionally thereafter during the not-payment of the principal sum, with a fifth part more of the interest due at each term of liquidate penalty in case of failure in the punctual payment thereof [If desired, insert fire insurance clause as on p. 430, altering the expression "after disponed"]: And I oblige myself for the expenses of assigning and discharging the said bond and disposition in security and these presents: And I consent to registration for preservation and execution.—In witness whereof.

Note.—The heir's title should be delivered if the titles generally were delivered when the loan was granted.

Stamp, 5/-.

BY A DISPONEE

I, A., considering that I am now proprietor of the house 10 Sylvern Place, Edinburgh, which is burdened with a bond and disposition in security for the

sum of £1000, granted by X., then the proprietor of the said subjects, in favour of Y., dated , and recorded in the division of the general register of sasines for the county of Edinburgh on : That when I purchased the said subjects I agreed to take over the said bond and disposition in security, and to relieve the said X. thereof: That the said bond and disposition in security still remains in force, and is now held by B., and that I have been requested and have agreed to grant these presents: Therefore [continue as on p. 539].

Note.—As to delivery of title, see supra.

Stamp, 5/-.

BY A FIRM

We, A. & B., grocers and wine merchants carrying on business at 1 and 2 Buchanan Street, Leith, and A., residing at , and B., , the individual partners of said firm, as such partners and residing at as individuals: Considering that the said business was until recently carried on by me the said A., by myself alone, and that I granted a bond and disposition in security for the sum of £1000 in favour of C. over the said subjects 1 and 2 Buchanan Street, Leith, which bond and disposition in security is dated , and recorded in the division of the general register of sasines for the county of Edinburgh on : That the said business is now carried on by us in partnership, and that we have been requested and have agreed to grant these presents: Therefore we, the said A. & B., as a firm and we, the said A. and B., the sole partners thereof, as such partners, and also personally and individually, bind ourselves jointly and severally, and the heirs, executors, and representatives whomsoever of us the said A. and B. respectively, all jointly and severally, and without the necessity of discussing them in their order, to repay the said sum of £1000 to the said C., his executors, or assignees whomsoever, at the term of [continue as on p. 539].

Note.—As to delivery of title, the note on p. 539 will apply, if in this case there has been any new title.

TO ACCUMULATE INTEREST

I, A., considering that I am indebted to B. in the sum of £1000 of principal, under bond and disposition in security, dated recorded in the division of the general register of sasines for the county of Edinburgh on , granted by me in his favour over the subjects hereinafter disponed, and that interest is in arrear thereon since the term of , which interest as at the term of last [insert year]. amounts to the sum of £100, making a cumulo debt of £1100 as at the said last, and that I have been requested and have agreed to term of grant these presents: Therefore I bind myself and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to pay the said sum of £1100 (hereinafter referred to as the "principal sum") [complete personal obligations as on p. 539]: And in security of the personal obligations before written, I dispone to and in favour of the said B. and his foresaids, heritably but redeemably as after mentioned, yet irredeemably

in the event of a sale by virtue hereof, All and Whole [insert subjects and burdens, if any]: And that in real security to the said B. and his foresaids of the whole sums of money above written, principal, interest, and penalties [and premiums of insurance]: And I assign the rents: And I assign the writs: And I grant warrandice: And I reserve power of redemption: And I oblige myself for the expenses of assigning and discharging this security: And on default in payment I grant power of sale: And I consent to registration for preservation and execution.—In witness whereof.

Stamp, 5/6.

TO CONSTITUTE CATHOLIC SECURITY

The case supposed is this:—B. holds a bond by A. for £1000 over the estate of X. He is now asked to grant another loan of £1000 to A. over (1) the estate of X., and (2) the estate of Y. Under such circumstances it may be a proper and natural stipulation that B. shall receive the security of Y. for both loans, which otherwise he would not have. Strictly, this is a case where what is needed is a disposition of the estate of Y. in security of the first £1000, and not any corroborative obligation at all. But it will be as convenient, and will not increase stamp duty, to take the deed in the following forms.

In these forms the circumstances have been figured as a little more involved, and somewhat more nearly representing what might probably happen in practice, than in the bare statement above.

The second of these cases is somewhat different in circumstances, as no new money is being lent.

BOND OF CORROBORATION AND DISPOSITION IN SECURITY FOR OLD AND NEW LOANS OVER EXTENDED PREMISES

I, A., considering that I am already indebted to B. in the sum of £1000, conform to bond and disposition in security, dated , and recorded in the division of the general register of sasines for the county of Aberdeen on , granted by me in his favour over my business premises in High Street, Peterhead: That in order to extend my premises I have acquired certain adjoining subjects, and the whole are now possessed by me as one property for the purposes of my business: That I have applied to the said B. for an additional loan of £500, and that he has agreed to grant it on condition of these presents being executed; and that I have received the said additional loan of £500, of which I hereby acknowledge the receipt, so that the whole debt due by me to the said B. is now £1500: Therefore [continue as on p. 539, inserting £1500 as the principal, and then insert disposition in security of the whole property, and conclude as above].

BOND OF CORROBORATION AND DISPOSITION IN SECURITY FOR TWO OLD LOANS OVER SEPARATE PARTS OF SAME TENEMENT, BONDS AND OWNERSHIP NOW BOTH CONSOLIDATED

I, A., considering that I am now proprietor of the tenement known as Nos. 1, 2, and 3 Crown Street, Dalkeith, as more particularly hereinafter

described: That I acquired the ground flat of the subjects from X., and the two upper flats from Y.; That the ground flat is burdened with a bond and disposition in security for £300 granted by the said X. in favour of B., , and recorded in the division of the general register of , and the two upper flats sasines for the county of Edinburgh on are burdened with a bond and disposition in security for £200 granted by the said Y. in favour of Z., dated , and recorded in the said division of the general register of sasines on : That when I purchased the said respective parts of the said subjects I agreed to take over the said bonds and dispositions in security: That the said bonds and dispositions in security are still in force, and are now both held by B., making a total debt of £500 due by me to him: And now seeing that for the greater security of the said B. I have been requested and have agreed to grant these presents: Therefore [continue as on p. 539, inserting £500 as the principal, and then insert disposition in security of whole property, and conclude as on p. 541].

- Stamps.—1. When a corroborative obligation or security or additional security, or all of them, for an old debt are incorporated in a bond for a further loan, there is only the one stamp, viz., mortgage duty at 2s. 6d. per cent. on the new money.¹
- 2. When a corroborative obligation or security or additional security, or all of them, for an existing debt are incorporated in an assignation of the debt, there is only the one stamp, viz., the transfer duty at 6d. per cent.¹
- 3. An agreement in gremio in terms of sec. 47 of the 1874 Act attracts no duty.
- 4. With these exceptions the stamp on a corroborative obligation or security or additional security, or all of them, if contained in one deed, is 6d. per cent., with a maximum of 10s.² This is on the assumption that the principal security bears mortgage duty.
- 5. Though interest be capitalised in the corroborative deed, that does not attract mortgage duty on that part of the new obligation or security.
- Ex. Bond £1000: £100 interest capitalised and bond of corroboration for £1100: stamp, 5s. 6d. Bond £10,000: £1000 interest capitalised and bond of corroboration for £11,000: stamp, 10s.

¹ Stamp Act, 1891, s. 87 (3). ² Revenue Act, 1903, 3 Edw. VII., c. 46, s. 7.

SECTION XXXIV

ASSIGNATIONS OF HERITABLE SECURITIES

Assignations of heritable securities are taken under many different circumstances. The main distinguishing feature is according as they are, or are not, arranged through the *debtor*. If they are, then they truly represent new loans to him, the method of assignation being adopted for certain advantages which it possesses over the other method, namely, discharging the old security and granting a new one.

These advantages are:

- 1. The old ranking is retained.
- 2. The present proprietor may hold in trust or may be otherwise incapable of constituting securities, which, however, is no objection to the arranging of an assignation of a subsisting security.
 - 3. Less expense.

Disadvantages.—1. If the proprietor is not the original obligant, the new lender, if he takes a bare assignation, will not hold the personal obligation of the proprietor of the mortgaged property, which is not a satisfactory position. But this is easily put right by adding a corroborative obligation to the transfer (see p. 551).

- 2. The lender may be put in the position of warranting, to the debtor, the sufficiency of the transmission of the security, which is a curious reversal of the natural relation of debtor and creditor in respect of title, at least if the loan has been arranged through the debtor. It is clear that the debtor, when he comes to repay, is entitled to have the security discharged by a creditor with a sufficient title (p. 596), but it is at least not clear that when he has himself arranged a transfer of it to a new lender, he would not be personally barred from subsequently stating any objection to the title which he himself had practically tendered. In some cases a clause may he added to the assignation by which the proprietor shall approve of the title and warrant it to the new lender, which is reasonable. But even this clause will not bind third parties, though it will bind the proprietor who signs it and his heirs.
- 3. There remains the question whether the assignee may be affected by modes of extinction of the security which do not appear on the record,

e.g. an unrecorded discharge, payment (most often payment on account) made on a simple receipt without any formal deed, intromissions, etc. It apparently is the case that the assignee is exposed to this risk. refers to the faith of the records as protecting assignees of heritable securities against reduction on the ground of error or force 1; but in the same work he is quite explicit that heritable securities in the modern form may be extinguished by payment,2 though he does not expressly refer to bond fide onerous assignees. It is clear that if the new lender knew the facts, he would not be entitled to rely on the faith of the records 3; and if the payment or part payment appeared from a marking or receipt on the bond he would be bound to know, or at least it would justly be held that he ought to have known. But suppose bond fide ignorance? Even in that case it can now hardly be questioned that the extinction will be effectual against the assignee. In Jackson 4 it was held as against an assignee that the security was extinguished following on the extinction of the debt, which again depended on the application of the rule as to indefinite payments in an account current. There were specialties in the case, but the judgments were very wide and unqualified in their terms on this point. The only practical advice is to make inquiry of the debtor; but if the transfer is arranged through him, he would, of course, be personally barred from denying the debt in whole or in part. It is obvious, however, that the most formal admission from him will not bind third parties, e.g. a postponed creditor, which is a risk which practically cannot be overcome if the law be that the new lender is not entitled to rely on the faith of the records.

4. The above are disadvantages from the point of view of the new lender. But there is one matter which requires consideration from the point of view of the old lender, the assigner. That is warrandice of title. It is clear that the assigner, who is simply in the position of taking repayment of his debt, ought not to be placed in the position of incurring any liability which he would not have incurred if he had granted a discharge. Apart from defects in the security (for a good instance of which see the case cited 5) or in prior transmissions, two matters may be specially mentioned, namely, (1) deeds of postponement or restriction granted to or at the request of the debtor, and (2) a higher rate of interest in the bond, qualified by a back-letter. It is clear that if a discharge were granted by the old lender to the debtor, the former could incur no liability of warrandice in respect of any of these matters. But if he grant an assignation it may be a different matter. Accordingly, it may on occasion be desired to insert a protective clause (p. 556).

It is clear that in the case of such matters as restrictions, post-

Jackson v. Nicoll, 1870, 8 M. 408. See
 also Cameron v. Williamson, 1895, 22 R. 293.
 Russell's Trs. v. Mudie, 1857, 20 D. 125.



¹ Prin., s. 14.

⁹ Ibid., s. 909.

³ P. 290, supra.

ponements, and back-letters, it will not be sufficient for the assigner's security, merely to limit the warrandice to fact and deed. quite clear that a limitation to fact and deed will keep the granter safe in the case of a defect in the security, owing, e.g., to want of capacity or power on the part of the person who purported to grant the bond. The point here is whether express warrandice from fact and deed implies (or, otherwise stated, whether it includes) warrandice debitum subesse. From the opinions in Russell's case it appears that this is a question of circumstances. That was a case in which the creditor was forced to take his money, and the view expressed was that his warrandice should not go further than an express clause to the effect that the money was advanced at the date of the bond, and that to the extent of the sum assigned it was unpaid. That may be appropriate when the assigner is the original creditor, but if not, he may desire to limit the clause to a warrandice that he advanced the money when he obtained his own assignation and that it has not been repaid, or the clause may run that he grants no warrandice other than that which would be implied if the deed were a discharge instead of an assignation. It appears the better opinion that the granter is entitled to these restrictions of warrandice, assuming that the deed is in lieu of a discharge, whether following on demand by him or premonition by the debtor or any one else entitled to give it, and that it is not a case of sale of the security.

5. Another matter is the confusion and uncertainty which may arise as to the order of ranking of two or more securities recorded on the same day under sec. 6 of the Land Registers Act, 1868. This shews that it does not follow that a security is preferable to another security which appears on record after it but on the same day.

Right to Assignation.—It is often a question of great importance whether the creditor is bound on receiving payment to grant an assignation, or is entitled to insist on the payer accepting a discharge. The following quotations are in point:

"The debtor cannot prevent any stranger from paying and demanding an assignation if the creditor chooses to grant it; but the creditor cannot be compelled to grant an assignation unless the debtor shall consent and the granting of the assignation shall not interfere with any other interest of the creditor himself." 1

"A party paying a debt in ordinary circumstances is entitled to ask for an assignation to the creditor's rights and remedies against the debtor, provided it can be shewn clearly that no prejudice of any kind can be done to the rights of the creditor granting the assignation, and it always lies upon the party asking the assignation to shew that such prejudice will not and cannot be done." ²

¹ Bell, Prin., s. 557.

"A third party is not entitled to say to a creditor, 'I want an investment, give me yours; here is payment of your debt."

It is not unimportant to notice in this connection that the Acts of 1868 and 1874 do not contain any provisions to meet the case of the creditor being required and bound, on redemption of his security, to grant an assignation instead of a discharge. The 1868 Act expressly refers to the creditor's "refusal to receive" the money, and the 1874 Act deals merely with the debtor being unable to "obtain a discharge," 2 and the only remedy provided in these Acts has the effect of extinguishing the security. It is true that the 1868 Act (sec. 119) does speak of an assignation, but no machinery to that end is provided or referred to in that or the 1874 Act. But notwithstanding this apparent awkwardness, it is clear that the result is not to entitle the creditor, by his "refusal" to receive repayment, to deprive the payer of his right, if he otherwise have the right, to require an assignation to himself or some third party. The debtor or payer would require to proceed by an action of adjudication in implement following on consignation in terms of the 1868 Act. As to postponed creditor paying prior debts, see p. 591.

Title: Infeftment.—Compare p. 596 as to discharges. Whether strictly the same rule (if sound at all) can be applied to assignations, viz., that the granter's infeftment is not necessary, at any rate a new lender could not be compelled to take a title from an uninfeft creditor. Possibly therefore it may come to this, that the debtor must either (1) be satisfied with a discharge, or (2) pay the expense of completing the assigner's title.

Cautioner.—When a cautioner pays he is entitled to an assignation, but only when he makes full payment. Sometimes when a cautioner pays interest he asks for an assignation thereof and of the securities to that extent. If, under such circumstances, or in any other case of partial payment, an assignation is granted at all, it ought to be expressly postponed to the creditor's claim and security for principal (or balance thereof), and all current and future interest, and all other sums which are or may become due to the creditor under the bond. But, on the other hand, it is to be observed that if another cautioner subsequently pays subsequent interest to say an equal amount, and obtains an assignation, the result may be to give this second assignee of interest a preference over the first assignee, or at least to raise a question whether that is not so, which is of course absurd. The matter can easily be kept right in the deeds if granted at all. Further, as regards

Assignations of Interest.—It is important to remember that the penalty clauses entitle the assignee to interest on the interest 1 and to the expense of his assignation 3; and not only so, but bring this compound interest within the benefit of the security. It is thought that the benefit of the penalty clauses applicable to the interest assigned

⁴ See cases in note, p. 11, supra.



¹ Smith v. Gentle, 1844, 6 D. 1164.

² See p. 592 infra.

² Inglis & Weir v. Renny, 1825, 4 S. 113.

would pass without special mention of them in the assignation, but they ought to be referred to in practice.

Assignation to prevent Confusion.—The general rule is that an absolute owner cannot, by taking an assignation instead of a discharge, keep up the debt, and no one would be safe to take an assignation thereof from him in turn. But when an estate is under curatorial management it is sometimes thought to be of advantage to pay off heritable debt out of personal estate, and yet it is not desired to affect the rights of parties who may become entitled to succeed to the estate; for which purpose it is thought to be better, if not necessary, to take an assignation in lieu of a discharge. These matters were fully considered by Lord Kincairney in a recent case, where, in his judgment and in the report which he obtained, the authorities are fully reviewed and alternative methods are indicated. The report also contains a print of the assignation which was adjusted by the reporter. The form on p. 563 infra is slightly altered from that form.

Original Obligant who has sold the Property.—If he is called upon to pay, he is entitled to an assignation of the debt and security exactly as he constituted it, and anything which prevents the creditor giving him that will free the original obligant under these circumstances.²

Catholic and Secondary Securities.—If the catholic creditor take payment of his debt out of the estate over which alone the post-poned security extends, he is bound to assign his debt and security therefor over the *other* estate to the postponed creditor in further security of his debt. If both the estates are subject to postponed securities, the assignation will be limited so as in the result to throw the burden of the catholic debt upon the two estates in proportion to value.

Various special clauses may on occasions require to be introduced into assignations of heritable securities, of which the following are the most common:—

1. Corroborative Obligation.—If the proprietor of the property is not already liable for the debt, an assignation of it is a fitting occasion on which to take a corroborative obligation from him. If he is already liable and it is not desired to make any change in the terms of the obligation, a corroboration is unnecessary, for at most a letter from him admitting the debt will, as in a question with him or his representatives, be enough to bar any question of extinction. But it may be desired to change the terms of the obligation or security, e.g. (1) place of payment, (2) rate of interest to the effect of introducing a higher rate than that stated in the bond, (3) power of sale, if, for example, the bond is an old one, with a power of sale fettered with conditions which either could not now be carried out, or at least not without inconvenience. In

¹ Macbean's c.b., Petr., 1890, 28 S. L. R. 8. ² North Albion Co. v. Macbean's c.b., 1893, 21 R. 90.



all these cases a new obligation should be taken. But then it may be necessary to have also a

- 2. New Disposition in Security.—That will be so if the interest is being raised in the sense just stated, for otherwise there would be no security for the additional interest, and it should be taken when the terms of the power of sale are being altered, though in the latter case it may not be essential. It goes without saying that whenever a new disposition in security is necessary it ought to be seen that there is no mid-security.
- 3. Discharge of Original Debtor.—If the deed contain a new obligation by a new proprietor, it may very appropriately also contain a discharge of the original debtor if the creditor has agreed to give that. It will be less expensive than a separate deed of discharge, and though it cannot be handed to the old proprietor, his purpose in that respect is amply met by the fact that it is recorded, which indeed is an additional advantage to him.
 - 4. Clauses of Ranking.—See p. 549.

SIMPLEST FORM OF ASSIGNATION

I, A., in consideration of the sum of £1000 now paid to me by B., do hereby assign and dispone to and in favour of the said B., and his executors and assignees whomsoever, a bond and disposition in security, dated the , and recorded as after mentioned, for the sum of £1000, granted by C. in my favour, with interest from the ; and also All and Whole : But always with and under [reference to burdens if necessary], all as specified and described in the said bond and disposition in security, recorded in the division of the general register of sasines for the county of on the .—In witness whereof.

ASSIGNATION TO PARTIAL EXTENT, BEING WHOLE OUTSTANDING BALANCE.

- I, A., in consideration of the sum of £500 now paid to me by B., do hereby assign and dispone to and in favour of the said B., and his executors and assignees whomsoever (but only to the extent after specified), a bond and disposition in security, dated the , and recorded as after mentioned, for the sum of £1000, granted by C. in my favour; and also All and Whole But always with and under [reference to burdens if necessary] all as
- : But always with and under [reference to burdens if necessary], all as specified and described in the said bond and disposition in security, recorded in the division of the general register of sasines for the county of on the
- : But declaring that these presents do and shall assign the said bond and disposition in security to the extent only of the said sum of £500 now paid to me as aforesaid, with the interest thereof from the term of , and penalties corresponding thereto, if incurred, and do and shall convey the said subjects in security only of the said sums hereby assigned [X]: Declaring that the said bond and disposition in security has been discharged to the extent

of the remaining sum of £500 and consequents, conform to partial discharge granted by me, dated the , and recorded in the said division of the said register on the , both days of .—In witness whereof.

ASSIGNATION OF PART, INCORPORATING DISCHARGE OF BALANCE

I, A., in consideration of the sum of £500 now paid to me by B. [as above, down to X]; And further, in consideration of the sum of £500 now paid to me by the said C., I do hereby discharge the said bond and disposition in security, but only to the extent of the said last mentioned sum of £500, with the interest thereof and penalties corresponding thereto: And I declare to be redeemed and disburdened thereof, and of the infeftment following thereon, but only to the extent last aforesaid, All and Whole the subjects hereinbefore described or referred to, all as specified and described in the said bond and disposition in security, dated and recorded as aforesaid.—In witness whereof.

Notes.—1. Stamp: assignation, £500 at 6d. per cent. = 2s. 6d.; discharge, 6d. per cent. on full £1000 = 5s.; together, 7s. 6d.

2. Write two warrants of registration, one on behalf of B., the other on behalf of C.

ASSIGNATION OF PART ONLY OF SUBSISTING DEBT

1. PARI PASSU

I, A., in consideration of the sum of £500 now paid to me by B., do hereby assign and dispone to and in favour of the said B., and his executors and assignees whomsoever (but only to the extent and effect after specified), a bond and disposition in security [as on p. 548, down to X], and to the effect of giving my said assignee, as in right of the said sums hereby assigned, a security and preference over the said subjects and the rents thereof, and the price thereof in the event of a sale, pari passu with the security and preference held by me as in right of the remainder of the sum contained in the said bond and disposition in security: And I bind myself to make the said bond and disposition in security forthcoming on all necessary occasions, on the usual receipt and obligation to return the same.—In witness whereof.

Even though the clause of ranking should be omitted the effect would be the same, but it is usual to insert the clause.

2. POSTPONED

If the part assigned is to be postponed to the part retained by the assigner, the words "pari passu with" will be changed to "after and postponed to."

3. Prior

If the part assigned is to rank prior to the part retained, then—

1. The words "pari passu with" will be changed to "prior and preferable to," and at the end of the clause of ranking will be added, "which I hereby postpone accordingly."

2. It may be the arrangement that the assignee is to have the custody of the bond, in which case the obligation to make forthcoming will be omitted, and the following substituted:—

And I have herewith delivered the said bond and disposition in security to the said B., under obligation on him, as by acceptance hereof he binds himself, to make the same forthcoming on all necessary occasions on the usual receipt and obligation to return the same.

WHO BY ONE CREDITOR HAS ASSIGNATION \mathbf{OF} BOND ACQUIRED RIGHT TO THE WHOLE DEBT, BUT BY DIFFERENT SERIES OF TRANSMISSIONS

[As on p. 548 to end, altering the words "in my favour" to "in favour of D."] To which bond and disposition in security, to the extent of £500, I acquired right conform to the following writs, namely (first) the trust dis-, and registered in the position and settlement of the said D., dated ; (second) confirmation in favour Books of Council and Session on of E. and F., as executors-nominate of the said D., granted by the sheriff of , and dated at ; (third) notarial on instrument in favour of the said E. and F., as executors of the said D., recorded in the said division of the general register of sasines on ; (fourth) act and warrant by the Lords of Council and Session in favour of G., as judicial factor on the estate of the said D., recorded in the said division of the said ; and (fifth) assignation to the extent of £500 by the register on said G. in my favour, dated , and recorded in the said division of the : And to which bond and disposition in security, to said register on the extent of the remaining sum of £500, I acquired right conform to the writs numbers one to four inclusive of the foregoing clause of deduction of title and the following additional writs, namely, (sixth) assignation to the extent of £500 by the said G. in favour of H., dated and recorded in the said division of the said register on ; (seventh) confirmation by the sheriff of in favour of me, as executor-dative of the said H., dated at ; and (eighth) notarial instrument in my favour recorded in the said division of the said register on regards the custody of the writs, (first) I have herewith delivered up the said bond and disposition in security and all the transmissions above enumerated, except Nos. 1, 2, and 7; (second) I assign my right to have Nos. 1 and 2 made forthcoming on all necessary occasions, on the usual receipt and obligation to return the same; and (third) I bind myself to make No. 7 forthcoming on the same terms.—In witness whereof.

ASSIGNATION OF TWO BONDS OVER SAME PROPERTY

I, A., in consideration of the sum of £2000 now paid to me by B., do hereby assign and dispone to and in favour of the said B., and his executors and assignees whomsoever, (first) a bond and disposition in security, dated the , and recorded as after mentioned, for the sum of £1000, granted by C. in my favour; and (second) a bond and disposition in security, dated the

, and recorded as after mentioned, for the additional sum of £1000, also granted by the said C. in my favour, with interest on both of said bonds and dispositions in security from the ; and also (as regards both of said bonds and dispositions in security) All and Whole : But always [refer to burdens if necessary], all as specified and described in the said bonds and dispositions in security recorded in the division of the general register of sasines for the county of on and respectively.

—In witness whereof.

ASSIGNATION OF (1) BOND AND DISPOSITION IN SECURITY, AND (2) BOND OF CORROBORATION AND DISPOSITION IN SECURITY

I, A., in consideration of the sum of £1100 now paid to me by B., do hereby assign and dispone to and in favour of the said B., and his executors and assignees whomsoever, (first) a bond and disposition in security, dated the , and recorded as after mentioned, for the sum of £1000 granted by C. in my favour; and (second) a bond of corroboration and disposition in security, dated the , and recorded as after mentioned, for the sum of £1100 (being the said sum of £1000, and £100 of interest accumulated as principal), granted by D., heir to the said C., in my favour, with interest on the said sum of £1100 from the ; and also (as regards both the said bond and disposition in security and the said bond of corroboration and disposition in security), All and Whole: But always with and under [refer to burdens if necessary], all as specified and described in the said bond and disposition in security and bond of corroboration and disposition in security recorded in the division of the general register of sasines for the county of on and respectively.-In witness whereof.

ASSIGNATION OF (1) BOND AND DISPOSITION IN SECURITY, AND (2) PERSONAL BOND OF CORROBORATION

I, A., in consideration of the sum of £1000 now paid to me by B. [as on p. 548 to end]: And further I assign to the said B. and his foresaids a personal bond of corroboration, dated , for the said sum of £1000, granted by D., heir to the said C., in my favour, with interest from the .—In witness whereof.

Stamp, 5s. No additional stamp is necessary in respect of the assignation of the bond of corroboration.

ASSIGNATION BY CREDITOR INCORPORATING BONI) OF CORROBORATION BY PROPRIETOR

I, A., in consideration of the sum of £1000 now paid to me by B. [as on p. 548 to end]: And further, I, D., the present proprietor of the said subjects, considering that the said B. agreed to advance the said sum of £1000 on condition of the following corroborative personal obligation being granted by me, and that I have agreed to grant same, without prejudice to the said bond

and disposition in security, but in corroboration thereof et accumulando jura juribus, do hereby [proceed as on p. 539 to end].

Stamp, 5s. No additional stamp is necessary for the corroboration.

- ASSIGNATION OF (1) BOND AND DISPOSITION IN SECURITY, AND (2) CORROBORATIVE OBLIGATION UNDERTAKEN BY PRESENT PROPRIETOR IN HIS TITLE
- I, A., in consideration of the sum of £1000 now paid to me by B. [as on p.548 to end]: And further I assign to the said B. and his foresaids the corroborative liability for the said sum of £1000, interest, and other consequents undertaken by D. in gremio of the disposition granted by the said C. in his favour, dated

 , and recorded in the said division of the said register on

 .—In witness whereof.
- ASSIGNATION OF BOND FOLLOWED BY SASINE, INCORPORATING
 (1) DISCHARGE OF PERSONAL OBLIGATION OF ORIGINAL
 DEBTOR, AND (2) CORROBORATIVE OBLIGATION AND DISPOSITION IN SECURITY BY NEW PROPRIETOR
- I, A., in consideration of the sum of £1000 now paid to me by B., do hereby assign and dispone to and in favour of the said B., and his executors and assignees whomsoever, a bond and disposition in security dated, for the sum of £1000, granted by C. in my favour, with interest from But declaring that the personal obligation of the said C. is hereinafter discharged, the personal obligation of D. hereinafter contained coming in substitution therefor; and also All and Whole : But always with and under [reference to burdens if necessary], all as specified and described in the said bond and disposition in security and instrument of sasine thereon [dated , and recorded in And further, I, on the said A., do hereby discharge the said C. of the whole personal obligations contained in the said bond and disposition in security, but declaring that this discharge shall nowise hurt or prejudice the real/security constituted by the said bond and disposition in security, or the powers and incidents attached thereto, all which shall remain in as full force and effect as if the foregoing discharge had not been granted: And further, I, the said D., considering that I have purchased the said subjects under burden of the said bond and disposition in security, and that the said B. agreed to advance the said sum of £1000 on consideration of the following corroboration being granted by me, and that I have agreed to grant same: Therefore, without prejudice to the said bond and disposition in security, except only as aforesaid, but in corroboration thereof et accumulando jura juribus, I, the said D., bind myself [as on p. 539, to end of obligations]: And in security of the personal obligations before written, I, the said D., dispone to and in favour of the said B. and his foresaids heritably, but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole the said subjects and others hereinbefore described or referred to, but always with and

under the real burdens [etc.] hereinbefore referred to: And that in real security to the said B. and his foresaids of the whole sums of money above written, principal, interest, and penalties: And I assign the rents: And I assign the writs: And I grant warrandice: And I reserve power of redemption: And I oblige myself for the expense of assigning and discharging the said bond and disposition in security and these presents: And on default in payment I grant power of sale: And I consent to registration for preservation and execution.—In witness whereof.

ASSIGNATION OF (1) BOND AND DISPOSITION IN SECURITY, AND (2) BOND OF CORROBORATION, WHEN THE ORIGINAL OBLIGATION HAS BEEN DISCHARGED

I, A., in consideration of the sum of £1000 now paid to me by B., do hereby assign and dispone to and in favour of the said B., and his executors and assignees whomsoever, a bond and disposition in security, dated, and recorded as after mentioned, for the sum of £1000, granted by C. in my favour, with interest from : But declaring that the personal obligations therein contained have been discharged in exchange for the bond of corroboration hereinafter assigned, conform to discharge granted by me in favour of the said C., dated, and recorded [if recorded]; and also All and Whole : But always with and under [refer to burdens if necessary], all as specified and described in the said bond and disposition in security recorded in the division of the general register of sasines for on: And further I assign [as on p. 551, to end].—In witness whereof.

If the corroborative obligation has been undertaken by clause in gremio of a conveyance, then—

- 1. Alter the words "bond of corroboration hereinafter assigned" to "corroborative obligation hereinafter assigned."
 - 2. Assign the corroborative obligation as on p. 552.

ASSIGNATION OF A BOND WHERE THE SECURITY HAS BEEN AFFECTED BY (1) RESTRICTION, AND (2) POSTPONEMENT

1. When the part released is articulately described in the bond.

[Ordinary form, p. 548, to the end, omitting the released property] Declaring (first) that the other property contained in the said bond and disposition in security has been released therefrom, conform to deed of , and recorded in the said division restriction granted by me, dated , and (second) that these of the general register of sasines on presents are subject to the terms and effect of the deed of postponement granted by me, dated , and recorded in the said division of the general register of sasines on , whereby I postponed the said bond and disposition in security to the bond and disposition in security for £ granted by the said C., in favour of D., dated , and recorded in the said division of the general register of sasines on , and which was then held by F.-In witness whereof.

2. When the part released is not articulately described in the bond.

[Ordinary form, p. 548, to the end, introducing the words "subject to the exceptions after specified," before All and Whole] Declaring that these presents are subject to the terms and effect of the following deeds, viz. (first) the deed of restriction granted by me, dated , and recorded in the said division of the general register of sasines on , whereby I released from the security constituted by the said bond and disposition in security the following part of the subjects before described, viz., All and Whole that shop No. 1 Leven Gardens, with saloon behind, cellarage below, and common rights, pertinents and others, being the subjects particularly described in the said deed of restriction, and the said part of the said subjects is hereby excepted from the foregoing assignation and disposition; and (second) the deed of postponement [as in preceding form to end].—In witness whereof.

Notes

- 1. The deeds of restriction and postponement will be examined, and also the preferred bond.
 - 2. See how the feu-duty has been apportioned.
- 3. See that the preferred security formerly ranked immediately after the security now being assigned (see p. 586).
- 4. As to the right of the assigner to grant the restriction and postponement, see pp. 586 and 589. If there is any doubt on these points it must be assumed that it will affect the assignee.

ASSIGNATION OF BALANCE WHEN PART HAS ALREADY BEEN ASSIGNED WITH PRIOR RANKING

I, A., in consideration of the sum of £500 now paid to me by B., do hereby assign and dispone to and in favour of the said B. and his executors and assignees whomsoever (but only to the extent and effect after specified), a bond and disposition in security [as on p. 548, down to X], and to the effect of giving to my said assignee, as in right of the said sum hereby assigned, a security and preference over the said subjects and the rents thereof, and the price thereof in the event of a sale, postponed to the security and preference held by D. or his executors or assignees as in right of the remainder of the sum contained in the said bond and disposition in security, the same having to that extent been assigned by me to the said D., conform to assignation dated and recorded in the said division of the general register of sasines on

, which assignation contains a clause to the effect that the security held by the said D. and his foresaids in virtue thereof should rank prior and preferably to the security retained by me as in right of the balance now hereby assigned. And the said bond and disposition having been delivered up to the said D., I assign to the said B. and his foresaids my right to have the same made furthcoming.—In witness whereof.

ASSIGNATION OF BALANCE WHEN PART HAS ALREADY BEEN ASSIGNED WITH POSTPONED RANKING

I, A., in consideration of the sum of £500 now paid to me by B., do hereby assign and dispone to and in favour of the said B. and his executors and

assignees whomsoever (but only to the extent and to the effect after specified), a bond and disposition in security [as on p. 548, down to X], and then proceed as in preceding form, altering "postponed" to "prior and preferable" and "prior and preferably" to "after and postponed to"]. And I have herewith delivered up the said bond and disposition in security under obligation on the said B. to make the same furthcoming to the said D. and his foresaids in terms of the said assignation.—In witness whereof.

ASSIGNATION OF A BOND TO WHICH ANOTHER HAS BEEN POSTPONED

The ordinary form is quite sufficient, it being unnecessary to refer to the postponement. But if desired by the new creditor and assented to by the old, the following words may be added before the testing clause or deduction of title if any:—

And with the effect and benefit of the deed of postponement granted by X., dated , and with a warrant of registration on my behalf, recorded in the said division of the general register of sasines on , whereby the said X. postponed to the said bond and disposition in security the other bond and disposition in security granted by the said C. in his favour for \pounds , dated and recorded in the said division of the general register of sasines on .

ASSIGNATION BY THREE TRUSTEES, OF WHOM ONLY ONE HAS A RECORDED TITLE TO THE SECURITY

I, A., trustee of D., acting under his trust disposition and settlement, , and registered in the Books of Council and Session on dated and sole trustee infeft in the bond and disposition in security hereinafter assigned, with consent of B. and C., assumed trustees of the said D., conform to deed of assumption granted by me the said A. in their favour, dated , and registered in the Books of Council and Session on and we the said B. and C. as such trustees, for our interest, and we all as trustees foresaid, in consideration of the sum of £1000 now paid to us by E., do hereby assign and dispone to and in favour of the said E., and his executors and assignees whomsoever, a bond and disposition in security, dated and recorded as after mentioned, for the sum of £1000, granted by F. in favour of me the said A. and of G., who is now deceased, and H., who has resigned office, conform to minute of resignation dated , and registered in the Books of Council and Session on , as trustees then acting under the said trust disposition and settlement, and the survivors and survivor: With interest from ; and also All and Whole [subjects]: But always with and under [burdens], all as specified and described in the said bond and disposition in security recorded in the division of the general register of sasines for the county of : And we bind ourselves to on make an extract of the said minute of resignation forthcoming on all necessary occasions, on the usual receipt and obligation for return thereof.—In witness whereof.

ASSIGNATION BY TRUSTEES TO BENEFICIARY

We, A. and B., the trustees of C., acting under his trust disposition and settlement, dated , and registered in on , considering that in the events which have now happened the residue of the estate of the said C. falls to be made over to D., as his residuary legatee, in terms of the said trust disposition and settlement, of which residue the bond and disposition in security hereinafter assigned forms part: Therefore, in implement pro tanto of the directions contained in the said trust disposition and settlement, we do hereby assign and dispone to and in favour of the said D. [complete in ordinary form].

ASSIGNATION OF BOND AND DISPOSITION IN SECURITY IN FORTIFICATION OF ABSOLUTE TITLE

I, A., considering that I hold a bond and disposition in security for £1000 granted by B. in my favour over the house 1 X. Crescent [town] and pertinents: That the said subjects have now been purchased by C. at the price of £1200, out of which it has been arranged that the said debt due to me is to be paid on the footing of these presents being executed, and that I have received payment of the said sum of £1000 accordingly, of which I hereby acknowledge the receipt: Therefore I do hereby assign and dispone to and in favour of the said C., and his heirs (excluding executors 1) and assignees whomsoever, a bond and disposition in security, dated , and recorded as after mentioned, for the sum of £1000, granted by the said B. in my favour, with interest from ; and also All and Whole [subjects]: But always with and under [burdens, if necessary], all as specified and described in the said bond and disposition in security recorded in the division of the general register of sasines for the county of on : But declaring,2 as the said C. by acceptance hereof agrees and declares, that the personal obligations contained in the said bond and disposition in security shall not be used against the said B. or his representatives unless the said C. or his foresaids shall be evicted from the said subjects,3 and that, except in that case, the same shall be used in corroboration and fortification only of the absolute title, but without prejudice to the said C. and his foresaids using the same in all questions of competition, and otherwise against all other parties, at any time and in any manner they may think fit: And I grant no warrandice other than that which would have been implied in a discharge of the said bond and disposition in security on payment by the debtor.4—In witness whereof.

² It is submitted that this clause is here in better form than if it began



¹ This is required to secure that the bond shall follow the house, the title of which it is intended to fortify. If there is any specialty in the destination of the house, such as a liferent to C.'s wife, or a substitution to children, or otherwise, it will be repeated here exactly. The exclusion of executors is necessary, even though (which is unlikely) the bond contains a similar exclusion (1868 Act, s. 117).

by an absolute statement that the security was to be held in corroboration only of the absolute title.

⁸ It is common to insert here qualifying words, such as "on account of any act or deed of the said B. or his foresaids, or any defect in their title to the said subjects." But these words appear quite inconsistent with the most common purpose of such an assignation, namely, to protect the purchaser against any objections to the way in which a power of sale has been exercised. That is neither an act or deed of the debtor, nor a defect in his title. Could the challenge of the title be said to be an act in this sense?

⁴ See p. 545.

THE SAME, WHEN THE BOND IS A CATHOLIC SECURITY, ONLY PART OF PROPERTY SOLD AND ONLY PART OF DEBT IS PAID

I, A., considering that I hold a bond and disposition in security for £1000, granted by B. in my favour, over inter alia the house 1 X. Crescent [town] and pertinents: That the said house and pertinents have now been purchased by C. at the price of £550, out of which it has been arranged that £500 of the said principal sum of £1000 due to me is to be paid on the footing of these presents being executed, and that I have received payment of the said sum of £500 accordingly, of which I hereby acknowledge the receipt: Therefore I do hereby assign and dispone to and in favour of the said C., and his heirs (excluding executors) and assignees whomsoever, but only to the extent and effect after specified, a bond and disposition in security, dated and recorded as after mentioned, for the sum of £1000, granted by the said B. in my favour; and also All and Whole [describe or refer to the house and pertinents purchased by C. only, and not the other subjects embraced in the bond]: But always with and under [burdens on said house and pertinents only, if necessary], all as specified and described in the said bond and disposition in security, recorded in the division of the general register of sasines for the county of : But declaring, as the said C. by acceptance hereof agrees and declares, (first) that these presents do and shall assign the said bond and disposition in security to the extent only of the said sum of £500 paid to me as aforesaid, with interest from ; (second) that these presents do and shall convey the subjects hereinbefore disponed in security of the said sum of £500 and interest only, but that the full benefit of the security constituted by the said bond and disposition in security over the said subjects is hereby conveyed; (third) that, on the other hand, no part of the security constituted by the said bond and disposition in security over the subjects therein contained other than those hereinbefore disponed is hereby assigned, the full benefit thereof being reserved to me in the same way as if these presents had not been granted; and (fourth) that the personal obligations contained in the said bond and disposition in security, to the extent to which the same are hereby assigned, shall not be used against the said B. or his representatives unless the said C. or his foresaids shall be evicted from the said subjects purchased by them as aforesaid, and that except in that case [conclude as on p. 556].

See notes to previous form.

The peculiarity here is that the bond contains property other than that purchased by C. It follows (1) that C. must be put in full control of the security so far as extending over his house, for if not, that house would still remain liable for the unpaid balance of A.'s debt, and C. would not get a clear title; and (2) that there must be communicated to C. no part in or control over the remaining security-subjects, which must be fully reserved to A., who otherwise would not have the sole charge under his bond over the remaining property, nor be able to deal with it without C.'s consent. This is one of the few cases in which the property, as well as the debt, must be split on partial assignments of bonds.

Even if A.'s debt were fully paid out of the price of C.'s house, no part of the other security could be assigned to C.: to the further extent the security must be discharged.

ASSIGNATION TO A CAUTIONER TO EXTENT OF INTEREST ONLY

I, A., considering that C. has paid me interest on the bond and disposition in security after mentioned for the period from the term of to the , at the rate of per cent. per annum under deduction of income tax, and that in the following instalments, viz. (first) on [date] the sum of £ , being on account of the interest for the half year to ; (second) on the term of , the sum of £ , being the balance of interest for the said half year; (third) on , the sum of . , being the interest for the half year to the term of , the sum of £ , being the interest for the half year to that term, said sums being all stated after deduction of income tax, and amounting in all to the sum of £ , and that I have been requested and have agreed to grant these presents: Therefore I do hereby assign and dispone to and in favour of the said C. and his executors and assignees whomsoever, but only to the extent and effect after specified, a bond and disposition in security, dated , and recorded as after mentioned for the sum of £ , granted by B. and D., and the said C. in my favour, and also All and Whole : But always with and under [reference to burdens, if necessary], all as specified and described in the said bond and disposition in security, recorded in the division of the general register of sasines for the county of : But declaring that these , on presents do not assign the said bond and disposition in security to the extent of any part of the principal sum therein contained or penalty applicable thereto, but do and shall assign the same only to the extent of the said , being interest for the foresaid period after deducting income sum of £ tax, and the penalties or termly failures applicable thereto, and do and shall convey the said subjects in security only of the said sum of interest and penalties or failures as aforesaid hereby assigned, and to the effect only of giving my said assignees as in right of the said sums hereby assigned a security and preference over the said subjects and the rents thereof, and the price thereof in the event of a sale, after and postponed to the security and

preference held by me and my successors as in right of the said principal sum, and all current 1 and future interest thereof in all time coming, premiums of fire insurance, interest thereon, penalties and expenses, and all other sums which are or may become due to me or my foresaids in any manner of way under or in respect of the said bond and disposition in security: And I grant no warrandice except that I am entitled to receive the said sum of £ , the receipt of which is acknowledged as aforesaid.—In witness whereof.

ASSIGNATION TO ANOTHER CAUTIONER ON PAYMENT OF SUBSEQUENT INTEREST

[As in preceding form to end of ranking clause] And further, whereas I assigned the said bond and disposition in security to C. to the extent of certain prior interest amounting to the sum of £, conform to assignation by me in his favour, dated, and recorded in the said division of the general register of sasines on, which contains a clause of postponed ranking, it is hereby declared that these presents shall not give to the said D. [the assignee under this deed] any priority over the said C., but that the said C. and D. shall rank pari passu inter se in proportion to the amounts paid by them respectively [warrandice as in preceding form].—In witness whereof.

ASSIGNATION OF INTEREST AND EXPENSES TO TWO CAUTIONERS, WITH ACCOUNTING BETWEEN THEM

I, A., considering that I have received payment of interest and expenses on the bond and disposition in security after mentioned from C. and D. to the amount of £110 from the said C. and £90 from the said D., conform to the schedule annexed and signed as relative hereto; that the said D. has now paid to the said C. an equalizing sum of £10, and the matter of interest on their disbursements has also been equalized between themselves, all as they by their signatures hereto hereby acknowledge, and that they have requested me to grant these presents, which I have agreed to do: Therefore I do hereby assign and dispone to and in favour of the said C. and D. equally, and their respective executors and assignees whomsoever [ordinary form]: But declaring that these presents do not assign the said bond and disposition in security to the extent of any part of the principal sum therein contained or penalty applicable thereto, but do and shall assign the same only to the extent of the said sums of £110 and £90, amounting together to £200, being interest and expenses as aforesaid, and the penalties or termly failures applicable thereto, and do and shall convey the said subjects in security only of the said sums of interest and expenses, and to the effect only of giving my said assignees equally and pari passu inter se, as in right of the said sums of interest and expenses and penalties and termly failures as aforesaid hereby assigned, a security and preference [as on p. 558].—In witness whereof.

¹ It is assumed that before this deed is granted the grantee will have paid the interest to the last preceding term.



	THE SCHEDULE WITHIN REFERRED TO	
Date.	Particulars. C.	D.
1903.		
May 20.	On account of interest for half year to Whit-	
	sunday 1900, £, less tax £ £50	•••
May 25.	Balance of same	£30
Nov. 11.	Interest for half year to this term 40	40
Dec. 1.	Account of expenses for attempted sale, which	
	account is docqueted and signed as relative	
	hereto 20	20
1904.	£110	90
Jan. 10.	Paid by D. to C. £10, with a further sum of	
	£ to equalize interest on their disburse-	
	ments 10	10
	£100	100

ASSIGNATION TO TWO LENDERS

1. IN EQUAL SHARES

I, A., in consideration of the sum of £1000 paid to me in equal portions by B. and C., do hereby assign and dispone to and in favour of the said B. and C. equally, and their respective executors and assignees whomsoever [proceed in ordinary form]: And I have herewith delivered the said bond and disposition in security to the said B., who by acceptance hereof binds himself and his foresaids to make the same forthcoming to the said C. and his foresaids on all necessary occasions on the usual receipt and obligation.

Under this deed the effect is exactly the same as if the bond were assigned by two separate deeds, half to B. and half to C., except that a certain amount of expense is saved.

Survivorship.—If it should be intended to give B. and C. each full power, both inter vivos and mortis causa, over their respective halves (as the above form does), but to secure that if the predeceaser should not exercise the power, his (or her) half shall go to the survivor (which the above form does not do), the following destination will be inserted:—

To and in favour of B. and C. equally and their respective assignees whomsoever; and failing assignation or alteration by the predeceaser, then to and in favour of the survivor and his (or her) executors and assignees whomsoever.

Under this destination the survivor (failing alteration by the predeceaser) is infeft in the whole without making up any title. "On the death of one of them her share of the fee would pass by accretion to the surviving sisters without service or confirmation." 1

The destination has been made very plain, to prevent any allegation as between B. and C. that there was an agreement barring alteration.

¹ Brydon's c.b. v. B.'s Trs., 1898, 25 R. 708, per Lord M'Laren; and see p. 238, supra.

As to what is alteration, and particularly the effect of a general testamentary conveyance, see *Brydon's* case. The above destination would undoubtedly favour the view of alteration, for which it expressly provides.

It is obvious that when destinations like these are prepared, care should be taken to see what testamentary instruments are in existence, and vice versa.

2. IN UNEQUAL SHARES

I, A., in consideration of the sum of £1500 now paid to me by the following parties in the proportions following, namely, (first) £1000 by B., and (second) £500 by C., do hereby assign and dispone to and in favour of (first) the said B. and his executors and assignees, but only to the extent after specified, and (second) the said C. and his executors and assignees, but only to the extent after specified, a bond and disposition in security [ordinary form]: But declaring that these presents do and shall assign the said bond and disposition in security to the said respective lenders only to the respective extents following, namely, (first) to the said B. to the extent of the sum of £1000 of principal, and (second) to the said C. to the extent of the sum of £500 of principal, with interest on the said respective sums from the term of , and penalties corresponding thereto respectively, and to the effect of giving the said respective lenders a security over the said subjects pari passu inter se: And I have herewith delivered [as in previous form].

ASSIGNATION TO ONE OF TWO OBLIGANTS AND PRO INDIVISO PROPRIETORS ON PAYMENT BY HIM, INCLUDING DISCHARGE IN HIS FAVOUR AND DISBURDENING OF HIS SHARE

I, A., considering that I hold a bond and disposition in security for £1000 granted in my favour by B. and C., under which they are jointly and severally liable, and by which they disponed in security their pro indiviso equal half shares of the subjects hereinafter described or referred to: And now seeing that the said B. has now paid to me the whole sum of £1000, with interest thereof from 1 , amounting together to the sum of £ Therefore, in the first place, I do hereby discharge the said bond and disposition , and recorded in the division of the general in security, dated register of sasines for , for the sum of £1000, granted by the said B. and C. in my favour, but that only to the extent of the sum of £500, with the interest thereof and penalties corresponding thereto: And I declare to be redeemed and disburdened thereof and of the infeftment following thereon the one-half pro indiviso share belonging to the said B. of All and Whole [subjects], all as specified and described in the said bond and disposition in security, dated and recorded as aforesaid: And, in the second place, I do hereby assign and dispone to and in favour of the said B., and his executors and assignees whomsoever, the said bond and disposition in security, and also All and Whole the one-half pro indiviso share belonging 2 to the said C. of All and Whole the said subjects hereinbefore described [or referred to]: But always

with and under [burdens if necessary], all as specified and described in the said bond and disposition in security, dated and recorded as aforesaid: But declaring that these presents do and shall assign the said bond and disposition in security to the extent only of the sum of £500 of principal, with the interest thereof from s , and penalties corresponding thereto, and do and shall convey the said subjects hereinbefore disponed in security of the said sums hereby assigned only: And I grant no warrandice other than that which would have been implied if these presents had been wholly a discharge on payment by the granters of the said bond and disposition in security of the whole debt in the proportions in which they are liable therefor inter se.—In witness whereof.

- ¹ If, in addition to the present payment of principal and interest, B. has paid the whole of *previous* payments of interest, the clause may run:
- B. has now paid to me the whole sum of £1000, with interest from Whitsunday last 1904, amounting together to £, and further paid to me the interest on the whole debt of £1000 due at the terms of Martinmas 1903 and Whitsunday 1904, and that at the said respective terms of payment.
 - ² If it is not now C.'s property, say "now or formerly belonging."
- ³ The same term as that from which it is stated in the earlier part of the deed that B. has paid the whole interest.

Assignation by a Catholic Creditor to a Postponed Creditor over one of the Properties, of the Catholic Security over the other

The case supposed is this: A. holds a bond for £1000 over the two properties X. and Y. B. holds a postponed bond over X. for £1000. A. sells X. under his power of sale. The price pays (a) expenses, (b) A.'s £1000 and interest, and (c) leaves a balance of £100. Under these circumstances B. is entitled to an assignation of A.'s security over Y. Assuming that the £100 from X. has been paid to B., the deed may take the following form:—

I, A., considering that I hold a bond and disposition in security for £1000 , and recorded in the division of granted by C. in my favour dated the general register of sasines for the county of the properties of X. and Y., both in the said county: That, under the power of sale contained in the said bond and disposition in security, I have sold the said property of X. at the price of £ , which has proved sufficient to pay all expenses of and attending the sale and my said loan of £1000, and interest thereof, and has left a surplus of £100: Further considering that B. holds a postponed bond and disposition in security for £1000, also granted by the said C. in his favour, dated , and recorded in the said division of the general register of sasines on , over the said property of X., but over that property only, and that he has now received the said surplus of £100 on account of his said bond: Further considering that I, as a catholic creditor, having sold the said property of X., the said B. has required me to grant these

presents in his favour, which it is reasonable that I should do: Therefore, in consideration of payment of my debt as aforesaid out of the said property of X., which formed the only security for the debt due to the said B., I do hereby assign and dispone to and in favour of the said B., and his executors and assignees whomsoever, the said bond and disposition in security, dated and recorded as aforesaid, for the sum of £1000, granted by the said C. in my favour, with interest from the [say, term of purchaser's entry], and also All and Whole [the property of Y.], all as specified and described in the said bond and disposition in security in my favour, dated and recorded as aforesaid: But declaring that these presents are granted, and shall be held by the said B. and his foresaids, in further security only of the sums due and to become due to him under the said bond and disposition in security in his favour: And I grant no warrandice other than that which would have been implied if these presents had been a discharge on payment by the debtor.—In witness whereof.

ASSIGNATION WHEN A CURATOR BONIS PAYS OFF HERITABLE DEBT OUT OF PERSONAL ESTATE

I, A., considering that B. granted in my favour [or otherwise, as the case may be] the bond and disposition in security hereinafter assigned, and that by interim act and decree of the Lords of Council and Session, dated , C. was appointed curator bonis to the said B.; and extracted Further considering that upon the day of Lords of Council and Session, on a petition by the said C., pronounced an interlocutor as follows [copy]; Further considering that the said C. has, in terms of the authority contained in said interlocutor, arranged with me to take an assignation of the said bond and disposition in security for the purpose of protecting the property and estate of the said B., and with the intention of not extinguishing the said security, and has requested me to grant these presents in manner hereinafter appearing, which it is just and proper that I should do: Therefore I, in consideration of the sum of £ me by the said C. as curator bonis foresaid, out of the moveable estate of the said B. under the management of the said C. as curator bonis foresaid, do hereby assign and dispone to and in favour of the said B., his executors and assignees whomsoever, subject to the declarations hereinafter contained, a , and recorded as after bond and disposition in security, dated mentioned, for the sum of £ granted by the said B. in my favour [or otherwise, as the case may be], with interest from the and also All and Whole [describe]: But always with and under [refer to burdens if necessary], all as specified and described in the said bond and disposition in security recorded in : But subject always to the declarations after mentioned, namely, (first) that this assignation shall in nowise operate as an extinction of the said debt or a discharge of said security, which are to be held as subsisting in any question affecting the said B. or the succession to his estates; and (second) that the foresaid payment and this assignation, made and granted in conformity with the said interlocutor, shall not prejudice or affect the rights of the parties

who would have been entitled to the said sum of \pounds , now paid to me as aforesaid, on the death of the said B. if this assignation had not been taken and if the said sum had not been paid to me: But reserving always to all parties concerned all pleas and claims affecting the right to the said sum which may hereafter arise in the event of the present assignation being at any future time validly consented to or adopted by the said B.: And I grant no warrandice other than that which would have been implied in a discharge on payment by the debtor.—In witness whereof.

ASSIGNATION OF BOND AND DISPOSITION IN SECURITY, AND DECREE OF REGISTRATION FOLLOWING THEREON

Ordinary form of assignation, but immediately before the testing clause, add: And further I assign to the said B. the decree of the Lords of Council and Session at my instance against the said C. for the sums contained in the said bond and disposition in security, which decree was obtained by the registration of the said bond and disposition in security in [or as in] the Books of Council and Session, and is dated [date of extract], with the extract thereof and warrant of the said Lords therein contained, with all that has followed or is competent to follow thereon.—In witness whereof.

ASSIGNATION OF A SECURITY OVER A RECORDED LEASE

I, A., in consideration of the sum of £ now paid to me, assign and transfer to B. a bond and assignation in security for the principal sum of £ granted by C. in my favour, dated , and recorded in the division of the general register of sasines for the county of Edinburgh on of and over a lease granted by D. in favour of E. of All and Whole in the parish of Duddingston and county of Edinburgh, which lease is dated , and is recorded in the said register of date ,¹ with interest from the term of .—In witness whereof.

¹ Partial Security.—If the bond covers only a part of the property in the lease, insert qualification and description of part here as on p. 356.

Not Original Holder.—If the granter of the assignation is not the original creditor, here also insert "my title to which bond and assignation in security [if necessary, to the extent after mentioned, or specify the extent] is recorded in said register on "; but it is not necessary to specify the writ or writs of transmission.

Partial Assignation.—If the assignation is partial only, here say, "But [if necessary to make the meaning plain, say, declaring that these presents do and shall assign the said bond and assignation in security] only to the extent of £, with interest thereon from the term of , and to the effect of giving a pari passu preference to the said B. over the said lease [to the extent foresaid] with me, my executors and assignees, as regards [or with the creditors in right of] the remainder of the said principal sum and corresponding interest." If the ranking is to be preferred or postponed, or if the whole sum is not outstanding, these points will be made clear.

SECTION XXXV

NOTARIAL INSTRUMENTS ON HERITABLE SECURITIES

NOTARIAL instruments are used for the purpose of completing title to heritable securities under a great variety of circumstances, differing according as (1) the transmission is *inter vivos* or *mortis causa*, (2) the creditor was infeft or uninfeft, (3) the security is heritable or moveable, and (4) the deceased died testate or intestate.

Narrative of the Bond in the Instrument.—Three cases may be distinguished:—

1. Unrecorded Bond.—The statutory direction (1868 Act, Sched. MM) is to

insert the personal obligation and disposition of the lands in security, with the description of them, and also all real burdens, etc., if any, all as set forth at full length or by reference in the bond.

What is here ordered to be set forth is (a) the obligation, (b) disposition and description, and (c) burdens. All these will be given fully and exactly as in the bond, with the necessary verbal alterations only. And further it is recommended that practically the whole bond should be inserted in the instrument. It must be remembered that the recording of the instrument is to take the place of the recording of the bond, and it seems fitting that all that would have gone on record in the one way should also be recorded in the other. It is obviously desirable that many other clauses should appear on record, e.g. clauses of ranking. But of course this does not apply to such cases as, e.g., (1) other property falling to be dealt with in a burgh register, or (2) trust purposes. The former will be omitted; and the latter will be referred to merely, as for instance in narrating the personal obliga-

2. Unrecorded Assignation.—In this case (1868 Act, Sched. MM) the instrument completing the title of, e.g., an executor of a creditor who held an unrecorded assignation of a recorded bond, does not contain any narrative of the personal obligations other than the statement that the bond was "for the sum of £." It sets forth the description and burdens as contained in the assignation.

tion to repay to the creditor as trustee "for the purposes therein

specified."

3. All other Cases.—The statutory direction (1868 Act, Sched. HH; 1874 Act, Sched. N) is to

insert the personal obligation so far as necessary and disposition of the lands in security, with the description of them, and also all real burdens, etc., if any, all as set forth at full length or by reference in the bond.

First, as regards the personal obligations. It will be observed that the direction here differs from that quoted on p. 565 by the addition of the words "so far as necessary." The reason is obvious, namely, that here the full obligation is already on record. It is quite sufficient to say:

by which bond and disposition in security the said A. bound and obliged himself to repay to the said C., his executors and assignees whomsoever, the sum of £1000 at the term of , with interest at the rate of per centum per annum, and penalties as therein contained; and he also thereby bound himself to pay the sum of £ yearly for premiums of fire insurance, with interest and penalties.

The reference to fire premiums may be omitted altogether unless the bond is so expressed as to constitute an effectual real security for the premiums. It is scarcely necessary to add that the words "all as set forth at full length or by reference" cannot apply to the personal obligations, which could not be set forth by reference in the bond.

Second, as to the dispositive words, the description, and the reference to burdens. The first and last of these will be set out as in the bond, with only the necessary verbal alterations. As to the description, see p. 360.

Is Notarial Instrument necessary?—Assuming the bond once recorded, there may be cases in which the completion of subsequent title is necessary as a protection against the bankruptcy of a previous holder (but see p. 570) or his fraud. But these considerations have no application to the vast majority of cases in which notarial instruments are used, e.g. by trustees and executors of infeft creditors, and the question is, do they really require to complete title to enable them to grant'a discharge? The logical, if not indeed the express, result of Lord Kyllachy's decision in Macrae¹ is that they do not. This, it must be admitted, is contrary to all practice.

1. TITLES inter vivos

General Disponees or Assignees.—The point is, whether, bearing in mind that we are dealing with deeds inter vivos, the security would be carried by a conveyance of moveable estate only, or by a conveyance of heritable estate only. Of course if the conveyance is of both heritable and moveable estate, no question arises. But it would be sharply raised by a general conveyance limited to heritable or moveable estate. On the construction of sec. 117 of the 1868 Act it would certainly appear that the conversion of heritable securities to moveable estate is limited to making them "moveable as regards the succession of such creditor." But then sec. 130 of the Act, dealing with the

¹ Macrae, etc. v. Gregory, etc., 1903, 11 S. L. T. No. 55. Cf. p. 546, supra, and p. 596, infra.

completion of title to unregistered securities, authorises "a notarial instrument in favour of the disponees or assignees of the moveable estate of such creditor under any deed or conveyance inter vivos or mortis causa." Though this is not involved in sec. 117, it is not in any way inconsistent with the provisions of that section, and it would therefore appear that it must clearly receive effect; and further, it would appear impossible to confine the rule to cases where the bond had not been registered. It must therefore be taken that in all cases (where executors are not excluded) an inter vivos general conveyance of moveable estate only will carry heritable securities, from which it should follow that a general conveyance, though inter vivos, of heritable estate will not have that effect. Fortunately when inter vivos general conveyances are taken, they usually embrace expressly both heritable and moveable estate; and in that case it is certainly recommended that the notarial instrument should repeat both words. See p. 570 as to trustees in cessio proceedings where a disposition omnium bonorum has not been granted.

Passing to the instruments themselves, first may be taken the case of what is not properly a transmission at all, but the constitution of a security, namely, an instrument expede in favour of the original creditor instead of recording the bond. This is given for the sake of completeness, and because it may just possibly be used, though it is hard to conceive circumstances which would justify it. If the bond contains matter which it is desired should not be recorded, the proper course is a clause of direction. In short, the only circumstance which would justify a notarial instrument would be the fact that the deed required to be recorded both in the general register and in a burgh register, and that this involved real delay and risk. Even in that case it is for consideration whether it would not be better to take two deeds from the debtor.

NOTARIAL INSTRUMENT IN FAVOUR OF ORIGINAL CREDITOR [1868 Act, s. 17, Sched. J]

At there was, on behalf of A., presented to me, notary public subscribing, a bond and disposition in security granted by B. in favour of the said A., and dated , by which bond and disposition in security the said B. bound and obliged himself [set out the whole deed down to but not including the testing clause, with the necessary verbal alterations only 1]: Whereupon this instrument is taken in the hands of C., notary public, in the terms of the Titles to Land Consolidation (Scotland) Act, 1868.—In witness whereof.

¹ But this is subject to exception in the cases referred to on p. 565.

NOTARIAL INSTRUMENT IN FAVOUR OF AN ASSIGNEE UNDER AN ASSIGNATION GRANTED "FOR FURTHER PURPOSES OR OBJECTS" [1868 Act, s. 124, Sched. HH]

At there was, on behalf of A., presented to me, notary public subscribing, a bond and disposition in security, dated , and recorded

in the division of the general register of sasines for the county of , granted by B. in favour of C., by which bond and disposition in security the said B. bound and obliged himself to repay to the said C. the sum of £1000 at the term of , with interest at the rate per centum per annum and penalties as therein mentioned; and further he bound himself to.pay £ per annum in respect of fire insurance premium: And in security of the personal obligations therein contained, the said B. disponed to and in favour of the said C., heritably but redeemably as therein mentioned, yet irredeemably in the event of a sale by virtue thereof, All and Whole [insert description in bond, with necessary verbal alterations only]: But always with and under [insert reference to burdens, if any, as in bond, with necessary verbal alterations [X]: As also there was presented to me an assignation, dated , granted by the said C. in favour of the said A., by which the said C. assigned the said bond and disposition in security, and sums of money and lands [or subjects] therein contained, to the said A. and his executors and assignees whomsoever, with interest from ,1 but in trust always for the purposes specified in the said assignation 2: Whereupon [as on p. 567].

If Granter Uninfeft.—In the above form it is assumed that the granter of the assignation was infeft. If not, everything must be set forth in full. In that case the schedule is 1868 Act, MM. But it is difficult to see why such a case should often arise. The better method would be to record the bond on behalf of the original creditor so as to infeft him, and then the assignation may be recorded de plano also. It is just possible, however, that it may be purposely wished not to complete the title of the original creditor, as that might have the effect of validating some third party's right which it is intended to attempt to cut out.

- ¹ Interest.—In the above form of instrument the date of the assignee's entry—the date from which he is entitled to the interest—is specified. This is not in the statutory form, but it seems an improvement.
- ² If Granter not Original Creditor.—If the assignation is granted not by the original creditor but by one who has himself acquired right, insert a deduction of title before "Whereupon," thus: "To which bond and disposition in security it was represented to me the said [granter of assignation] acquired right conform to the following writs, namely"—specifying them briefly. This proceeds on the footing of those writs not being presented to the notary. Under the schedule it is not essential that they should be presented, but if possible it is better, and in that case this clause will run thus: "As also there were presented to me the following writs by which the said [granter of assignation] acquired right to the said bond and disposition in security, namely."

NOTARIAL INSTRUMENT IN FAVOUR OF ASSUMED TRUSTEES, THE FORMER TRUSTEES HAVING BEEN INFEFT [1874 Act, s. 53, Sched. N]

At there was, on behalf of A. and B. and the survivor, as trustees and trustee assumed and acting under the trust disposition and settlement of

C., dated , and registered in , presented on to me, notary public subscribing, a bond and disposition in security, dated , and recorded in the division of the general register of sasines for the county of , granted by D. in favour of the said on C., by which bond and disposition in security [as on p. 568 to X, altering the names]: As also there was presented to me an extract of a deed of assumption and conveyance granted by E. and F., then the trustees acting under the said trust disposition and settlement, dated , and registered in , by which deed of assumption and conveyance the said E. and F. assumed the said A. and B. as trustees under the said trust disposition and settlement, and conveyed to themselves, the said E. and F., and to the said A. and B., as trustees under the said trust disposition and settlement, and the survivors and survivor, All and Sundry the whole trust estate and effects then belonging to them or under their control as trustees under the said trust disposition and settlement, in which general conveyance was included the said bond and disposition in security, and infeftment following thereon, the said E. and F., as trustees foresaid, being then vest therein in virtue of the following writs, which were also presented to me, namely (first) the said trust disposition and settlement of the said C., of which an extract was presented to me, and (second) notarial instrument in favour of the said E. and F. as trustees foresaid, recorded in the said division of the general register of sasines on As also there was presented to me an extract of a minute of resignation by the said E. and F. of their offices as trustees foresaid, dated , and : Whereupon [as on p. 571]. registered in on

Inter vivos.—The difference between this and the form on p. 369 is that the original trustees in this case had made up their title, and were accordingly in a position to grant a warrant for direct infeftment. Therefore the "general disposition" on which the instrument proceeds is that contained in the deed of assumption granted by the original trustees, and not that contained in the will of the testator; and therefore this is an inter vivos transmission, though it is a testamentary trust.

Alternative Course.—For the same reason, the better course would usually be to include a special assignation of the bond in the deed of assumption, and take infeftment by recording the deed of assumption with a warrant of registration for preservation as well as for publication. But, on the other hand, even though the deed of assumption does contain a special assignation, the above method by notarial instrument will still be competent, though usually very inexpedient and unjustifiable.

Mid-couples prior to General Disposition.—As regards the writs intervening between the bond and the granters of the "general disposition" (which in this case is the deed of assumption), and forming the title of the granters of the general disposition—the writs in question being in this case (a) C.'s will, and (b) the prior notarial instrument in favour of E. and F.—it appears to be plain that it is not necessary to produce them, though they must be referred to. See the directions in Sched. N, 1874 Act. But it is better to produce them.

Mid-couples after General Disposition .- On the other hand, the writs, if

any, between the grantees of the general disposition and the parties expeding the instrument must be produced. See the schedule. Here there is only the minute of resignation. It is hardly a proper instance, for A. and B. acquire right not under it but under the deed of assumption, and for that special reason it might be enough simply to say that it was represented that E. and F. had resigned office. But certainly the minute should in practice be produced.

Evidence of Death unnecessary.—In case of death, as distinct from resignation of the original trustees, see note on p. 371.

NOTARIAL INSTRUMENTS IN FAVOUR OF TRUSTEES IN BANKRUPTCY

- 1. Sequestration.—For general matters, see p. 379. As to the possibility of the trustee cutting out deeds granted by the bankrupt, it is thought to be clear that if the deed were an ordinary discharge, or an assignation in lieu of discharge, granted on repayment, even though it were not recorded, or were defectively recorded, no completion of title by the trustee will enable him to compete with it. Indeed, if the trustee does not complete a title, it would appear that even after sequestration the debtor in the bond would be protected if he paid to the bankrupt "bond fide and in ignorance of the sequestration" (Bankruptcy Act, s. 111). And even if the trustee does complete a title?
- 2. Trustee in Cessio.—See pp. 380 and 567. It is perfectly plain that, unless and until the trustee obtains a disposition omnium bonorum, he has a title to moveable estate only. But it is equally plain that the decree is equivalent to an assignation of moveable estate (Debtors (Scotland) Act, 1880, s. 9 (5)), and therefore that the trustee is an "assignee of the moveable estate of such creditor" in the sense of sec. 130 of the 1868 Act, and accordingly entitled to make up title by notarial instrument on the decree alone without a disposition. In point of fact, however, where there are heritable securities amongst the assets, it will rarely be found that the proceedings take the form of cessio.
- 3. Trustees under Trust Deeds.—These trustees are, as regards this matter, simply in the position of ordinary *inter vivos* general disponees.

NOTARIAL INSTRUMENT IN FAVOUR OF TRUSTEE ON A SEQUESTRATED ESTATE [1868 Act, s. 25, Sched. LL]

At there was, on behalf of A., as trustee on the sequestrated estate of C., presented to me, notary public subscribing, a bond and disposition in security [as on p. 568, to X]: As also there was presented to me an extract act and warrant of confirmation in favour of the said A., granted by the sheriff of and dated at on , whereby the said A., as trustee foresaid, has right to the said bond and disposition in security: Whereupon [as on p. 567].

- If Bankrupt not Original Creditor or not Infeft.—In the above form it is assumed that the bankrupt was the original creditor and that he was infeft. But various other cases may be imagined; thus the bankrupt may have been—
- 1. Original Creditor but Uninfeft.—Narrate bond at full length as on p. 567.
- 2. Assignee Infeft.—Deduce title before "Whereupon," but it appears to be unnecessary to produce the writs. It will do no harm, however, to do so; and the clause may run thus: "the said C. being vest therein conform to the following writ [or writs] which was [or were] presented to me, namely." On the other hand, it is essential to specify all the deeds of transmission, and not merely the immediate assignation in favour of the bankrupt.
- 3. Assignee Uninfeft.—In this case Sched. MM (which is not applicable to trustees on sequestrated estates) begins by presenting the assignation. But the form of LL should be adhered to, and accordingly the instrument will follow the above style (p. 570). The deed or deeds of transfer by which the bankrupt acquired right will not be mentioned until after the act and warrant has been produced. Here again it appears that it is not necessary to produce these transmissions. The clause may be introduced thus: "the said C. having acquired right thereto conform," etc. All must be specified.

As to the question whether a notarial instrument is competent at all when the bankrupt was not infeft, see p. 380.

NOTARIAL INSTRUMENT IN FAVOUR OF TRUSTEE FOR CREDITORS UNDER TRUST DEED [1874 Act, s. 53, Sched. N]

At there was, on behalf of A., trustee for behoof of the creditors of C., acting under the trust deed after mentioned, presented to me, notary public subscribing, a bond and disposition in security [as on p. 568, to X]: As also there was presented to me an extract of a trust deed granted by the said C. in favour of the said A., dated , and registered in the Books of Council and Session on , by which trust deed the said C. assigned and disponed to the said A. All and Sundry his whole heritable and moveable estate, but in trust always for the purposes specified in the said trust deed, in which general conveyance was included the said bond and disposition in security, and infeftment following thereon, the said C. being then vest therein as aforesaid: Whereupon this instrument is taken in the hands of , notary public, in terms of the Titles to Land Consolidation (Scotland) Act, 1868, and the Conveyancing (Scotland) Act, 1874.—In witness whereof.

If Granter Uninfest.—The above assumes the infestment of the granter of the trust deed. If he was not infest, the bond will be fully set forth as on p. 567. The schedule then is 1868 Act, MM.

Heritable or Moveable.—See pp. 567, 570.

If Bankrupt not Original Creditor.—If the granter of the trust deed was not the original creditor, omit the words "as aforesaid," and say "in virtue of the following writs, namely"; and if they are to be presented to the notary, insert after "writs," "which were also presented to me." But their presentation is not essential.

NOTARIAL INSTRUMENT IN FAVOUR OF LIQUIDATOR OF A JOINT STOCK COMPANY [1868 Act, s. 25, Sched. LL]

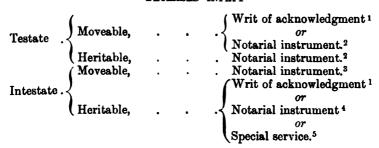
At there was, on behalf of A., as liquidator of the Y. Company Limited, incorporated under the Companies Acts, 1862 to 189 [or as the case may be], presented to me, notary public subscribing, a bond and disposition in security [as on p. 568, to X]: As also there was presented to me the minute of an extraordinary general meeting of the said Y. Company Limited, held at on , which contains a resolution passed at that meeting to the effect that the said company be wound up voluntarily, and that the said A. be, and he was thereby, appointed liquidator: Whereupon [as on p. 567]. See notes on pp. 382-3.

We now pass to notarial instruments used in the completion of title to heritable securities in the case of

2. Transmissions Mortis causa

It is necessary to distinguish according as (1) the creditor was infeft or uninfeft, (2) he died testate or intestate, and (3) the security is heritable or moveable. In order to shew this at a glance, the following table may be useful:—

DECEASED INFEFT



DECEASED UNINFEFT

Whether the creditor died testate or intestate, and whether the security is heritable or moveable, there is one way only, namely, notarial instrument.⁶

- 1 1874 Act, s. 63; 1868 Act, Sched. II.
 2 1874 Act, s. 64; 1868 Act, Sched. KK;
 1868 Act, s. 19, Sched. L; 1874 Act, s. 53,
 Sched N.
- ² 1868 Act, s. 126, Sched. JJ.
- ⁴ 1868 Act, s. 128, Sched. JJ.
- ⁵ Hare, Petr., 1889, 17 R. 105.

As to writs of acknowledgment, it is quite impossible to give any reason for the way in which they are thrown in. There appears to be no reason why they should be applicable only to moveable bonds in testate succession and to heritable bonds only in intestate succession. In point of fact they are hardly ever used.

With reference to the above scheme, it is necessary to draw attention to the following points:—

Whether Security Heritable or Moveable.—This, it might be thought, is a matter of no importance except in intestate succession. But that is not so for two reasons, (1) even in testate succession the competency of proceeding by the alternative method of writ of acknowledgment depends upon the security being moveable (for which it is quite impossible even to suggest any reason), and (2) as regards general testamentary conveyances and the recital of them in instruments, see p. 566. The question whether the security is heritable or moveable must involve one, and may involve both, of the following elements, namely, (1) whether the creditor died (a) before or (b)on or after 1st January 1869, and (2) whether executors have been excluded (see p. 487). The instrument should always be framed so as to show whether executors have or have not been excluded, unless, indeed, it is expede in favour of a general disponee of heritable and moveable estate, and then it does not matter. But if the instrument is in favour of a mere executor-nominate or any executor-dative, it is essential to his claim that executors should not have been excluded. On the other hand, in all instruments in favour of an heir, the exclusion of executors is the ground of his claim. In either case the fact should be made to appear on the face of the instrument by the recital of the destination, and by presenting and narrating any minute of exclusion, or removal of exclusion, of executors, or both.

Then as to the other matter, namely, whether the deceased died before or after the commencement of the 1868 Act, it is expressly provided in Sched. KK (testate succession) to that Act that it shall "if necessary" be stated in the instrument "who died after [or before, as the case may be the commencement " of the Act. Curiously enough, there is no similar provision in Sched. JJ (intestate succession). As to when the point is of importance, the matter stands thus:--In the case of bonds excluding executors, the point is never material, for these are all heritable, no matter when the creditor died. In the case of bonds which do not exclude executors, then, if the creditor died intestate, that is the most obvious case, for, according as he died before or after the commencement of the Act, will the security go to the heir or to the executor. But even if he died testate, the point may be of much importance: it depends on the terms of his will. If he left a general conveyance of heritable and moveable estate, or if he specially bequeathed the particular security, obviously the point is of no importance. But if his general conveyance is limited to heritable estate, it is necessary that he should have died before the commencement of the Act to give a title; while if it is limited to moveable estate, it does not carry the bond unless he died after that date. Whenever the point is essential to the right, it is to be taken that the fact must be made to appear on the face of the instrument. But to that end it is not necessarily required that an express statement should be inserted. Thus, in testate cases, if the date of the will as given in the instrument is after the commencement of the Act, the fact of the testator's survivance of that date is sufficiently brought out; but a further express statement, if desired, will do no harm. It cannot be suggested that, in any case, the notary should require proof of the date of death.

When Confirmation necessary.—Executors, proceeding as such, must obtain confirmation before they expede a notarial instrument or obtain a writ of acknowledgment (1874, ss. 63 and 64). It does not appear, however, that it is necessary to produce it to the notary, or even to refer to it in the instrument or writ, in the case of executors-nominate (and these only can use a writ of acknowledgment). The will only must be referred to. Further, it must be produced to the notary; it is not sufficient to produce the confirmation. That, of course, can apply to testate successions only; in intestacy the confirmation is the only thing that can be produced (the security being moveable), and its production is essential.

When not.—But in cases of testate succession the common case is that the executors are also general disponees in trust, or, it may be, beneficially. In that case they have the option of proceeding as general disponees under Sched. N of the 1874 Act, and then confirmation is not a necessary preliminary.

Contents of Confirmation.—It is rather curious that, as to those cases in which confirmation is necessary, it is nowhere laid down what the confirmation must contain. Three points may be stated, namely, (1) is it essential that it include the security in question, (2) and at its full value, and (3) would errors of description be of any moment? In all cases the statutory rule is that the executors are to be "duly confirmed." According to the ordinary practice in Scotland, that can be the case only if the particular asset is confirmed. From that it would appear to follow that it must be included at its full value. Then as to errors of description, it is thought to be clear that if these do not go so far as to throw serious doubt on the identity of the investment, they would be of no importance at all in the case of testate succession, whether the title be completed by writ of acknowledgment or by notarial instrument (in which cases the confirmation is not a title), and even as regards instruments in favour of executors-dative the same view is submitted. It is to be remembered that a very slight description in the confirmation would certainly be sufficient, such as "Heritable bond by A. for £1000."

On Probates and Letters of Administration, see p. 363. The enactments there referred to apply expressly to securities as well as to property titles. Where the title to be made up is that of general or special assignees in trust or beneficially, no difficulty arises. But if the title is that of executors or administrators in that capacity only, then note—

- 1. The grant must be resealed in Scotland.
- 2. If the instrument is in favour of the executors appointed in the will or the survivors or survivor of them, the case is clear enough. All that must be referred to in the instrument is the appointment of executors as contained in the will, and it may run—

As also there was presented to me the probate issued from the principal (?) probate registry in England, and resealed in Scotland, of the last will and testament, dated , granted by the said X., by which the said X. nominated the said A. and B. to be his executors, and which probate comprised an official copy of the said last will and testament; whereby.

But strictly it is not necessary to mention the resealing.

- 3. If the instrument is in favour of administrators under letters of administration with the will annexed (i.e. testate cases), then (1) if the deceased was infeft it would appear on the construction of s. 64 of the 1874 Act that difficulty arises. Thus if the will contained no appointment of executors, the section in terms does not apply; and even if the will appointed executors who have failed, so that the grant is in favour of other persons, it is not clear that the provisions of s. 3 of the 1868 Act (p. 227) can be imported. In these cases the course appears to be declaratory adjudication. (2) If the deceased was not infeft there is no difficulty (1868 Act, s. 130).
- 4. If the instrument is in favour of administrators of intestate estates, it will be observed that s. 51 of the 1874 Act and s. 5 of the 1887 Act have no application, for they are limited to testate cases. But then the letters of administration, when resealed here, are "of the like force and effect and have the same operation in Scotland as if a confirmation had been granted"; and accordingly the instrument will proceed exactly as if the administrators held a Scots confirmation-dative, whether the deceased was infeft or not. In this case the question which occurs in all these cases comes up most sharply, viz., how is it to appear that the executors or administrators have given up the particular heritable security? Seeing that probates and letters of administration do not disclose this information, it is suggested that the title may be quite well completed without any reference to this, but that information should in fact be obtained.

¹ Confir. and Prob. Act, 1858, s. 14.

³ Ibid., s. 130.

² 1868 Act, s. 126.

Colonial and Indian Probates and Letters of Administration.—Assuming that the title is to be made up as mere executors or administrators (and not as assignees), resealing is necessary, and the special point is that under the regulations made under the Colonial Probates Act in the Edinburgh Sheriff Court an inventory of the Scottish assets must be given up, and therefore it is suggested that the ordinary Scots rule should be applied and the grant be rejected as a title unless the heritable security is included in the inventory.

Heir's Title.—If the deceased was infeft, the heir has a choice of three methods, namely, (1) Writ of acknowledgment. This makes no reference to any service, but of course the debtor may decline to grant the writ without a service being produced. In that case it is difficult to see why that procedure should be followed, and in fact, as already stated, it is rarely followed at all. (2) General service and notarial instrument. (3) Special service.

Heirs of Provision.—Suppose a bond is payable to A., whom failing to B., how is B. on A.'s death to complete a title? Or suppose the bond is payable to A. and B. as trustees, and their successors in office; that A. and B. die; and that X., in terms of a power to that effect, appoints C. and D. to be new trustees: how are C. and D. to complete title? These are simple enough questions, but they were considered to be attended with a good deal of difficulty. The difficulty was that, as executors are not expressly excluded, the bonds must be reckoned as moveable as regards succession in virtue of the 1868 Act; and if that be so, how can service be a competent method of completing title to moveable estate? The difficulty was got over by holding that the alteration made by the 1868 Act is applicable only to succession ab intestato.1 That view is obviously untenable,2 and has been expressly overruled.³ But, in the first place, by the above destinations, executors are practically excluded. And further, whatever the bonds be as regards beneficial succession (and notwithstanding the provisions of sec. 130 of the 1868 Act; see p. 567), the deceased creditor held feudally an estate in land; and in the cases figured no other method having been provided, the ordinary feudal method of service is available and competent.

Deceased infeft and testate. Security heritable or moveable. NOTARIAL INSTRUMENT IN FAVOUR OF THE EXECUTORS - NOMINATE [1868 Act, s. 127, Sched. KK; 1874 Act, s. 64]

At there was, on behalf of A. and B. and the survivor of them, as executors and executor-nominate of C., duly confirmed conform to confirmation by the sheriff of , dated at on

¹ Hare, Petr., 1889, 17 R. 105.

² 1868 Act, s. 127, Sched. KK.

² Hughes' Trs. v. Corsane, 1890, 18 R. 299.

presented to me, notary public subscribing, a bond and disposition in security [as on p. 568, to X]: As also there was presented to me a testament, dated and registered , granted by the said C. The public said A and A are now in right of the said bond and disposition in security A: Whereupon [as on A as A as A as A and A and A and A are now in right of the said bond and disposition in security A as A and A are now in right of the said bond and disposition in security A as A and A are now in right of the said bond and disposition in security A as A and A are now in right of the said bond and disposition in security A and A are now in right of the said bond and disposition in security A and A are now in right of the said bond and disposition in security A and A are now in right of the said bond and disposition in security A and A are now in right of the said bond and disposition in security A and A are now in right of the said bond and disposition in security A are now in right of the said bond and disposition in security A are now in right of the said bond and disposition in security A and A are now in right of the said bond and disposition in security A are now in right of the said bond and disposition in security A are now in right of the said bond and disposition in security A are now in right of the said bond and disposition in security A and A are now in right of the said bond and disposition in the said bond

Confirmation.—The executors must be confirmed before they expede the instrument, but it is not essential to refer to the confirmation.

- ¹ Personal Estate.—If necessary, say, "who died after the commencement of the Titles to Land Consolidation (Scotland) Act, 1868" [see p. 573].
- ² Deduction of Title.—If the deceased was not the original creditor, deduce the title here, thus: "the said C. having acquired right thereto conform to the following writ [or writs], which [if it is the case] were also produced to me"; but their production is not necessary.

Alternative Mode.—Writ of acknowledgment, p. 585, but only if the security is moveable.

Deceased infeft and testate.

Security heritable or moveable.

NOTARIAL INSTRUMENT IN FAVOUR OF UNIVERSAL LEGATORY [1868 Act, s. 127, Sched.
KK; 1874 Act, s. 64]

At there was on behalf of A. presented to me, notary public subscribing, a bond and disposition in security, dated , and recorded in the division of the general register of sasines for on , granted by B. in favour of C., by which [narrate bond as on p. 568]: As also there was presented to me an extract of a general disposition and settlement, dated , and registered in the Books of Council and Session on , granted by the said C., by which the said C. assigned to the said A. his whole heritable and moveable estate, and appointed her to be his universal legatory, whereby the said A. is now in right of the said bond and disposition in security: Whereupon, etc. [as on p. 567].

As an Individual.—Under the above circumstances care should be taken to make up the title in favour of A. strictly as an individual and not as executrix, though A. will no doubt possess that character. This brings out A.'s absolute title and power; it saves all trouble about confirmation; and it saves much trouble afterwards, on A.'s death, in the matter of making up title again to the bond, assuming that it is then still subsisting.

No Reference to Executry.—Therefore no reference should be made to the office of executor or executrix in any way. A. will not be designed as executrix.

Universal Legatory.—Of course these words are not necessary, but if they are in the will it is well to set them out, as they show the beneficial nature of A.'s right. If the words in the will are "sole executrix and universal legatory," drop the former in the instrument.

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Deceased infeft and testate.

Security heritable or moveable.

NOTARIAL INSTRUMENT IN FAVOUR OF GENERAL ASSIGNEES—FIRST FORM [1874]

Act, s. 53, Sched. N

there was, on behalf of A. and B. and the survivor of them, At. as trustees and trustee acting under the trust disposition and settlement of C., dated and registered as after mentioned, presented to me, notary public subscribing, a bond and disposition in security, dated , and recorded in , granted the division of the general register of sasines for by D. in favour of the said C., by which bond and disposition in security the said D. bound and obliged himself to repay to the said C. the sum of £1000 at the term of , with interest at the rate of per centum per annum, and penalties as therein mentioned; and further he bound himself per annum in respect of fire insurance premium: And in security of the foresaid obligations therein contained the said D. disponed to and in favour of the said C., heritably but redeemably as therein mentioned, yet irredeemably in the event of a sale by virtue thereof, All and Whole [insert full description in bond, with necessary verbal alterations]: But always with and under [insert reference to burdens, if any, as in bond, with necessary verbal alterations]: As also there was presented to me an extract of a general trust disposition and settlement granted by the said C., dated , and registered in the Books of Council and Session on , by which the said C. conveyed to the said A. and B. and the survivor of them All and Sundry his whole heritable and moveable estate, but in trust always for the purposes specified in the said trust disposition and settlement, in which general conveyance was included the said bond and disposition in security and infeftment following thereon, the said C. being then vest therein as aforesaid [Y]: Whereupon this instrument is taken in the hands of X., notary public, in terms of the Titles to Land Consolidation (Scotland) Act, 1868, and the Conveyancing (Scotland) Act, 1874.—In witness whereof.

As this is a case of *mortis causa* conveyance, and the security may (and probably will) be moveable in that respect, it will in that case be essential to state that the general assignation included "moveable" estate. On the other hand, if the security is heritable, it is just as necessary to state that the title includes "heritable estate." And in this connection it may be necessary to state that the deceased "died before [or after] the commencement of the Titles to Land Consolidation (Scotland) Act, 1868" [see p. 573].

Deceased infeft and testate.

Security heritable or moveable.

Deceased infeft NOTARIAL INSTRUMENT IN FAVOUR OF GENERAL ASSIGNEES—SECOND FORM [1868]

Act, s. 127, Sched. KK; 1874 Act, s. 64]

At there was, on behalf of A. and B. and the survivor of them, as trustees and trustee of C., acting under his trust disposition and settlement after mentioned, presented to me, notary public subscribing, a bond and disposition in security [as on p. 568, to X]: As also [present the will as above],

whereby the said A. and B., as trustees foresaid, are now in right of the said bond and disposition in security: Whereupon, etc. [as on p. 567].

If the nomination of trustees be complicated by death, revocation, declinature, resignation, assumption, or any of them, see p. 371.

Deceased infeft and testate.

Security heritable or moveable.

NOTARIAL INSTRUMENT IN FAVOUR OF GENERAL ASSIGNEES COMPLETING TITLE TO TWO BONDS OVER THE SAME PROPERTY

At there was, on behalf of A. and B. and the survivor of them, as trustees and trustee acting under the trust disposition and settlement of C., dated and registered as after mentioned, presented to me, notary public subscribing, (first) a bond and disposition in security [as on p. 568], and (second) another bond and disposition in security, dated , and recorded in the said division of the general register of sasines on , granted by the said D. in favour of the said C., by which bond and disposition in security the said D. bound and obliged himself to repay to the said C. the additional sum of £ at the term of , with interest at the rate of per centum per annum, and penalties as therein mentioned: And in security of the personal obligations therein contained the said D. disponed to and in favour of the said C., heritably but redeemably as therein mentioned, yet irredeemably in the event of a sale by virtue thereof, All and Whole the said subjects hereinbefore described [or referred to], but always with and under the [burdens, etc.] hereinbefore referred to: As also there was presented to me an extract of a general trust disposition and settlement [narrate the will as on p. 578], in which general conveyance were included the said bonds and dispositions in security and infeftments following thereon, the said C. being then vest therein as aforesaid: Whereupon, etc. [as on p. 567].

When Composite Instruments available.—So long as the bonds are over the same property there appears no reason against including any number of them in the one instrument. Nor does it matter (1) whether they are granted by the same or by different persons, or (2) whether the deceased was the original creditor or not, or the original creditor in some and not in others, or (3) that, where he was not the original creditor, he acquired right by different titles. Further, even though he was infeft in one and not in another, that might be no absolute bar, though it would affect the form; but in that case separate instruments are recommended.

Deceased infeft and testate. Security heritable or moveable. NOTARIAL INSTRUMENT IN FAVOUR OF GENERAL ASSIGNEES COMPLETING TITLE TO THREE BONDS, THE DECEASED HAVING BEEN ORIGINAL CREDITOR IN ONE AND HAVING ACQUIRED RIGHT TO THE OTHERS, EACH BY SEPARATE TITLE

At there was, on behalf of A. and B. and the survivor, as trustees and trustee acting under the trust disposition and settlement of C.

dated and registered as after mentioned, presented to me, notary public subscribing, (first) a bond and disposition in security [as on p. 568, to X]; (second) another bond and disposition in security, dated and recorded in the said division of the general register of sasines on , granted by E. in favour of F., by which bond and disposition in security the said E. bound and obliged himself to repay to the said F. the sum of £ at the term of , with interest at the rate of per centum per annum, and penalties as therein mentioned: And in security of the personal obligations therein contained the said E. disponed to and in favour of the said F., heritably but redeemably as therein mentioned, yet irredeemably in the event of a sale by virtue thereof, All and Whole the said subjects hereinbefore described [or referred to], but always with and under the [burdens, etc.] hereinbefore referred to; and (third) another bond and disposition in security, dated recorded in the said division of the general register of sasines on granted by G. in favour of H., by which bond and disposition in security [narrative as in the case of the second bond]: As also there was presented to me an extract of a general trust disposition and settlement [narrate the will as on p. 578], in which general conveyance were included the said three bonds and dispositions in security and infeftments following thereon, the said C. being then vest therein, as follows, namely, (first) in the said first mentioned bond and disposition in security, as aforesaid; (second) in the said second mentioned bond and disposition in security, in virtue of the following writ, which was also produced to me, namely, an assignation granted by the said F. in favour of the said C., dated , and recorded in the said division of the general register of sasines on ; and (third) in the said third mentioned bond and disposition in security, in virtue of the following writ, which was also produced to me, namely, an assignation granted by the said H. in favour of the said C., dated , and recorded in the said division of the general register of sasines on : Whereupon, etc. [as on p. 567].

Different Granters.—It might quite well happen that the bonds were granted by successive proprietors, but in that case there would likely be new obligations by the present proprietor for the whole debt.

Production of Assignations.—This is unnecessary; if not produced, the words "which was also produced to me" will be omitted.

Deceased infeft and testate.

NOTARIAL INSTRUMENT IN FAVOUR OF
GENERAL ASSIGNEES ON A DECREE OF
ADJUDICATION FOR DEBT [1868 Act, s. 19
Sched. L]

At there was, on behalf of A. and B. and the survivor of them, as trustees and trustee acting under the trust disposition and settlement of C., dated and registered as after mentioned, presented to me, notary public subscribing, a decree of adjudication obtained in the Court of Session in an action at the instance of the said C. against D., dated

extracted , and recorded in the division of the general register of sasines for the county of on , by which recorded decree of adjudication the said C. was infeft in All and Whole [subjects], but always with and under [burdens], and that heritably, and for payment to the said C. of the sum of [specify the sums as in the decree, giving the general details, and finally the accumulated amount, with interest, etc., all as in the decree]: As also [specify the will as on p. 578]: Whereupou, etc. [as on p. 567].

Form.—Though Sched. L is not generally to be used for completion of title to securities, it is the proper form here, for an adjudication, though in its nature a pignus prætorium, is in form, and may become in effect, a transference of the lands.

Heritable Estate.—Any reference to heritable estate in the will should be repeated in the instrument.

Deceased infeft and testate.

NOTARIAL INSTRUMENT IN FAVOUR OF GENERAL TESTAMENTARY ASSIGNEES ON (1) A BOND, AND (2) AN ADJUDICATION FOLLOWING ON THE BOND [1868 Act, s. 19, Sched. L; 1874 Act, s. 53, Sched. N]

At there was, on behalf of A. and B. and the survivor of them, as trustees and trustee acting under the trust disposition and settlement of C., dated and registered as after mentioned, presented to me, notary public subscribing, a bond and disposition in security [as on p. 568, to X]: As also there was presented to me a decree of adjudication obtained in the Court of Session in an action at the instance of the said C. against the said D., dated , extracted , and recorded in the said division of the general register of sasines on , by which recorded decree of adjudication the said C. was infeft in All and Whole the said subjects hereinbefore described [or referred to], but always with and under the [burdens, etc.] hereinbefore referred to, and that heritably, and for payment to the said C. of the said sum of £ contained in the said bond and disposition in security, and [specify the sums, accumulated sum, and interest, etc., as in the decree]: As also [specify the will as on p. 578], in which general conveyance were included the said bond and disposition in security, and also the said decree of adjudication, and infeftments following thereon respectively, and the said subjects themselves, the said C. being then vest therein as aforesaid: Whereupon, etc. [as on p. 578].

Nature and Purpose of Adjudication.—This is intended to refer to the case of the holder of a bond and disposition in security adjudging the same property as is covered by the bond. The purpose of the adjudication is to accumulate interest.

Bond must be produced.—Obviously it would never do to make up title to the adjudication only, for the title may never be allowed to become irredeemable, and the debtor would certainly require a discharge of the bond.

Heritable Estate.—In view of the adjudication any reference to heritable estate in the will should be repeated in the instrument.

Deceased infeft NOTARIAL INSTRUMENT IN FAVOUR OF A and testate.

Security heritable or moveable.

SPECIAL ASSIGNEE [1868 Act, s. 127, Sched. KK; 1874 Act, s. 64]

At there was, on behalf of A., presented to me, notary public subscribing [as on p. 568, to X]: As also there was presented to me an extract of a testamentary writing signed by the said C., dated , and registered in the Books of Council and Session on , by which he left to the said A. [quote the terms of the bequest such as "D.'s bond," or "my heritable security," or "my invested money," or "the £1000 lent to D."], which it was represented to me meant [or embraced] the said bond and disposition in security, whereby the said A. is now in right of the said bond and disposition in security: Whereupon, etc.

Generally, as to such cases see pp. 226, 361.

Declarator.—If the meaning of the bequest has been judicially declared, it will be well, though not essential, to produce an extract of the judgment and set it forth.

Deduction of Title.—See note, p. 577.

Deceased infeft and intestate.

Security moveable.

NOTARIAL INSTRUMENT IN FAVOUR OF AN EXECUTOR-DATIVE [1868 Act, s. 126, Sched.

At there was, on behalf of A., executor-dative of C., duly confirmed conform to testament-dative after mentioned, presented to me, notary public subscribing, a bond and disposition in security [as on p. 568, to X]: As also there was presented to me testament-dative of the said deceased C., expede before the sheriff of _____, as commissary, and dated at on _____, whereby the said A. was ordained and confirmed executor of the said deceased C., whereby the said A. acquired right to the said bond and disposition in security: Whereupon, etc.

Contents of Confirmation.—See p. 574. Deduction of Title.—See note, p. 577.

Deceased infeft NOTARIAL INSTRUMENT IN FAVOUR OF AN and intestate.

HEIR [1868 Act, s. 128, Sched. JJ]

At there was, on behalf of A., presented to me, notary public subscribing, a bond and disposition in security [as on p. 568, to X]: As also there was presented to me an extract decree of general service in favour of the said A. as nearest and lawful heir in general to the said (deceased), dated , expede before the sheriff of , and recorded in Chancery on , whereby the said A. acquired right to the said bond and disposition in security: Whereupon, etc.

Heritable Estate.—It will be made to appear that the bond is heritable as regards succession, thus:

- (1) If it is heritable because the deceased "died before the commencement of the Titles to Land Consolidation (Scotland) Act, 1868," that will be stated here.
- (2) If the deceased was the original creditor, and executors are excluded in the bond, that will be set forth in specifying the bond.
- (3) If the deceased was an assignee, and executors are excluded in the assignation, that will be set forth in specifying the assignation in the deduction of title.
- (4) If executors are excluded by minute, the minute will be presented and narrated after the bond and before the service.

Special Service.—The schedule contemplates that the instrument may proceed on a special service. But if the heir has obtained a special service applicable to the bond, his course is to record it de plano.

Deduction of Title.—See note, p. 577.

Alternative Modes. - (1) Special service.

(2) Writ of acknowledgment, p. 585.

NOTARIAL INSTRUMENT WHERE (1) DEBT PARTLY REPAID, AND (2) SECURITY RESTRICTED

[As on p. 578, to Y, and proceed] but that only to the extent of £500 of the principal sum therein contained, with the interest thereof and penalties corresponding thereto, the said bond and disposition in security having been discharged quoad ultra, conform to partial discharge granted by the said C., dated , and recorded in the said division of the said register on the , both days of , and under exception from the said security-subjects of the part thereof disburdened by deed of restriction granted by the said C., dated , and recorded in the said division of the said register on the , both days of : Whereupon, etc.

Reference not essential.—Strictly, it is not necessary that any reference should be made to the partial discharge or to the restriction, but it is better that these references should be made. General terms are quite sufficient without any description of the disburdened part.

Still less is Proof.—In any case it will usually be impossible to produce the deeds of discharge and restriction, and it is not in the least necessary to do so.

Deceased uninfeft and testate. Security heritable or moveable.

NOTARIAL INSTRUMENT IN FAVOUR OF TESTAMENTARY TRUSTEES OF THE HOLDER OF AN UNRECORDED BOND AND DISPOSITION IN SECURITY [1868 Act, s. 130, Sched. MM]

At there was, on behalf of A. and B. and the survivor of them, as trustees and trustee acting under the trust disposition and settlement of C., dated and registered as after mentioned, presented to me, notary public subscribing, a bond and disposition in security granted by D., and dated

by which bond and disposition in security the said D. bound and obliged himself [Insert the whole bond here, with only the necessary verbal alterations]: As also there was presented to me [narrate the will as on p. 578, but instead of saying "in which general conveyance was included," say] whereby the said A. and B., as trustees foresaid, are now in right of the said bond and disposition in security: Whereupon, etc.

Deceased uninfeft and testate. Security heritable or moveable.

NOTARIAL INSTRUMENT IN FAVOUR OF TESTAMENTARY TRUSTEES OF THE HOLDER OF AN UNRECORDED ASSIGNATION [1868 Act, s. 130, Sched. MM]

At there was, on behalf of A. and B. and the survivor, as trustees and trustee of C. acting under his trust disposition and settlement after mentioned, presented to me, notary public subscribing, an assignation granted by D. in favour of the said C., and dated , by which assignation the said D. assigned to the said C. a bond and disposition in , and recorded security granted by E. in favour of the said D., dated in the division of the general register of sasines for the county of , for the sum of £ ; and also All and Whole [(1) subjects, and (2) burdens, exactly as in assignation, with necessary verbal alterations only]: As also there was presented to me an extract of a general trust disposition and settlement granted by the said C., dated , and registered in , by which the said C. conveyed to the on said A. and B. and the survivor of them All and Sundry his whole means and estate, heritable and moveable, but in trust always for the purposes specified in the said trust disposition and settlement, whereby the said A. and B., as trustees foresaid, are now in right of the said bond and disposition in security: Whereupon, etc.

Even though the granter of the assignation was not the original creditor, it is not necessary to produce or refer to the writs by which he acquired right.

NOTARIAL INSTRUMENT COMPLETING TITLE OF TESTA-MENTARY GENERAL DISPONEES TO BOND AND RECORDED LEASE, OF NATION IN SECURITY OVER A WHICH THE TESTATOR WAS THE ORIGINAL GRANTEE, AND WHICH WAS REGISTERED

Be it known that by bond and assignation in security of date and recorded in , A. assigned to B., in security of a sum of £ , with interest, penalties, and fire insurance premiums, a lease granted by C. of All and Whole , in the parish of and county of , which lease is dated , and recorded , to which bond and assignation in security D., on E., and F., and the survivors and survivor of them, have acquired right, as general disponees, in trust, of the said B., in virtue of the trust disposition and settlement of the said B., dated , and registered in the Books of Council and Session on : Wherefore [as on p. 385].

WRITS OF ACKNOWLEDGMENT IN HERITABLE SECURITIES

As these are very rarely used it is not proposed to occupy space with forms. The statutory schedule is II of the 1868 Act.

When Competent.—This mode of completing title is not available unless the following conditions concur, namely, (1) mortis causa transmission, (2) deceased creditor infeft. But further, even supposing that these conditions do concur, the use of writs of acknowledgment is further limited to the following cases:—

- 1. Creditor testate and security moveable.
- 2. Creditor intestate and security heritable.

Who may Grant?—The writ is to be granted by "the debtor in the said security infeft in the lands." Therefore the granter must be infeft in the whole subjects of the security, but it is not necessary that he should be personally liable for the debt (see 1868 Act, s. 3, "debtor").

Confirmation.—Executors, making up title as such, must first be confirmed, but it is not necessary to refer to the confirmation.

SECTION XXXVI

POSTPONEMENT AND EXTINCTION OF HERITABLE SECURITIES

POSTPONEMENT

This matter has already been so far dealt with on p. 422, but there are certain further points which require to be mentioned.

Consent of Obligants.—Before any postponement is granted there should be evidence of consent on the part of all the obligants for the debt. This applies most obviously when any of them are cautioners, but it holds equally in the case of all joint, or joint and several, obligants. Further, though there is only one obligant, it may in certain cases be necessary to have his consent, e.g. when he has sold the property but it is wished to keep up his liability.

Catholic Security.—If the debtor is insolvent, the holder of a catholic security should grant no postponement, nor, in fact, any deed which may prejudice his claim and ranking over any part of his securities.²

Effect as regards other Bonds.—In one sense a postponement operates only in favour of the favoured security. It neither expresses nor implies any contract with the holder of any other security, and no third security-holder could prevent the effect of the postponement being discharged. If there are three bonds held by A., B., and C., each for £1000, and ranking in the order stated, and if A.'s bond is then postponed to C.'s, but not to B.'s, and if the property is sold for £1000, B. gets nothing, for the postponement in favour of C. implies none in favour of B. But in this same case the postponement must receive effect as between the parties to it, namely, A. and C., so that A. shall lose all before C. shall lose anything, and therefore, while A. will draw the whole £1000 as against B., he will require to hand it all over to C.

Again, suppose that in the same case the property sold for £2500, A., as against B., draws £1000, B. draws £1000, and C. draws the balance of £500. But in virtue of the postponement as between A. and C., the former must hand over £500 to the latter, so that the ultimate

¹ See p. 547.
² Morton v. Liddell, 1871, 10 M. 292.

ranking is: A. £500, B. £1000, C. £1000. Thus A. loses though the property brings enough to have paid both him and C., to whom alone he had postponed his security. These instances go to show, in short, that a postponement has no effect upon third parties' securities, but that the existence of the latter securities may have a serious bearing on the effect of the postponement. The fact, of course, is that when a deed of postponement is granted, it is on the assumption that the favoured security ranks immediately after that held by the granter of the postponement: but it might very easily turn out that this was not so, and it is thought that no warrandice to that effect could be implied against the acceptor of the postponement. There are two remedies, namely, (1) a search; (2) a qualification of the postponement to the effect that the receiver warrants that his security ranks immediately after the postponem's, and that if it should be found that that is not so, the postponement is to be null and void.

Warrant of Registration.—It is thought to be clear that the warrant ought to be on behalf of the creditor preferred by the deed, but it is also thought that a warrant on behalf of the debtor only would be sufficient. If thought proper, there may be two warrants, one on behalf of each.

DEED OF POSTPONEMENT OF AN ORDINARY HERITABLE SECURITY

I, A., considering that I hold a bond and disposition in security for the , granted by B. in my favour, dated sum of £ recorded in the division of the general register of sasines for the county of , over All and Whole [very brief specification without uny detailed description, e.g. the lands of X. in the county of Y., or the house 1 King Street in the city and county of Y., and pertinents]: Further considering that C. holds a bond and disposition in security for £ over the same subjects, granted by the said B. in his favour, dated , and recorded in the said division of the general register of sasines on and that I have been requested and have agreed to postpone my security to the said security in favour of the said C.: Therefore I hereby postpone the security and preference held by me over the said subjects, in virtue of the said bond and disposition in security in my favour, to the security and preference held by the said C. over the said subjects in virtue of the said bond and disposition in security in his favour: And I agree and declare that the said last mentioned bond and disposition in security, and the whole sums, principal, interest, penalties, and others due and to become due thereunder, shall have the same preference and priority over the said bond and disposition in security in my favour, and the whole sums, principal, interest, penalties, and others due and to become due thereunder, as if the said bond and disposition in security in favour of the said C. had been duly recorded in the said division of the said register prior to the recording of the said bond and disposition in security in my favour: Reserving always the full force and effect of the said bond and disposition in security in my favour in all other respects: And I warrant these presents absolutely to the said B. and C.—In witness whereof.

CLAUSE OF POSTPONEMENT INCORPORATED IN NEW SECURITY

And further, I, C., considering that I hold a bond and disposition in over the said subjects, granted by the said A. in my security for £ , and recorded in the said division of the said register favour, dated : That the said B. [new lender] has agreed to grant the said on condition of my granting the postponement hereinafter loan of £ written, and that I have agreed to do so: Therefore I hereby postpone the security and preference held by me over the said subjects, in virtue of the said bond and disposition in security in my favour, to the security and preference held by the said B. over the same subjects in virtue of the foregoing bond and disposition in security: And I agree and declare that the foregoing bond and disposition in security, and the whole sums, principal, interest, penalties, and others due and to become due thereunder, shall have the same preference and priority over the said bond and disposition in security in my favour, and the whole sums, principal, interest, penalties, and others due and to become due thereunder, as if these presents had been duly recorded in the said division of the said register prior to the recording of the said bond and disposition in security in my favour: Reserving always the full force and effect of the said bond and disposition in security in my favour in all other respects: And I warrant this postponement absolutely to the said A. and B.: And we consent to registration for preservation and execution.—In witness whereof,

DEED OF POSTPONEMENT OF A BOND AND DISPOSITION AND ASSIGNATION IN SECURITY OVER (1) HERITAGE, AND (2) A LIFE POLICY

I, A., considering that I hold a bond and disposition and assignation in security for the sum of £ , granted by B. in my favour, dated and recorded in the division of the general register of sasines for the county of , and intimated to the X. Insurance Company , secured over, (first) [subjects, see p. 587], and (second) a policy of assurance granted by the said X. Insurance Company in favour of the said B. on his own life for the sum of £ , numbered Further considering that C. holds a bond and disposition and assignation in security for the sum of £ , granted by the said B. in his favour, , and recorded in the said division of the said register on dated and intimated to the said X. Insurance Company on , secured over the said subjects and life policy; and that I have been requested and have agreed to postpone my security to the said security in favour of the said C.; Therefore I hereby postpone the security and preference held by me over the said subjects and life policy, in virtue of the said bond and disposition and assignation in security in my favour, to the security and preference held by the

said C. over the said subjects and policy, in virtue of the said bond and disposition and assignation in security in his favour: And I agree and declare that the said last mentioned bond and disposition and assignation in security, and the whole sums, principal, interest, premiums, and extra or additional premiums, yearly additional sums, interest thereon respectively, penalties and others due and to become due thereunder, shall have the same preference and priority over the said bond and disposition and assignation in security in my favour, and the whole sums, principal, interest, premiums, and extra or additional premiums, yearly additional sums, interest thereon respectively, penalties and others due and to become due thereunder, as if the said bond and disposition and assignation in security in favour of the said C. had been duly recorded in the said division of the said register, and duly intimated to the said X. Insurance Company, prior to the recording and intimation of the said bond and disposition and assignation in security in my favour: Reserving always the full force and effect of the said bond and disposition and assignation in security in my favour in all other respects: And I warrant these presents absolutely to the said B. and C.—In witness whereof.

CONSENT BY ANNUITANT POSTPONING PRESENT AND FUTURE ARREARS OF ANNUITY

And whereas I, A., am infeft in the said subjects in security of an annuity of £ for my lifetime under a bond of annuity granted by in my favour, dated , and recorded , and the same is at present in arrear, and further arrears thereof may arise, and it has been stipulated as a condition of the present loan that I should grant the following limited postponement, which I have agreed to do: Therefore I hereby agree and declare that, in competition with the said [lender] and his foresaids as in right of these presents, neither I nor anyone deriving right from me will make any claim in respect of the said annuity except only for the annuity of the year in which the claim is made and intimated to the said [lender] or his foresaids, that is, for the period from the term of Whitsunday previous to such claim, and for the annuities to become due thereafter: And quoad ultra I postpone the said annuity to these presents, reserving the same as against all other persons and to all other effects: And we consent to registration hereof for preservation and execution.—In witness whereof.

Note.—This may be inserted immediately before the consent to registration. Or it may take the form of a separate deed, which will be easily adapted. If incorporated in the bond, it will not affect the stamp duty—otherwise 10s. If the deed is separate, two warrants (see p. 587).

RESTRICTION

The remarks on p. 586 as to cases in which the creditor may not be in safety to grant a postponement apply also to any restriction. As to restricting entail securities for family provisions, see p. 757.

Apportionment of Feu-duty.—If the part released was subject to a cumulo feu-duty along with the part retained in the security, the

consent of the creditor should be taken to the allocation or apportionment of feu-duty which will no doubt be made either by the superior or at least in the purchaser's disposition. The creditor's interest is obvious. The clause may be introduced immediately before the testing clause or before the deduction of title if any. It may run—

And I approve of the apportionment on the subjects hereby [absolutely] disburdened of the sum of \pounds per annum, with corresponding duplicand, part of the cumulo feu-duty of \pounds per annum and duplicands payable for the whole subjects contained in the said bond and disposition in security.

1. Where the Property released is articulately described in the Bond

- I, A., considering that B. has requested me to release the subjects hereinafter described or referred to from the security hereinafter specified, but without any consideration having been paid to me therefor, do hereby declare to be redeemed and disburdened of the security constituted by a bond and disposition in security, dated , and recorded in the division of the general register of sasines for the county of on , for the sum of \pounds , granted by the said B. in my favour, All and Whole the house 1 King Street in the city and county of Edinburgh, with the solum thereof, ground attached, and pertinents, being the subjects particularly described in the first place in the said bond and disposition in security: And I restrict the security constituted by the said bond and disposition in security to the subjects therein contained other than those hereby disburdened [if necessary, deduce title briefty].—In witness whereof.
- 2. Where the Property disburdened is not articulately described in the Bond, Part of Debt has formerly been paid, and this is not the first Restriction

[As in previous form, down to amount of bond, and proceed] for the sum of £ , now reduced to £ , granted by the said B. in my favour, All and Whole the following houses in the tenement forming 1, 2, and 3 X. Street in the city and county of Edinburgh, which has been erected on the area of ground disponed in the said bond and disposition in security, namely, (first) the main-door house 1 X. Street; (second) the eastmost house on the first flat above the street flat, entering by the common passage and stair 2 X. Street; and (third) the westmost house on the second flat above the street flat, entering by the said common passage and stair, together with [specify briefly common rights, e.g. solum, green, etc.]: And I restrict the security constituted by the said bond and disposition in security to the subjects therein contained other than those hereby and formerly disburdened [deduction of title if necessary].—In witness whereof.

3. WHERE PART DEBT IS PAID AT SAME TIME.—See p. 600.

REDEMPTION

Who may redeem ?—Under sec. 119 of the 1868 Act, the power is available to "the granter" of the security, which includes his "heirs,

successors and representatives." The successor may be a successor in the obligation or in the property, or in both; but in any case he will be entitled to redeem. A postponed bondholder is entitled to give notice for redemption of prior securities. In the decided cases, there were specialties, but according to Lord Kyllachy in *Reis* the rule holds even apart from specialties. The postponed creditor may require an assignation in lieu of a discharge unless the prior creditors have some legitimate interest to object. But of course a postponed creditor, like any other redeemer, must comply with the statutory rules as to term of payment and period of notice, and these are matters which require attention when selling under a postponed bond.

Conditions.—The creditor is entitled to require that the repayment shall be (a) at the term of payment specified in the bond, or at a term of Whitsunday or Martinmas thereafter; (b) after three months' notice; and (c) full, not partial. But if the debt has been split up by partial assignations, whether with or without the debtor's consent, of course this last rule does not prevent the debtor forcing any partial creditor to accept repayment of his part of the debt though the other parts, due to other creditors, are left unpaid; for in that case the payment is full payment to that creditor. But, again, if the same creditor has obtained more than one partial assignation of parts of the same bond, whether these parts do or do not make up the whole bond, he is entitled to require full payment of what is due to him under the bond before he accepts any part of it. The case is different when the creditor holds two or more bonds, or parts of two or more bonds: in that case the debtor is entitled to compel acceptance of what is due under each bond apart from the others; and by his notice he may appropriate the payment as between the different bonds. But of course the creditor has his remedy by proceeding under the other bond or bonds if he is not fettered by any time-bargain regarding them.

Notice.—A notice is given by the debtor or his procurator in presence of a notary and two witnesses. It is given to the creditor personally or at his dwelling-place, or if he be furth of Scotland, edictally. There is no statutory form (see p. 593).

To whom?—It is not (as in the contrary case of sale by the creditor) provided that the notice is effectual though given to one in pupillarity or minority or subject to any legal incapacity. In these cases, unless guardians are appointed, the debtor will not be able to obtain a discharge when he comes to pay; nor is it at all clear that he will be in a position to proceed, under sec. 49 of the 1874 Act, by notarial certificate as referred to below, for it is limited to the case

creditor in possession charging higher interest and retaining all rents).

¹ Adair's Trs. v. Rankin, 1895, 22 R. 975 (postponed creditor selling); Reis v. Mackay, 1899, 6 S. L. T. No. 411 (prior

where the debtor has "exercised the power or right of redemption," i.e. has duly done so, which is not the case if the notices are defective by reason of nonage or incapacity. In these cases, therefore, it will be better to have guardians appointed; or alternatively, according to circumstances, to obtain the appointment of a judicial factor on the heritable security, with power to complete a title thereto; in either case before the notice is given. On the other hand, the mere fact that the creditor has not completed a title to the security creates no difficulty if his right and capacity are clear.

Consignation.—The 1868 Act (s. 119) provided for consignation in case of the creditor's "absence or refusal to receive" the debt. The consignation is directed to be

in the bank specified in the security if any bank shall be so specified, and if not, then in one or other of the banks in Scotland, incorporated by Act of Parliament or Royal Charter having an office or branch at the place of payment.

It did not provide in whose name the consignation was to be made; nor did it provide any machinery for clearing the record. The 1874 Act contains supplementary provisions (s. 49). The case dealt with is "where, from the death or absence of the creditor or any other cause, the debtor cannot obtain a discharge." He is to consign principal and interest, and then he expedes a notarial certificate (see below), which, being recorded, clears the record. It is not stated in which bank the consignation is to be made, but the rules of the 1868 Act, above quoted, will be followed. Nor is it stated in the body of the Act in whose name the consignation is to be made. But this is cleared up in the form of notarial certificate (Sched L, No. 2), from which it appears that the consignation is to be in name of "the creditor in the said bond and disposition in security." This is all very well when there is no doubt about who is the creditor, but it is clear that it will not cover all cases in which from any cause "the debtor cannot obtain a discharge." Take, for instance, the case of a dispute as to the ownership of the debt. In whose name is the debtor to consign? Is there any warrant for his consigning in the joint names of both or all the parties who claim to be, or who, he fears, may be, entitled to the money? His better course would appear to be to bring a multiplepoinding, with a conclusion that on consignation in the name of the Accountant of Court he is entitled to exoneration and to a decree clearing the record. On the other hand the statutory procedure quite meets the case of the creditor having merely failed to complete his title to the security, his right being clear. It is not stated what the debtor is to do with the consignation receipt, but apparently he would be bound to hand it over to the creditor in exchange for a mere acknowledgment. The consignation receipt will of course earmark

A.

the money as "being the amount, principal and interest, due under" the bond, which will be briefly specified.

It will be observed that the statute does not contemplate the case of the payer being entitled to an assignation in lieu of a discharge. This is referred to on p. 546, supra.

Notarial Certificate.—The schedule states that the principal party (in the Act (s. 49) he is called "the debtor," and in the schedule "the proprietor of the lands") appears, which might be held to require personal appearance. It is not required that the consignation receipt should be produced.

SCHEDULE OF PREMONITION BY DEBTOR

I, A., procurator for B., do hereby give notice to you, C., that the said B. is to exercise, at the term of next, 19, the power of redemption under the bond and disposition in security for the sum of £, granted by the said B. [or by X] in favour of you, the said C. [or of Y], dated, and recorded in the division of the general register of sasines for the county of on: This I do at on the day of, before and in presence of D., notary public, and E. and F., witnesses to the premises, called and required and hereto with me subscribing.

E., witness. F., witness.

A copy will be certified by the notary on a ls. stamp. The certificate ought to be holograph.

CERTIFICATE OF CONSIGNATION BY DEBTOR

I, A., notary public, do hereby certify that B., proprietor of [name the subjects], and others in the county of , being the subjects contained in the bond and disposition in security for £ after mentioned, has appeared before me and represented that he did on the day of consign in the bank at the sum of , being the whole interest due under the said , with £ bond and disposition in security, in name of C., the creditor in the said bond and disposition in security, which consignation was made in virtue of the power of redemption reserved in the said bond and disposition in security which was granted by the said B [or by X, then proprietor of the said subjects] in favour of the said C. [or Y., the original creditor in the said security], and is , and recorded in the division of the general register of sasines : And the said consignation for the county of was rendered necessary by the refusal of the said C. to receive the said sum of and interest thereon for by the absence of the said C., or otherwise as the case may be, stating the reason why discharge could not be obtained], notwithstanding that the requisite notice of redemption was given to him: And I make this certificate in terms of the Conveyancing (Scotland) Act, 1874.—In witness whereof.

DISCHARGE

This is pre-eminently a case in which advantage ought to be taken of every means of brevity. The guiding principle is that the security is but the creature of the debt, and that if the debt be discharged there can be no security for the sufficient reason that nothing then remains to be secured.¹

Payment.—The fact of payment should be categorically stated, and also the person by whom the payment has been made. This last is a matter of great importance, in which it is easy, by inaccuracy or indefiniteness, to create confusion and trouble. Assuming that there is an acknowledgment of repayment, it would appear that even in the case of a heritable security words of discharge are unnecessary.²

Description.—It is too common a practice simply to copy in the description as contained in the bond. This is quite indefensible. Strictly, no "description" at all is necessary. No doubt the statutory form (1868 Act, Sched. NN) says "describe the lands." But that must be taken along with the statutory provisions for references, and particularly those contained in the 1874 Act. And in this connection it is to be noted that the statutory form of discharge contains a reference, namely, to the bond itself, in the words "all as specified and described in the said bond and disposition in security, dated and recorded as aforesaid." There is no doubt that the bond is a "deed . . . relating thereto," that is, to the property (1874 Act, s. 61). But of course this will not do unless the property has been "particularly described" in the bond. This does not mean that the bond is not available for reference in the discharge if the bond itself contains a reference. The question is, reference or no reference, does the bond in itself and apart from the reference, if any, identify the property? If it does, then a reference to the bond in the discharge will be a good statutory reference. Of course the county (or in the case of burgage property, the burgh and county) must be specified. But even in that case it will probably be desired to have a statement of some sort as to what the property actually is. Any statement of this kind should, however, be of the shortest. This holds equally though, for the reason above referred to, the bond is not available for a statutory reference. Suppose the bond describes the property as "the lands of X. in the county of Y., as particularly described in" a certain deed. It is quite sufficient in the discharge to disburden-

the lands of X. in the county of Y., being the whole subjects disponed, and all as specified and described in the said bond and disposition in security dated and recorded as aforesaid.

¹ Cameron v. Williamson, 1895, 22 R.

² Niven v. Ayr Burgh, 1899, 1 F. 400
(this was the case of a personal debenture).



Again if the bond contains a great mass of description with little definite point about it, it is far better to discard it altogether, and get some very brief and popular description of the property, such as

the tenement forming Nos. 1 to 5 inclusive of X. Street in the city and county of Y., with *solum*, ground attached, and pertinents, and others, being the whole subjects disponed in [etc., as before].

Part previously Disburdened.—Where part of the property has already been released from the security, it is, in the ordinary case, quite superfluous to insert in the final discharge any formal exception of that part. It is quite sufficient to say:

And I declare to be redeemed and disburdened thereof, and of the infeftment following thereon (so far as not already disburdened), All and Whole.

This avoids a long description of the excepted part or parts, and further lengthening of the deed by specification of the prior deeds of release. But there are two exceptions to this rule: (1) The first is where the part already disburdened is *separately* described in the bond. In that case, of course, it will *not* be inserted in the final discharge, and in order to explain the omission, it may be thought desirable to say:

Declaring that the subjects in the second place described in the said bond and disposition in security have already been disburdened thereof, conform to partial discharge [or otherwise] by me recorded in the said division, etc.

(2) The second case is where the creditor who is granting the final discharge acquired right to the bond after the partial release had been granted. In this case it is right that the creditor should protect himself from any claim of warrandice or otherwise, by making it clear and express what he does disburden and what he does not.

Reference to Burdens.—No reference to any burdens, restrictions, or other conditions in the title should ever be carried into a discharge. The practice is uniform to this effect. No doubt, if the feu-charter contains an order to refer to the conditions of the title in all subsequent "conveyances or other deeds of or relating to the lands" under pain of nullity, it would appear as if this extended to reach a discharge. But it is clear that the superior has no interest to enforce it, and would not be allowed to do so.

Deduction of Title.—This is statutory, and must not be omitted, but it should be curtailed as much as possible, e.g. (1) any attempt to state the contents or purport of the deeds is out of place; (2) in the case of deeds granted by or to trustees it is quite sufficient to name and design the first of them, and say "and others," and then state their trust capacity, and in doing so it is sufficient to say, e.g., the testamentary trustees of X., naming and designing the testator, without taking up space by giving the particulars of the will.

Searches.—See p. 285.

Creditor's Power and Title.—Title generally.—It has been recently laid down that the debtor is not entitled to require anything more than that the granter of the discharge shall produce a clear title to the debt and that that title shall be set out in the discharge. According to this view the debtor is not entitled to require the completion of title by notarial instrument, much less to state formal objections to the title, if any, which may have been completed to the security as distinct from the debt. The principle is that stated above, namely, that the security necessarily falls with the debt, and that a discharge in the terms above indicated will formally clear the record. What is stated below in individual cases must be read as subject to this general note. But observe that this was not exactly and in terms the point in Macrae's case.

Pupils.—The father, as administrator-in-law, assuming that he is solvent, and all tutors, may grant discharges without special powers,² and the power covers the granting of an assignation in lieu of a discharge.³ Under the Guardianship of Infants Act, 1886, the mother "has apparently just as good a right to grant a discharge as the father would have had, had he been alive." ⁴

Minors.—The Court have refused to compel a debtor to pay to a minor without curators, or to a curator ad litem. But a minor with no curators may by himself alone give good receipts for income. If the minor has curators, any discharge by him without their consent is bad except in so far as the money may actually have been applied in rem versum. It accordingly follows that it can never be safe to take a minor's discharge extrajudicially, not only because of the expressions of opinion in Kirkman's case to the effect that even full payment would not be a protection "unless the money were to be afterwards profitably employed for the minor's behoof," but also because the debtor cannot know whether there are or are not curators. Curators may concur without special powers.

Curators bonis do not require special power,8 nor do they require to make up titles in their own names.9 This last case covers all judicial factors in the position of guardians to wards, but it expressly does not extend to include judicial factors upon lapsed trusts and similar officers, the distinction being that the former merely exercise powers on behalf of another living person, while the latter hold the title in their own persons and act as principals. A curator bonis may discharge a bond and disposition in security taken in name of a former curator bonis without

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<sup>1</sup> Per Lord Kyllachy in Macrae, etc. v. Gregory, etc., 1903, 11 S. L. T. No. 55.
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² Cattanach v. Thom's Exrs., 1858, 20 D. 1206; Graham v. E. March, 1735, Mor. 16339.

³ Fraser, P. & C., 252.

⁴ L. P. Inglis in Jack v. N. B. Ry. Co., 1886, 14 R. 263.

⁵ Kirkman v. Pym, 1782, Mor. 8977.

⁶ Pratt v. Knox, 1855, 17 D. 1006.

⁷ Cf. Harkness v. Graham, 1833, 11 S. 760.

⁸ Wills, Petr., 1879, 6 R. 1096.

⁹ Scott, Petr., 1856, 18 D. 624.

making up any title either in his own name or in name of the ward.¹ But as to the special case of a *curator bonis* to a minor *capax*, see p. 293.

Married Women.—If the case falls within any of those mentioned on p. 294, the wife will be entitled to grant a discharge (or assignation in lieu of discharge) without her husband's consent. A statement in the bond that the money belongs to the wife free from the jus mariti and right of administration, if confirmed by the husband's signature to the bond (without which the debtor should not allow the statement to go into the bond), will entitle the debtor and assignees to rely upon its accuracy in point of fact, and will entitle them (and will bind the debtor) to accept discharges or assignations signed by the wife only, without her husband's consent. At the same time it is usual for the husband to concur, and this practice should be followed if possible. the statement in the bond as to the exclusion of the husband's rights is not subscribed to by him, it does not appear that an assignee would be entitled to rely upon it. Where the debt is being paid in full there appears little necessity for a ratification, seeing that in exchange for full payment the wife is bound to grant the deed.

Liferenter and fiar must both concur.

Fiars in Succession.—If the substitute is to grant the discharge, he must complete title, which he may do by special service, or general service and notarial instrument.²

Executors must be confirmed and must complete title. But if they are also general disponees, the condition as to confirmation does not concern the debtor or any assignee.

The position of matters which arises when a sole or last surviving executor dies without having uplifted or assigned an heritable security forming part of the estate has been considerably altered, and to a certain extent reversed, by the Executors (Scotland) Act, 1900.³ For the present purpose the question may not be who is the executor in succession, for the executor-nominate of a sole or last surviving executor-nominate is authorised to recover the funds, which involves granting a discharge or assignation in lieu of a discharge, although he is debarred from carrying on the administration of the estate of the first testator.⁴ On the other hand the executor (whether nominate or dative) of an executor-dative has no standing at all,⁵ contrary to what was previously understood to be the law.

Trustees.—Contrary to what was stated in the first edition of this work, it has been decided that when a bond is held by say three trustees, of whom A. and B. have a completed title by infeftment, and C. is a subsequently assumed trustee without infeftment, a discharge signed by A. and C. only is sufficient.⁶

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<sup>1</sup> Keith's c.b., Petr., 1893, 30 S. L. R. 621. <sup>5</sup> Sec. 2
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² Hare, Petr., 1889, 17 R. 105.
⁶ Macrae, etc. v.

^{3 63 &}amp; 64 Vict. c. 55.

⁶ Macrae, etc. v. Gregory, etc., 1903, 11 S. L. T. No. 55.

⁴ Sec. 6.

Trustees in sequestration grant the discharge in their own name, with consent of the commissioners. They require to complete no title.¹

Trustees in Cessio.—As to whether the decree of cessio by itself alone is a warrant for a notarial instrument without a disposition omnium bonorum, see p. 570. The expense of a disposition and notarial instrument may be obviated by the concurrence of the debtor under the cessio, i.e. the heritable creditor.

Liquidators.—See pp. 382, 572.

Factors, Commissioners, and Attorneys.—A clear power to uplift capital sums and investments will clearly entitle the attorney to discharge (or assign) a heritable security, the security being purely ancillary to the debt.

Stamp Duty on Partial Discharge.—Any partial discharge, no matter how large or how small may be the bonds, or the payment on account, is strictly chargeable with a fixed duty of 10s. But when the original sum in the bond is under £2000, any partial discharge is allowed to pass with the stamp which would be sufficient on a total discharge.²

Examples.—Bond £5000, partial discharge for £500, stamp 10s.

Bond £5000, partial discharge for £4000, stamp 10s.

Bond £2000, any partial discharge, stamp 10s.

Bond £1000, any partial discharge 5s.

Bond £100, any partial discharge 6d.

Final Discharge.—In no case is any credit given for stamps paid on partial discharges. The final discharge must always be stamped with 6d. per cent. on the total original amount of the debt.

If, when the bond is finally extinguished, it is held by different creditors to partial extents respectively, then, if they concur in one deed, it is plain that the one stamp duty only is payable, namely 6d. per cent. on the total original amount of the bond, without credit for stamps on partial discharges, and without any increase for fractions which may occur in the different creditors' holdings.

If, on the other hand, each partial creditor gives a separate discharge, one of the deeds should be stamped as last mentioned, and the others should each bear 10s., unless the total original amount of the loan was under £2000, in which case each of the deeds should bear 6d. per cent. of the total original debt.

Examples.

Bond for £30,000; already partially discharged to extent of £10,000; balance of £20,000 held by A. and B., £10,000 each. They grant separate discharges: one should bear £7, 10s. (6d. per cent. on £30,000) and the other 10s.

Bond for £1000; already partially discharged to extent of £500;

² Stamp Act, 1891 (Mortgage No. 5); 232.

balance of £500 held by A. and B., £250 each. Separate discharges; each should be 5s., being 6d. per cent. on £1000.

The law and practice on these points are the same in the case of deeds of restriction, and the incorporating of a deed of restriction with a partial discharge does not increase the stamp.

DISCHARGE IN SIMPLEST FORM

I, A., in consideration of the sum of £1000 now paid to me by B., do hereby discharge a bond and disposition in security, dated the , and recorded in the division of the general register of sasines for the county of on the , both days of , for the sum of £1000 granted by the said B. in my favour, and all interest due thereon: And I declare to be redeemed and disburdened thereof, and of the infeftment following thereon, All and Whole that tenement forming Nos. 1 to 5 inclusive of King Street [name town] in the county of , with the solum, ground attached, and pertinents, all as specified and described in the said bond and disposition in security, dated and recorded as aforesaid.—In witness whereof.

DISCHARGE ON PAYMENT BY INSTALMENTS

I, A., in consideration of the sum of £1000 paid to me in four instalments of £250 each, at the term of Whitsunday in each of the years 19, 19, 19, and 19, the last of the said instalments being paid to me on the delivery of these presents, do hereby discharge, etc.

Or,

We, the X. Building Society, incorporated under the Building Societies Act, 1874, and having our chief office at \star , in consideration of the sum of £1000 paid to us in fortnightly instalments over a course of years, do hereby, etc.

PARTIAL DISCHARGE

I, A., in consideration of the sum of £500 now paid to me by B., do hereby discharge (but only to the extent after specified) a bond and disposition in security, dated , and recorded in the division of the general register of sasines for the county of , on , for the sum of £1000 granted by the said B. in my favour: But that only to the extent of the principal sum of £500 now paid to me as aforesaid, and interest and penalties corresponding thereto: And I declare to be redeemed and disburdened of the said bond and disposition in security, and of the infeftment following thereon, but only to the extent foresaid, All and Whole [as above].

DISCHARGE OF (1) ONE BOND IN FULL, AND (2) ANOTHER TO A PARTIAL EXTENT

I, A., in consideration of the sum of £750 now paid to me by B., do hereby discharge (first) a bond and disposition in security, dated, and recorded in the division of the general register of sasines for the county

of , for the sum of £500 granted by the said B. in my favour, and all interest due thereon, and that absolutely and to the full extent of the whole sums therein contained; and (second) a bond and disposition in security, dated , and recorded in the said division of the said register , for the sum of £500, granted by the said B. in my favour, but that only to the extent of the sum of £250, being part of the said principal sum of £500 therein contained, with the interest of the said sum of £250 and penalties corresponding thereto: And I declare to be redeemed and disburdened of the said first mentioned bond and disposition in security, and of the infeftment following thereon, absolutely as aforesaid, and also of the said second mentioned bond and disposition in security, and of the infeftment following thereon, but that only to the extent foresaid, All and Whole as specified and described in the said bonds and dispositions in security, dated and recorded respectively as aforesaid.—In witness whereof.

PARTIAL DISCHARGE AND DEED OF RESTRICTION

I, A, in consideration of the sum of £500 now paid to me by B., do hereby discharge (but only to the extent after mentioned) a bond and disposition in security, dated , and recorded in the division of the general register of sasines for the county of \mathbf{on} , for the sum of £1000, granted by the said B. in my favour: But that only to the extent of the principal sum of £500 now paid to me as aforesaid, with the interest thereof and penalties corresponding thereto: And I declare to be redeemed and disburdened of the said bond and disposition in security, and of the infeftment following thereon, but only to the extent foresaid, All and Whole that tenement Nos. 1, 3, and 5 X. Street in the town of Y. and county of Z., with the solum thereof, ground attached, and pertinents, all as specified and described in the said bond and disposition in security, but excepting always that part of the said tenement hereinafter absolutely disburdened: And further, seeing that it has been agreed that in consideration of the said payment I should release that part of the said tenement hereinafter described from the said security, Therefore I declare to be redeemed and disburdened of the said bond and disposition in security, and of the infeftment following thereon, and that absolutely and to the full extent of the whole sums, principal, interest, and penalties, contained in the said bond and disposition in security, and whole obligations therein contained, All and Whole those two houses forming the uppermost storey of the said tenement, and entering from the common stair No. 3 X. Street aforesaid, together with [specify briefly the common rights, such as to back green, etc.].—In witness whereof.

As to apportionment of feu-duty, see p. 589.

DISCHARGE OF THREE BONDS HELD BY SAME CREDITOR

I, A., in consideration of the sum of £1000 now paid to me by B., do hereby discharge the following bonds and dispositions in security granted by

the said B. in my favour, and all recorded in the division of the general register of sasines for the county of , namely, (first) a bond and dis-, and recorded on position in security for the sum of £500, dated , (second) a bond and disposition in security for the sum of £250, , and recorded on , and (third) a bond and disposition in security for the sum of £250, dated / , and recorded , and all interest due thereon respectively: And I declare to \mathbf{on} be redeemed and disburdened of the said bonds and dispositions in security and of the infeftments following thereon, All and Whole specified and described in the said bonds and dispositions in security, dated and recorded as aforesaid.—In witness whereof.

STAMP.—On cumulo sum = 5s.

DISCHARGE OF ONE BOND BY SEVERAL PARTIAL CREDITORS

We, the parties following, namely, (first) A., B., and C., the testamentary trustees of X., and (second) D., E., and F., the marriage-contract trustees of Y. and Z., his spouse: In consideration of (first) the sum of £550 paid to us, the said A., B., and C., as trustees foresaid, and (second) the sum of £450 paid to us, the said D., E., F., as trustees foresaid, both said payments being made by G., do hereby, but each for our respective interests only, discharge a bond and disposition in security, dated , and recorded in the division of the general register of sasines for the county of the sum of £1000 granted by the said G. in favour of us, the said A., B., and C., as trustees foresaid, and all interest due thereon: And we, but each for our respective interests only, declare to be redeemed and disburdened thereof, and of the infeftment following thereon, All and Whole as specified and described in the said bond and disposition in security, dated and recorded as aforesaid: To which bond and disposition in security we, the said D., E., F., as trustees foresaid, acquired and have right to the extent of the sum of £450 of principal, with corresponding consequents, conform to assignation granted by the said A., B., and C., as trustees foresaid, in our favour, dated , and recorded in the said division of the general .-In witness whereof. register of sasines on

DISCHARGE OF SEPARATE BONDS BY SEPARATE CREDITORS

We, the parties following, namely, (first) A. and B., the testamentary trustees of C., hereinafter called "the first parties," (second) D. and E., the testamentary trustees of F., hereinafter called "the second parties," and (third) G. and H., the trustees acting under the contract of marriage between I. and K., hereinafter called "the third parties": In consideration of the following sums now paid by L., namely, (first) to the first parties the sum of £2000, (second) to the second parties the sum of £1500, and (third) to the third parties the sum of £500, do hereby discharge the following bonds

and dispositions in security, all granted by the said L., and all recorded at length in the division of the general register of sasines for the county of , and by memorandum in the division of the said register for , and all interest due thereon; That is to say, In the county of the first place, we, the first parties, do hereby discharge (first) a bond and and recorded on , for the sum disposition in security, dated of £1000 in our favour, and (second) a bond and disposition in security, , for the sum of £1000 in our and recorded on favour: In the second place, we, the second parties, do hereby discharge a bond and disposition in security, dated and recorded on for the sum of £1000 in our favour: In the third place, we, the second and third parties, each for our own interest only, do hereby discharge a bond and disposition in security, dated and recorded on sum of £1000 in favour of us, the second parties, to which we, the third parties, acquired and have right to the extent of £500 of principal and corresponding consequents as after mentioned: And in the fourth place, we all, each for our own interest only, do hereby declare to be redeemed and disburdened of the said bonds and dispositions in security, and of the infeftments following thereon, (first) All and Whole , and (second) , all as specified and described in the said bonds All and Whole and dispositions in security, dated and recorded as aforesaid: To which last mentioned bond and disposition in security we, the third parties, acquired and have right to the extent foresaid, conform to assignation by the second , and recorded at length in the parties in our favour, dated division of the general register of sasines for the county of by memorandum in the division of the said register for the county of .-In witness whereof.

DISCHARGE OF (1) BOND AND DISPOSITION IN SECURITY, AND (2) SEPARATE DISPOSITION IN SECURITY

I, A., in consideration of the sum of £1000 now paid to me by B., do hereby discharge a bond and disposition in security, dated recorded in the division of the general register of sasines for the county of , for the sum of £1000, granted by the said B. in my favour, and all interest due thereon: And I declare to be redeemed and disburdened thereof, and of the infeftment following thereon, All and Whole , all as specified and described in the said bond and disposition in security, dated and recorded as aforesaid: And further, I declare to be redeemed and disburdened of the security constituted by a disposition in further security, dated , and recorded in the said division of the , granted by the said B. in my favour, and of said register on the said bond and disposition in security so far as affecting the same, and of the infeftments following thereon respectively, All and Whole all as specified and described in the said disposition in further security, dated and recorded as aforesaid.—In witness whereof.

DISCHARGE OF PERSONAL OBLIGATION OF ORIGINAL DEBTOR, WHERE A BOND OF CORROBORATION HAS BEEN GRANTED

I, A., considering that I hold a bond and disposition in security, dated , and recorded in the division of the general register, of sasines for the county of Edinburgh on , for the sum of £1000, granted. by B. in my favour over the house known as Ashgrove, Newington Road, Edinburgh, and pertinents: That the said B. has sold the said house to C., conform to disposition dated , and recorded in the said division of the said register on [X], under which it is declared that the said C. takes over the liability for the said debt [Y]: That the said C. has granted a bond of corroboration in my favour for the said sum of £1000 and consequents, and that I have been requested and have agreed to grant these presents: Therefore I do hereby discharge the said B. of the whole obligations contained in the said bond and disposition in security: But declaring that these presents shall nowise hurt or prejudice (first) the liability of the said C. for the personal obligations contained in the said bond and disposition in security, as transmitted against him under the said disposition; (second) the said bond of corroboration; and (third) the real security constituted by the said bond and disposition in security, or the powers and incidents attached thereto, all which shall remain in as full force and effect as if these presents had not been granted.—In witness whereof.

DISCHARGE OF PERSONAL OBLIGATION OF ORIGINAL DEBTOR, WHERE THE NEW PROPRIETOR HAS MERELY TAKEN OVER THE DEBT IN THE DISPOSITION

I, A. [as in previous form, to X], which disposition is signed also by the said C., and contains a clause by which he becomes directly liable to me for the obligations contained in the said bond and disposition in security, and that accordingly I have been requested and have agreed to grant these presents: Therefore I do hereby discharge the said B. of the whole obligations contained in the said bond and disposition in security: But declaring that these presents shall nowise hurt or prejudice the liability of the said C. for the said obligations or the real security constituted under the said bond and disposition in security, or the powers and incidents attached thereto, all which shall remain in as full force and effect as if these presents had not been granted.—In witness whereof.

THE SAME, WITH CONCURRENCE OF NEW PROPRIETOR

I, A. [as above, to Y], which by his signature hereto he hereby confirms: And that accordingly I have been requested and have agreed to grant these presents: Therefore I, with consent of the said C., testified by his signature hereto, do hereby discharge [as in preceding form].—In witness whereof.

THE SAME, WHERE PART OF DEBT IS REPAID

I, A., considering that I hold a bond and disposition in security, dated , and recorded in the division of the general register of sasines for , for the sum of £1000 granted by B. in the county of Perth on my favour over the main-door house 10 X. Street in the city and county of Perth, and pertinents: That the said B. has sold the said house to C., conform to disposition dated , and recorded in the said division of the said register on for intended to be recorded in the said division of the said register of even date with the recording of these presents], under which it is declared that the said C. takes over the liability for the said debt, but only to the extent of £750 of principal, with corresponding interest and other consequents: That the said C. has granted a bond of corroboration in my favour to the extent foresaid: That the said B. has paid to me the sum of £250, being the balance of the said principal sum of £1000: And that under these circumstances I have been requested not only to discharge the said bond and disposition in security to the extent of the said sum of £250 and consequents, but also to discharge the liability of the said B. for the sum of £750 still remaining due and consequents, and that I have agreed to do so: Therefore, in the first place, I do hereby discharge the said bond and disposition in security, but only to the extent of the said sum of £250 of principal, with interest thereof and penalties corresponding thereto: And I declare to be redeemed and disburdened thereof and of the infeftment following thereon, but only to the extent of the said sum of £250, with relative interest and penalties, All and Whole all as specified and described in the said bond and disposition in security, dated and recorded as aforesaid: And, in the second place, I do hereby discharge the said B. of the whole obligations contained in the said bond and disposition in security: But declaring that these presents shall nowise hurt or prejudice (first) the liability of the said C. for the personal obligations contained in the said bond and disposition in security as transmitted against him under the said disposition, but that only to the extent of the principal sum of £750 remaining due as aforesaid, interest thereof, penalties corresponding thereto, premiums of fire insurance, and expenses, (second) the said bond of corroboration, and (third) the real security constituted by the said bond and disposition in security, and the powers and incidents attached thereto, all which shall remain in as full force and effect as if these presents had not been granted, but only to the extent last aforesaid.—In witness whereof.

DISCHARGE OF (1) BOND AND DISPOSITION IN SECURITY, (2) CORROBORATIVE OBLIGATION, AND (3) BOND OF CORROBORATION.

I, A., in consideration of the sum of £1000 now paid to me by C., do hereby discharge (first) a bond and disposition in security, dated , and recorded in the division of the general register of sasines for the county of on , for the sum of £ , granted by B. in my favour, and all interest due thereon; (second) the liability for the said debt undertaken

by the said C., conform to disposition by the said B. in his favour, dated
, and recorded in the said division of the said register on
; and (third) a bond of corroboration, dated
, for the said sum of
£1000 granted by the said C. in my favour, and all interest due thereon: And
I declare to be redeemed and disburdened of the said bond and disposition in
security, and of the infeftment following thereon, and of the security for the
said debt in any manner of way, All and Whole
, all as specified and
described in the said bond and disposition in security, dated and recorded as
aforesaid.—In witness whereof.

DISCHARGE OF SECURITY OVER (1) HERITAGE, AND (2) LIFE POLICIES

I, A., in consideration of the sum of £1000 now paid to me by B., do hereby discharge a bond and disposition and assignation in security, dated , and recorded in the division of the general register of sasines for , for the sum of £1000, granted by the the county of said B. in my favour, and all interest due thereon, and all obligations therein contained: And I declare to be redeemed and disburdened thereof, and of the infeftment following thereon, All and Whole , all as specified and described in the said bond and disposition and assignation in security, dated and recorded as aforesaid: And I re-assign to the said B., and his executors and assignees, the policy of assurance granted by the X. Insurance Company in his favour on his own life for the sum of £500, No. , and dated -which policy was assigned by the said B. to me in security in the said bond and disposition and assignation in security: And further, seeing that the other policy of assurance hereinafter assigned was effected in my favour in connection with the arrangements for the said loan, and that now that the said loan has been repaid, it is incumbent on me to assign the said policy to the said B.: Therefore I do hereby assign to the said B. and his foresaids the policy of assurance granted by the said X. Insurance Company in my favour on the life of the said B. for the sum of £500, No. , and dated Together with all bonus additions (if any) accrued and which may accrue on the said two policies, and the whole benefits thereof, present and future: And I warrant the foregoing assignations from my own facts and deeds only.-In witness whereof.

DISCHARGE OF A SUB-SECURITY OVER A HERITABLE SECURITY

I, A., in consideration of the sum of £1000 now paid to me by B., do hereby discharge a bond and assignation in security, dated , and recorded in the division of the general register of sasines for the county of on , for the sum of £1000, granted by the said B. in my favour, and all interest due thereon: And I declare to be redeemed and disburdened of the said bond and assignation in security, and of the infeftment following thereon, and I hereby re-assign and re-dispone to the said B., and his executors and assignees whomsoever, a bond and disposition in security, dated

, and recorded as after mentioned, for the sum of £1200, granted by X. in favour of the said B., and all interest due thereon: and also All and Whole [describe or refer to the property contained in this last mentioned bond], all as specified and described in the said last mentioned bond and disposition in security, recorded in the division of the general register of sasines for the county of ________, and in the said bond and assignation in security dated and recorded as aforesaid.—In witness whereof.

DISCHARGE OF PRINCIPAL AND SUB-SECURITY IN ONE DEED

We, the parties following, namely, (first) A., and (second) B., considering that I, A., hold a bond and disposition in security, dated recorded in the division of the general register of sasines for the county of , for the sum of £1000, granted by C. in my favour: That I the said A. granted a bond and assignation in security in favour of me the said B. for the sum of £500, dated , and recorded in the said division of the said register on , by which the said bond and disposition in security for £1000 was assigned to me the said B. in security of the said sum of £500 and consequents: That it has now been arranged that both loans are to be repaid, and that the said C. shall pay the said sum of £1000 in two sums of £500 each, the one to be paid to me the said A., and the other to be paid to me the said B, and that the said C. has paid these sums accordingly: Therefore, in the first place, I the said A. do hereby discharge the said bond and disposition in security granted by the said C. in my favour, and all interest due thereon: In the second place, I the said B. do hereby discharge the said bond and assignation in security granted by the said A. in my favour, and all interest due thereon: And, in the third place, we both, for our respective rights and interests, declare to be redeemed and disburdened of the said bond and disposition in security and bond and assignation in security, and of the infeftments following thereon, All and Whole , all as specified and described in the said bond and disposition in security and bond and assignation in security, respectively dated and recorded as aforesaid.—In witness whereof.

DISCHARGE OF PERSONAL OBLIGATION OF ONE OF TWO OBLIGANTS, WITH CONSENT OF THE OTHER

I, A., considering that I hold a bond and disposition in security for the sum of £1000 granted by B. and C., jointly and severally, in my favour, dated , and recorded in the division of the general register of sasines for the county of on , and that the said B. has requested me to discharge him of his personal obligations therein contained, which, with consent of the said C., I have agreed to do: Therefore, with consent of the said C., testified by his signature hereto, I hereby discharge the said B. of the whole obligations contained in the said bond and disposition in security: But declaring that these presents shall nowise hurt or prejudice the liability of the said C. for the said sum of £1000, and whole other obligations contained in

the said bond and disposition in security, or the real security thereby constituted, all of which shall remain in as full force and effect as if these presents had not been granted.—In witness whereof.

C.'s consent and clear evidence of it are essential.

Even with C.'s consent it cannot be done unless the obligation of B. and C. in the bond is joint and several.

In B.'s interest the deed ought to be recorded.

DISCHARGE BY DEBTOR, WHO IS NOW ALSO CREDITOR, IN ORDER TO CLEAR THE RECORD

I, A., considering that I am infeft in (first) the lands of X. in the county of as absolute proprietor thereof, and (second) the bond and disposition in security over the said lands hereinafter specified: That under these circumstances the said bond and disposition in security has been extinguished confusione, but that in order formally to clear the records I have resolved to execute these presents: Therefore I do hereby discharge [as on p. 599].

If there is any right of partial relief or contribution available to A., which may be the case, e.g., if he has succeeded to the estate, and the bond embraces also another estate to which he has not succeeded, he will of course exhaust that right before he discharges the security.

DISCHARGE OF A SECURITY OVER A RECORDED LEASE

I, A., in consideration of the sum of £ now paid to me by B., discharge a bond and assignation in security for the sum of £ granted by the said B. in my favour, and which is dated , and recorded in the division of the general register of sasines for the county of and my title to which is an assignation granted by X. in my favour, dated , and recorded in the said register on]: And I declare to be redeemed and disburdened thereof a lease granted by Y. of All and Whole, in the parish of and county of , which lease is dated and recorded in the said register on .-In witness whereof.

SECTION XXXVII

LEASES 1

CAPACITIES AND POWERS

Pupils.—The powers of tutors were formerly very limited, but since 1884 they are entitled to exercise the same powers as trustees, as stated below. This includes the father as administrator-in-law and guardians under the 1886 Act.³

Minors.—Even with the consent of curators there is the possibility of challenge within the *quadriennium utile* on proof of damage. The Court will not give special power.⁴ Curators and curators *bonis* are within s. 2 of the 1884 Trust Act.⁵

Married Women.—See p. 294. When the jus mariti and right of administration are both in force the husband may, without his wife's consent, grant a lease for the period of his administration, which, however, it will be noted, is not necessarily co-extensive with the joint lives of the spouses, e.g. divorce.

Trustees.—(1) Lessors.—The Trusts Act, 1867, gives (s. 2) implied power, if not at variance with the terms or purposes of the trust, "to grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands and thirty-one years for minerals." Special power may be obtained from the Court or the beneficiaries (s. 3), with the like qualification, "to grant long leases of the heritable estate or any part of it." As to English trustees, see the case cited.

(2) Lesses.—The first point will be whether the trustees have any power to take a lease. If they are to do so, they should, if allowed by the landlord, expressly negative the idea of personal liability by contracting in the lease "as trustees only, and not personally or individually."

Burghs.—See p. 295.

Heirs of Entail in Possession.—(1) All the express powers

¹ Recorded leases are dealt with on pp. 354-358.

² Trusts Act, 1884, s. 2.

³ Guardianship of Infants Act, 1886, s. 12.

⁴ Wallacs v. W., 8 March, 1817, F. C.

⁵ Pattison's c.b., 1890, 17 R. 303.

⁶ Pender's Trs., 1903, 5 F. 504.

of leasing, if any, contained in the deed of entail will be available according to their terms. But even if the entail should prohibit the granting of a lease at a lower rent than is payable under the expiring tenancy, the rent may be reduced by the heir in possession at his own hand, provided the new rent be fair, without grassum or other consideration.¹

- (2) Without any Consent or Judicial Authority.—The Rosebery Act, 1836.² The terms and conditions are: thirty-one years for minerals, twenty-one years in all other cases. Fair rent at the period of letting must be obtained. No grassum. The home-farm, mansion-house, offices, garden, lawn, park, and policies not to be let beyond the life of the heir. The Act does not apply to trout fishings.³ It does apply to salmon fishings, but if trout be included with salmon in one lease, apparently the lease must be reduced in toto.³ Quære as to the effect of trout fishing being included in a farm lease.
- (3) For all other cases, see Feus (p. 200), the conditions for feuing and leasing being generally the same. But all applications under the Entail Acts for authority to lease may be made in the Sheriff Court.

If there be a current lease for not less than seven years, the heir in possession may during the last two years of the lease grant a new lease (to the same tenant?) to commence at the expiration of the current lease, and the new lease is valid though the heir should die before it commences.⁴ Except under this authority the rule is that the entry must be immediate.⁵

Liferenter.—Can let for his lifetime only, but the tenant is entitled to remain till the Whitsunday next after the lessor's death.

Heritable Creditor in Possession.—See p. 510.

Constitution

The rule is that there must be probative writing with these qualifications:

- 1. Verbal leases not exceeding one year are valid. As to longer verbal leases, it appears that if possession has not followed they are not good for even one year, but that if there be possession they bind for one year only.⁶
- 2. A verbal agreement for more than a year followed by rei interventus is sufficient. But the verbal agreement must be established by writ or oath or judicial admission, and the acts setting up rei interventus must be irreconcilable with a one year's lease, e.g. mere possession is insufficient.

¹ Entail Act, 1882, s. 8.

^{2 6 &}amp; 7 Will. IV. c. 42.

³ E. Galloway v. D. of Bedford, 1902, LF 851

⁴ Entail Act, 1882, s. 9.

⁵ Kerr v. Redhead, 1794, 3 Paton 309. Quoted in E. of Galloway v. D. of Bedford, 1902, 4 F. 851.

⁶ Cases in Rankine, Leases, 105.

⁷ Fowlie v. M^{*}Lean, 1868, 6 M. 254.

3. An improbative lease followed by rei interventus or possession is sufficient.¹

REAL RIGHT

The above relates to questions between the parties to the lease and their heirs or other representatives. But more is required to give a right which shall be effectual against singular successors of the granter. The tenant's security is founded on the Act 1449, c. 18, which does not apply to leases of shootings ² or trout fishings, ³ or perhaps land to be used for sporting purposes, *i.e.* exclusive use as in the case of a deer forest. ⁴ The requirements of the Act are:—

- 1. Granter's Infeftment,⁵ but accretion will operate on his subsequent infeftment or that of his heir if there be no impediment.
- 2. Probative Writing.—But even against a singular successor possession and rei interventus will set up a verbal agreement, and possession alone will set up an improbative written lease. Here also, of course, the verbal agreement must be proved by writ or oath. If the lease do not exceed one year it may be proved even against a singular successor by parole.
- 3. Possession.—But as to recording as equivalent to possession in certain cases, see p. 354. The possession must be after the date of the lease, and after the term of entry thereunder.
- 4. A Definite Ish.—The period need not be certain, e.g. it may be for a life or for lives. But it must not amount to a perpetuity, e.g. nineteen years, with an obligation to renew for the same period, and so on ad infinitum, though in that case the first nineteen years will be effectual. Whether there is any limit, e.g. whether one thousand years would be good, is not settled, and is now of less importance in view of the Registration of Leases Act, 1857.
- 5. Rent, which must not be illusory. Even in a question with the heir of the granter, it would appear that there must be a rent of some kind; and, on the other hand, the plea of illusory is not available even to a singular successor in the case of registered leases.

ENTRY

If parties enter into a contract for a lease complete in all its details, but without any statement of the commencement of the lease, the necessary reading of that contract is, that it is a lease from the time at which it is made, subject, of course, in the case of an agricultural lease, to those specialties which the sequence of cultivation of an arable subject makes necessary, and which, of course, affect both entry and ish.⁸

- ¹ Buchanan v. Harris and Sheldon, 1900, 2 F. 985.
 - ² Birkbeck v. Ross, 1865, 4 M. 272.
- ³ E. Galloway v. D. of Bedford, 1902, 4 F. 851.
 - 4 Ibid., L. O. at p. 857.

- ⁵ Ritchie v. Scott, 1899, 1 F. 728, at p. 736.
 - ⁶ Gibson v. Adams, 1875, 3 R. 144.
 - ⁷ Buchanan, supra.
- ⁸ Per Macdonald, L. J.-C., in *Christie* v. Fife Coal Co., 1899, 2 F. 192.

TRANSMISSION inter vivos—Assignation and Sub-letting

Implied Power.—Powers of assigning and sub-letting are implied in the following cases:—

- 1. Leases of extraordinary duration, e.g.
 - (1) thirty-seven years, and probably anything over twenty-one;
 - (2) leases for life;
 - (3) or for the lessee's term of office.
- 2. Leases of urban subjects (i.e. buildings as the principal subject, whether in town or country), apparently though for only a year or less.¹

Implied Exclusion.—In all other cases these powers are impliedly excluded; but in the case of assignation, this extends to exclude only voluntary assignees, and not judicial assignees ² e.g. adjudgers and trustees in sequestration, or quasi-judicial e.g. trustees under trust deeds and managers for creditors.

Express clauses are inserted for the purpose of conferring powers of assigning and sub-letting where they would not be implied, or of excluding them where they would be implied. Regarding these clauses it is enough to note (1) that the grant or exclusion of either power does not give or exclude the other, and (2) that the exclusion of assignees simply is sufficient to exclude not only voluntary, but also judicial and quasi-judicial assignees. If the clause should exclude the powers except with, or confer them but only with, the landlord's consent, the giving or withholding of consent is in his absolute discretion without reason assigned.

Result of Assignation.—On an assignation being validly granted, or being assented to by the landlord, then (subject to the conditions, if any, of the power or assent) the results are: (1) that the assigner is free from liability for rent and other prestations except for the period to the assignee's entry 6; and (2) that the assignee is liable for the past as well as the future.

Result of Sub-lease.—A sub-lease (properly so called), whether granted in virtue of express or implied power or granted ultra vires, has no effect on the personal liabilities, that is to say, neither is the principal tenant freed nor is the sub-tenant personally liable to the over-landlord. As to hypothec it is different: the security and remedy of the over-landlord extend to the goods of the sub-tenant to the extent following:

1. If Sub-lease ultra vires.—The over-landlord's hypothec extends

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<sup>1</sup> Bell, Prin., 1274.
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⁷ M'Greyor v. MacLean's Tr., 1850, 13



² Stair, ii. 9. 26.

³ Cases in Rankine, Leases, 158, 162.

^{4 1} Bell, Com., 77.

⁵ M. of Breadalbane v. Whitehead, 1893, 21 R. 188.

⁶ Elphinstone v. Monkland, etc., Co., 1886, 13 R. (H. L.) 98.

to secure the principal rent, even though the sub-tenant may have paid his own rent to his own immediate landlord.

2. If Sub-lease intra vires or assented to.—The over-landlord's hypothec extends to secure only the sub-rent or principal rent (whichever is the less), and only if the sub-rent has not been paid to the principal tenant,³ or (it appears) if it has been paid before the term of payment.

Mortis causa Transmission

Within the operation of the Agricultural Holdings Acts and the Crofters' Holdings Act, the lessee has a qualified power of bequest, for the terms and machinery of which reference is made to the Acts. It is enough to add that neither under these Acts nor in any other case is the heir-at-law entitled to challenge a deed or bequest excluding him from the succession, on the ground of want of power on the part of the testator, that objection being personal to the landlord.⁴

NOTICE OF TERMINATION

The following statutory provisions are in point:—

1. Where the Agricultural Holdings Act 1883 applies (s. 28);

Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end—

- (a) In the case of leases for three years and upwards, not less than one year nor more than two years before the termination of the lease.
- (b) In the case of leases from year to year, or for any other period less than three years, not less than six months before the termination of the lease.

Failing such notice by either party, the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year.

Professor Rankine expresses the opinion that leases dated after the Act may make their own law.⁵ When there are two dates of ish (e.g. one for houses and grass, and another for the remainder of the holding), it has been indicated that the notice must be in good time before the first of these dates.⁶

The notice may be given in the same manner as under the Removal Terms Act next mentioned.⁷

2. Under the Removal Terms (Scotland) Act, 1886. The Act applies to any

dwelling-house, shop, or other building, and their appurtenances . . . includ-

¹ 2 Bell, Com., 31.

² Steuart v. Stables, 1878, 5 R. 1024.

³ Blane v. Morison, 1785, Mor. 6282; 2 Bell, Com., 31.

⁴ Bell, Prin., 1218.

⁵ Leases, 480.

⁶ Per Lord Chancellor in *Black* v. *Clay*, 1894, 21 R. (H. L., 72). *Contra*, *Gould* v.

Paterson, 1896, Glasgow Sheriff Ct., 12 Sh. Ct. Rep. 284.

⁷ A. H. Act, 1900, s. 8.

ing . . . a dwelling-house or building let along with land for agricultural or other purposes.

Briefly stated the enactments are: Apart from contrary stipulation, entry and removal are at noon on 28th May and 28th November, or on Monday if these dates are Sunday. But notice of removal must be given forty days before 15th (not 28th) May and 11th (not 28th) November. It may be given by registered letter, properly addressed and posted in time for delivery on or prior to the last day for notice.

MISSIVE OF LET OF HOUSE OR SHOP

I hereby take on lease that house [or shop] No. Street, , and that from at present occupied by to : The , which I bind myself to pay by equal portions at the rent shall be £ terms of ; and I also bind myself to pay all rates, taxes, and assessments, and expenses of water supply, lighting, and cleaning, all in respect of the occupation of the premises [and I also undertake to pay my proportion of stair gas]: The premises shall be kept continuously plenished and occupied, and without prejudice thereto they shall be always fired and aired by me: And, having inquired into the condition and repair of the premises and fittings and sanitary arrangements, I accept the same as satisfactory in all respects, and bind myself to keep and leave the same in good tenantable and habitable repair to the satisfaction of the proprieter, or in his option to pay on demand such a sum as may be found by him necessary to put the same into such repair 1: Any glass broken from the outside by strangers shall be replaced at mutual expense: I agree that I have no power to assign or sublet.

There ought to be witnesses.

THE SAME, WITH (1) ARRANGEMENT FOR CONTINUANCE, AND (2) CAUTION

I, A., after designed, hereby take on lease that house [or shop] No.

Street, , at present occupied by , and that from Whitsunday 1904 to Whitsunday 1905, and thereafter unless and until written notice shall be given on either side, before the day of 1905, or before the same day in any subsequent year, of an intention to

¹ Turner's Trs. v. Steel, 1900, 2 F. 363. This clause displaces the landlord's common law obligation to execute ordinary repairs and puts that obligation on the tenant. But this may not extend to extraordinary repairs rendered necessary by, e.g., "an extraordinary accident or a latent defect, or the inevitable deterioration of the structure owing to the

long lapse of time." Further, there may, of course, "be other clauses in the lease to put a different meaning on the words used," e.g., the clause as to glass in the above form might free the tenant from the consequences of third parties' malice or carelessness except on the glass.

terminate this lease at the term of Whitsunday next after such notice: The rent shall be \pounds , which I bind myself to pay by equal portions at the terms of Martinmas and Whitsunday in each year [complete as in previous form].

And I, B., after designed, bind myself, jointly and severally with the said A. and his successors, that all obligations for rent, and all other obligations for payment or otherwise, incumbent on the said A. and his foresaids under these presents, or at common law, or otherwise, shall be punctually and duly fulfilled, and that until this lease shall be brought to an end after written notice as above provided.

Both parties will sign as in the previous form. There ought to be witnesses.

LEASE OF A SHOP

It is contracted between A. (who and his successors in the ownership of the premises after mentioned are referred to wherever the expression "the landlord" is used throughout these presents), on the one part, and B. (who and his successors in the right of occupancy under this lease are referred to wherever the expression "the tenant" is used throughout these presents), on the other part, in manner following, that is to say;

- 1. The said A., in consideration of the rent and other stipulations hereinafter contained, hereby lets to the said B., but always with and under the conditions hereinafter contained, All and Whole the shop No. 10 Drummond Street, Edinburgh, with saloon behind and cellarage below, all as at present possessed by X., together also with the fittings therein so far as belonging to the landlord [of which an inventory is annexed and signed as relative hereto], and that for the period of years from the term of Whitsunday 1904, which is declared to be the term of the tenant's entry.
- 2. There are hereby excluded from this lease, (1) heirs-portioners, the eldest heir-female or her representative always succeeding without division; (2) sub-tenants; (3) trustees and managers for creditors; and (4) assignees, whether legal or conventional, except that in the event of the death of the said B. the landlord shall receive as tenant anyone to whom the said B. may bequeath the lease, or his testamentary trustees having a title thereto, or anyone to whom his testamentary trustees having such title may assign the lease, and that whether before or after they have been received as tenant, but all only on the following conditions, which shall be fulfilled at the sole expense of the tenant, namely, (1) that the landlord shall be satisfied that the tenant so desiring to be received has sufficient means, and is otherwise in a position to carry on the business successfully, of which the landlord shall be sole judge; (2) that the tenant shall by separate writing become personally and individually and jointly and severally liable for the rent and whole other tenant's obligations for the remainder of the lease; and (3) that caution or security for the rent and other obligations as aforesaid shall be found and maintained to the satisfaction of the landlord, of the sufficiency and continued sufficiency of which caution or security he shall be the sole judge.

- 3. The premises are let for the purpose of carrying on therein a retail drapery and general soft goods business, and they shall not be used in whole or in part for any other purpose. No sales by auction shall be held in the premises.¹
- 4. The landlord is to make the following alterations and improvements at his own expense, namely, (1) to reconstruct the lavatory accommodation, and (2) to enlarge the two front windows and to insert therein single sheets of plate glass. These alterations and improvements are to be executed according to plans which have been prepared by Y., architect in Edinburgh, and which have been examined and approved of by both parties. The work will be commenced as soon as possible after the said term of entry, but the tenant is to have no claim against the landlord for disturbance to business or otherwise in respect thereof. Such painting and papering as may be necessary in connection with these operations the tenant is to execute according to his own taste and at his own expense.
- 5. The rent shall be £ per annum, which rent the said B. binds himself, and his heirs, executors, representatives, and successors whomsoever (all hereinafter referred to as "his foresaids"), all jointly and severally, without the necessity of discussing them in their order, to pay to the landlord at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at Martinmas 1904 for the half year to that term, with a fifth part more of each term's payment of liquidate penalty in case of failure, and with interest on each term's payment at the rate of five per cent. per annum from the date at which the same falls due till paid.
- 6. As regards insurance the said B. binds himself and his foresaids as follows:—
 - (1) To pay to the landlord annually any excess of fire premium beyond 2s. 6d. per cent. charged by the Z. Insurance Company on an insurance of £ on buildings and fittings, and £ on rent,² on account of the nature of the tenant's business, or stock, or mode of carrying on the business, but without prejudice to the landlord's right to enforce the tenant's obligation hereinbefore contained in article third.
 - (2) To pay to the landlord annually one-half of an insurance of the said plate-glass windows to the amount of £: Both of these fire and plate glass insurances shall be in the landlord's name and under his control only.
 - (3) To keep the stock constantly insured with an insurance company of standing to the extent of £ at least, and to exhibit the policy and premium receipts to the landlord.
- 7. Subject to article four, the tenant having inquired into the condition and repair of the premises and fittings and sanitary arrangements, accepts the same as satisfactory in all respects, and binds himself and his foresaids to keep and leave the same in good tenantable and business condition and

¹ This prohibition is not implied. *Keith* on neighbouring property may also be inv. *Reid*, 1870, 8 M. (H.L.) 110. creased.

² It will be kept in view that the premium

repair, to the landlord's satisfaction, ordinary tear and wear excepted, or, in the option of the landlord, to pay on demand such a sum as may be found by him necessary to put the same into such condition and repair. The landlord will keep the premises merely wind and water tight. All other repairs, and all painting, papering, and cleaning, shall be executed by the tenant at his own expense. But the tenant shall have no authority to make alterations.

- 8. If at any time during the currency of this lease the tenant shall have an award of sequestration or *cessio* pronounced with reference to his estate, or shall grant a trust deed for behoof of creditors, or become notour bankrupt, then it shall be in the option of the landlord to terminate this lease, and the landlord shall be entitled to apply to the sheriff of the county or other competent authority for a warrant of summary ejection.
- 9. The tenant binds himself and his foresaids to remove themselves, their stock and all others, from the premises at the expiry or sooner termination of this lease, and that without warning or process of removing to that effect, failing which they shall pay an increased rent at the rate of \pounds per annum, which is pactional and not penal, with interest and penalty as aforesaid, but without prejudice to the landlord's right to insist on removal by ejection or otherwise.
- 10. All disputes and questions of any kind which may arise between the landlord and the tenant and his foresaids, whether before the commencement, or during the currency, or after the termination, of this lease, are hereby referred to the decision of two arbiters, one to be appointed by each party, or of an oversman to be appointed by the arbiters before they enter on the submission, and the arbiters and oversman shall have power to award and assess damages.¹
- 11. Both parties consent to the registration hereof, and of any and all decree or decrees arbitral, interim and final, to be pronounced under the foregoing clause of arbitration, and all other proceedings thereunder, for preservation and execution.—In witness whereof.

LEASE OF A PUBLIC-HOUSE

It is contracted between A. (who and his successors in the ownership of the premises after mentioned are referred to wherever the expression "the landlord" is used throughout these presents), heritable proprietor of the subjects after mentioned, on the one part, and B. (who and his successors in the right of occupancy under this lease are referred to wherever the expression "the tenant" is used throughout these presents) on the other part, in manner following; that is to say, the said A., in consideration of the instant payment by the said B. of a grassum of \mathcal{L} , of which the said A. hereby acknowledges receipt, and of the rent and interest on the sum expended by the said A. on alterations, and other prestations and conditions and others after specified, hereby lets to the said B. and his heirs (but excluding assignees, whether legal or conventional, and sub-tenants, and creditors and trustees

¹ See another form of stating the arbitration clause, p. 631. Or it may be preferred to omit it altogether.

and managers for creditors, and subject to the conditions, provisions, and declarations after specified), All and Whole that licensed public-house 1 X. Street, Portobello, at present occupied by the said B., and that for the space of years from and after the term of, which is hereby declared to be the term of entry of the tenant to the said subjects in virtue hereof: Declaring, as it is hereby expressly contracted, that as the tenant at present occupies the said subjects as a public-house, and said subjects are let as such, the tenant shall continue to occupy the same as a public-house during the whole period of this lease, and the tenant shall duly and properly conduct the public-house business therein, and shall not incur a conviction for breach of certificate or other offence in connection with the business, or a forfeiture, withdrawal, refusal, or non-renewal of the certificate of licence held for said subjects under the statutes for the regulation of public-houses in Scotland; and in the event of the certificate of licence being forfeited, withdrawn, refused, or not renewed, through the fault of the tenant, 1 a claim of damages shall arise 2 at the instance of the landlord against the tenant; the question of liability or non-liability and amount of damages to be settled by two arbiters, one chosen by each party, and in the event of their differing in opinion, by an oversman to be named by them before entering on the business of the submission: And in the event of any such conviction being obtained, or of the certificate of licence being forfeited, withdrawn, refused, or not renewed, or in the event of the bankruptcy or insolvency of the tenant [or if the tenant shall in the opinion of the landlord so misconduct himself or manage or neglect the business as in the opinion of the landlord to endanger the licence 8], or if a half-year's rent or interest shall remain due and unpaid for three months, it shall be in the power and option 4 of the landlord immediately to bring this lease to a termination, and to remove the tenant from the said subjects, in the same manner as if the whole years of this lease had expired, and that without any process of law or proceeding of any kind, and without prejudice to any claim of damages as aforesaid at the instance of the landlord: For which causes, and on the other part, the said B. binds himself, and his heirs, executors, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, to pay to the landlord (first) the sum of £ per annum of rent for the said subjects, and (second) the sum of £ per annum, being interest at the rate of seven and a half per centum per annum on £ the sum now expended by the landlord on alterations on the premises, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof under these presents at the term of for the half-year preceding, and the next term's payment thereof following, and so forth half-yearly and termly during the currency of this lease, with a fifth part more of each term's payment of liquidate

The landlord is not bound to state any reason, and his action can be impugned only on averment and proof of fraud.

¹ When these words are absent, see *Dalley* v. *Phillips & Marriott Ltd.*, 1901, 18 T. L. R. 18.

² This is not implied. *Hart's Trs.* v. *Arrol*, etc., 1903, 10 S. L. T. No. 463.

³ Guild v. M'Lean, 1897, 25 R. 106.

⁴ The implied rule is that loss of licence does not terminate the lease. *Hart*, supra.

penalty in case of failure, and the interest of each term's payment of the said , at the rate of five per centum per annum from the respective terms of payment during the not-payment, and also to make payment of all rates and taxes, and all expenses of water supply, lighting, and cleaning, all in respect of the occupation of the said premises: And further the tenant hereby accepts of the premises as in good tenantable condition and repair and in all respects satisfactory, and binds himself and his foresaids to keep them during the currency of this lease, and to leave them at the termination thereof, in good tenantable condition and repair: Declaring that all alterations, and also all repairs, shall be made and executed at the expense of the tenant, and all such alterations and repairs shall thereupon become the property of the landlord without any payment or compensation being made therefor to the tenant, but the tenant shall have no power to make any alterations on the premises without the previous consent in writing of the landlord: And the said B. binds himself and his foresaids, at the expiry or earlier termination of this lease, to flit and remove themselves, and their families, servants, goods, gear, and effects furth of and from the subjects hereby let, without any warning or process of removing to be used for that effect [general reference clause, if desired, p. 616]: And both parties consent [registration clause, p. 616, substituting "clauses" for "clause" if necessary]. —In witness whereof.

LEASE OF PREMISES FOR WHICH LICENCE IS BEING APPLIED FOR

When the lease is conditional on a licence being obtained, a suitable course is to have a short agreement having reference to an adjusted draft lease. The one party to the agreement will of course be the proprietor. The other may be a wholesale firm. The tenant's name in the lease may be blank, and certain points in the draft lease will be indeterminate until the licence is obtained. The following are suggested as forms, and the opportunity is taken to give another form of public-house lease.

AGREEMENT BETWEEN A. AND B. & CO. RELATIVE TO INTENDED PUBLIC-HOUSE LEASE

- 1. Reference is made to the draft lease docqueted and signed as relative hereto.
- 2. B. & Co. are to use their best endeavours to obtain a public-house licence for the premises referred to in the said draft lease in name of the tenant at the licensing Court in which failing then again in .
- 3. If A. is satisfied that B. & Co. are actively fulfilling condition 2 above, he is to keep the premises available (but not necessarily vacant) until the licensing Court in [the second occasion].
- 4. If a licence be obtained, B. & Co. undertake to find a responsible man to hold it who will enter into a lease in the terms of said draft. The endurance will be for years after the commencement of the licence

and until the first term of Whitsunday [or Martinmas] after the expiry of such years. B. & Co. will be cautioners for the rent and the other obligations of the lease.

5. A. is to [specify any repairs or alterations if any to be executed by landlord.] Anything else which may be required will be done by B. & Co.

Or.

5. The premises as they stand are accepted as satisfactory, and if anything is required it will be done by B. & Co.—In witness whereof.

LEASE OF PUBLIC-HOUSE REFERRED TO IN THE FOREGOING AGREEMENT

It is contracted between A. (he and his successors in the ownership of the premises hereby let being hereinafter referred to and included wherever the expression "the proprietor" is used throughout these presents) of the first part, and B. (he and his heirs in the right of occupation of said premises being hereinafter referred to and included wherever the expression "the tenant" is used throughout these presents) of the second part, in manner following: That is to say:—

- 1. The proprietor in consideration of the rent and other obligations, stipulations, and prestations hereinafter specified, hereby lets to the said B. and his heirs, but expressly excluding assignees and sub-tenants legal or conventional, and all creditors and trustees and managers for creditors, All and Whole that shop and cellar at , belonging to the proprietor, at present standing vacant (hereinafter referred to as "the premises"), and that for the period from and after the day of until the term of .
- 2. The rent shall be £ per annum, payable half-yearly at Whitsunday and Martinmas, beginning the first term's payment at the first term of Whitsunday or Martinmas after the term of entry for the period preceding that term, with interest at five per centum per annum on each term's payment till paid.
- 3. The premises shall be used as a public-house only, and no other trade, business, or occupation whatever shall be carried on therein so long as the necessary licence can be obtained and retained therefor.
 - 4. With reference to the licence the following provisions shall apply:—
- (1) The tenant shall not, directly or indirectly, apply to the Licensing Authority for a transfer of the licence from the premises to any other premises, or for an extension of premises, and he shall not voluntarily renounce or give up the licence under any circumstances whatever, but, on the contrary, he shall regularly apply for and endeavour to obtain the continuous renewal of the licence at the proper times.
- (2) The tenant shall neither do nor permit nor suffer to be done or occur in the premises, or in connection therewith, any act or omission whereby the licence may be forfeited or the renewal thereof withheld, and he undertakes and guarantees that there shall not occur any act or omission, whether by

himself or by any person employed in or about the premises, or by anyone for whom he is responsible, on account of which the licence may be forfeited or withheld.

- (3) On the natural expiry or earlier termination of this lease the tenant shall, if desired by the proprietor, apply or concur in or support an application to the Licensing Authority for a transfer of the licence to the proprietor or any nominee of the proprietor, and shall not for a period of five years thereafter directly or indirectly apply for a public-house or other liquor licence within one mile of the premises.
- (4) In the event of any and each and every breach of the terms of any of the preceding subsections of this fourth article, the tenant shall be bound forthwith to pay to the proprietor the sum of \pounds , with interest thereon at five per centum per annum from the date of the breach till paid. The said sum is the amount of liquidate damages payable on each occasion not subject to modification and over and above the other prestations of this lease for the full period thereof, and without prejudice to the proprietor's option in addition to terminate this lease as hereinafter provided, and also without prejudice to the right of the proprietor to insist in addition on specific performance.
- 5. The tenant binds himself regularly in each year to pay to the proprietor the annual premium on a policy of fire insurance taken or to be taken out by and in name of the proprietor for the sum of £ £ on the rent thereof with the Insurance Company, or other office to be selected by the proprietor, with interest at five per centum per annum from the due date till paid. And in the event of the premises or part of them being destroyed by fire, the proceeds of the insurance on buildings shall be applied by the proprietor towards re-instatement, and the tenant shall not be entitled to any interruption or abatement of rent in respect of such fire or destruction or partial destruction of the premises, and the full rent shall notwithstanding be continuously payable at the usual terms, under deduction of the sum which may be received in respect of the said rent insurance after allowing for the expenses of recovering same, or a proportion of such sum, according as the whole or only a part of the period for which the same is recovered is included in the period for which the rent is payable.
- 6. The proprietor having already [specify any alterations, etc.], the tenant accepts the premises as in first-rate tenantable condition and repair, and complete and satisfactory in all respects, and shall be bound to maintain the same in first-rate condition and repair, and complete and satisfactory in all respects, during the currency of this lease, and inter alia to execute all repairs from whatever cause necessary, and to do all painting and papering, and on his tenancy of the premises ceasing at the natural expiry of this lease or earlier termination thereof, the tenant binds himself to leave the premises in the like condition and repair and complete and satisfactory in all respects, and that to the satisfaction of an architect to be mutually agreed on, or failing agreement, of an architect to be appointed by the Sheriff of or by one of his substitutes, or in the proprietor's option to pay such

a sum as may be found by said architect to be necessary to put the premises

into such condition, repair, and state, with interest thereon at the rate of five per centum per annum from the date of termination of the occupancy till paid. But the proprietor is to keep the premises wind and water tight. The tenant shall have no power to make structural or other alterations without the previous written consent of the proprietor and of the Licensing Authority. The tenant shall have no claim against the proprietor or an incoming tenant in respect of any alterations, repairs, or improvements, all which shall be left without compensation.

- 7. Should the tenant at any time during the currency of this lease commit or incur by himself or by any employee, or any person for whom he is responsible, any breach of the provisions of the Public Houses Acts for the time being in force, or of the provisions of this lease, or conduct his business disconform to his licence, or become bankrupt or insolvent, or grant a trust deed for behoof of his creditors, or if, in point of fact, the licence is lost with or without fault on the tenant's part, then and in each of these cases, but only in the option of the proprietor, this lease shall cease and determine, and in the event of the proprietor so electing, the tenant shall be bound to remove from the premises without any warning whatever, and that either forthwith or in the proprietor's option at any term of Whitsunday or Martinmas thereafter, and the tenant binds himself in that event to pay the rent to the date of removal prescribed by the proprietor, and otherwise to implement the obligations of this lease in all respects, and in addition to pay to the proprietor the of rent for each day he thereafter retains possession of the premises, which is a liquidate sum hereby adjusted and not subject to modification.
- 8. The tenant shall remove from the premises at the natural expiry or earlier termination of this lease without any warning or process of law to that effect.
- 9. All the pecuniary and other obligations contained in this lease shall be binding on the said B. and his heirs, executors, and representatives whomsoever, all jointly and severally, and he binds himself and his foresaids accordingly.

Lastly. Both parties consent to registration hereof, and of any decree or decrees arbitral, interim or final, to be pronounced by the architect under the above written clause of reference and other proceedings therein for preservation and execution.—In witness whereof.

CAUTIONARY OBLIGATION ON BEHALF OF THE TENANT

If there be no objection to the cautionary obligation appearing ex facie of the lease, that is of course the simplest method. But it may be preferred that that should not appear, in which case it is suggested that the obligation should be annexed to a full copy of the lease.

We, B. & Co., and X. Y. and Z., the individual partners of the said firm, bind ourselves all jointly and severally, and the respective heirs, executors, and representatives whomsoever of us the said X. Y. and Z., all jointly and severally, as cautioners for the due and punctual fulfilment of all the tenant's pecuniary and whole other obligations under the lease of which the foregoing is a copy,

and we approve of the terms of the lease in all respects, and we consent to registration hereof and of the foregoing copy lease, and of any decree or decrees arbitral, interim or final, to be pronounced by the architect under the clause of reference contained in the said lease and other proceedings therein for preservation and execution.—In witness whereof.

LICENCE INSURANCE

It is obvious that the preceding forms of lease contain some obligations to which a tenant may have objections with reference to his liability in the event of the licence being lost. To meet this it may be sought to find a solution by means of licence insurance in name of the proprietor, the tenant paying or contributing to the premium. In connection with these insurances some points must be kept in view. Thus the renewal of the policy is in the annual option of the insurance company, so that the benefit of the insurance may be lost at any time during the lease, or the premium may be increased. Then, in the case of some companies some of the conditions of the policy are very restrictive. For instance, it is sometimes made a condition that the tenant's bankruptcy prior to the licence being lost is to avoid the policy, which obviously exposes the proprietor to a most serious risk. The tenant's payment in respect of licence premium may be included in the rent. it be desired to secure that he shall pay or contribute to any increase in premium, a substantive clause may be inserted, for which a form is given below.

A THIRD FORM OF PUBLIC-HOUSE LEASE, WITH LICENCE INSURANCE

[As on p. 619 to end of article 2.]

- 3. [As on p. 619 to "therein."]
- 4. [4 (1), p. 619.]
- 5. The tenant shall neither do nor permit nor suffer to be done or occur in the premises or in connection therewith any act or omission whereby the licence may be forfeited or the renewal thereof withheld.
- 6. [If special clause as to licence insurance premium desired, insert it here, thus], Whereas the proprietor has effected an insurance of the licence in his name and for his own behoof only, to the extent of £ , the , the tenant binds annual premium whereon is at present £ himself regularly in each year to pay to the proprietor [one-half of] the said premium, or [of] any other higher or lower premium for an insurance on the terms and to the amount foresaid, and the production by the proprietor of the receipt for said premium shall be sufficient proof not only that the payment has been made by him, but also that the same has been properly fixed and paid, and the tenant shall not be entitled to object to the amount. tenant shall pay interest at the rate of five per cent. per annum from the date when the annual premium becomes due till payment by him. All sums to be recovered under any such policy shall be the absolute property of the proprietor, and the tenant shall have no right or interest therein or in any

part thereof nor any right to any abatement of his obligations under this lease in respect thereof.

- 7. [5, p. 620.]
- 8. [6, p. 620.]
- 9. Should the tenant at any time during the currency of this lease commit or incur, by himself or by any employee or any person for whom he is responsible, any breach of any of the provisions of the Public Houses Acts for the time being in force, or of the provisions of this lease, or conduct his business disconform to his licence, or become bankrupt or insolvent, or grant a trust deed for behoof of his creditors [or if the licence insurance cannot in the proprietor's uncontrolled discretion be reasonably continued on satisfactory terms], then and in each of these cases, but only in the option of the proprietor, this lease may be brought to an end either forthwith or at any term of Whitsunday or Martinmas thereafter.
- 10. In the event of the licence being lost, then this lease may be brought to an end by either party as follows: The proprietor's right to terminate shall be on the same terms and conditions as to time and otherwise, and its exercise shall be followed by the same effects, as set forth in Art. 9th. The tenant's right to terminate shall be exerciseable only as at the first term of Whitsunday three months after the loss of the licence, and only after three months' written notice to the proprietor.
 - 11. [No. 8, and to the end, as on p. 621.]
- LEASE OF A HOUSE AND GARDEN, WITH (1) A BREAK, (2) SEPARATE RENT FOR FITTINGS, (3) PERMISSION TO TENANT TO ERECT CONSERVATORY, (4) SPECIAL CLAUSES AS TO CAUTION

It is contracted between A. (who and his successors in the ownership of the premises after mentioned are referred to wherever the expression "the landlord" is used throughout these presents), on the first part, B. (who and his successors in the right of occupancy under this lease are referred to wherever the expression "the tenant" is used throughout these presents) on the second part, and C. on the third part, in manner following, that is to say;

1. The said A., in consideration of the rent and other stipulations and under the conditions hereinafter written, hereby lets to the said B. and his heirs, excluding sub-tenants and assignees legal and conventional, All and Whole the house No. 1 X. Terrace, Edinburgh, with the garden attached thereto, all as at present possessed by Y., with the fittings in and upon the subjects of which an inventory is annexed and signed as relative hereto, and that for the period of five years from Whitsunday 1904 to Whitsunday 1909, but with this modification, that it shall be in the power of the tenant (but not of the landlord) to bring this lease to an end at the term of Whitsunday 1907 on giving written notice to the landlord to that effect in absolute terms not later than the first day of February 1907: Such notice if given, shall not be revocable even before the said 1st day of February 1907, and if such

written notice is not given before that date, this lease shall be absolute for the whole period to Whitsunday 1909.

Or.

but with this modification, that it shall be in the power of either party to bring this lease to an end at the term of Whitsunday 1907 on giving written notice to the other party to that effect, etc.

- 2. The premises shall be occupied as a private dwelling-house and garden only, and by the tenant and his family and servants only. The premises shall be kept continuously plenished and occupied, and without prejudice thereto they shall be always fired and aired by the tenant.
- 3. The landlord is to execute the following repairs, painting, and papering as soon as possible after the tenant's entry [specify these briefly].
- 4. The annual rent shall be £60 for house and garden, and £5 for the said fittings, amounting altogether to £65 per annum, which sum [as on p. 615].
- 5. The tenant may erect a conservatory in the garden, but not in that part of it which is in front of the house. It shall be erected so as not to injure the house, nor to prejudice its appearance or amenity. At the expiry of the lease the landlord shall have the option to acquire it, with all its shelving. stoves, and pipes, for the sum of £ [or at a valuation to be put thereon , and failing both then by a sole , whom failing by by arbiter to be mutually appointed], or to require the tenant to remove it, in which case the tenant shall restore the ground and premises to the condition in which they were before the conservatory was erected. The landlord's option shall be intimated in writing not later than the 1st day of April in the year of expiry. While the conservatory exists, the tenant shall repay to the landlord annually at Whitsunday the excess beyond 1s. 6d. per centum of fire premium charged by the Z. Insurance Company on an insurance of £ on the house and rent thereof on account of the heating arrangements of the conservatory, or otherwise on account thereof.
- 6. Subject to article 3, the tenant having inquired [as in article 7, p. 615, to end], except only as specified in the immediately preceding article.

Or, leaving out article 3, say here:

The tenant having inquired into the condition and repair of the house, offices, fittings, garden, and whole premises, and sanitary arrangements, the agreement between the parties is that the tenant shall be allowed a deduction from his rents to the total amount of \pounds on production of vouchers showing expenditure by him to that extent on painting or papering on the premises, the amount or amounts so expended, not exceeding the said maximum, to be deducted from the half year's rent payable at the term of Whitsunday or Martinmas next succeeding the production of the voucher: And subject to this agreement, the tenant accepts the house, offices, fittings, garden, and whole premises as satisfactory in all respects, and binds himself to keep and leave the same in good tenantable and habitable condition and repair to the landlord's satisfaction, or, in the landlord's option, to pay on demand such a sum as may be found by him necessary to put the same into such condition and repair.

The landlord will merely keep the premises wind and water tight, and pay one-half of the expense of replacing glass broken from the outside by strangers. All other repairs, and all cleaning and (except up to the said limit of \pounds) all painting and papering shall be executed by the tenant at his own expense. But the tenant shall, except as regards the conservatory, have no authority to make alterations.

- 7. Without prejudice to the general obligations on the tenant hereinbefore contained, he shall keep the garden always trim and in good and tasteful order and properly stocked. All the ground visible from the front shall be used as a flower and ornamental garden only.
- 8. The said C. binds himself, and his heirs, executors, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, and all also jointly and severally with the said B. and his foresaids, that all obligations for rent, and all other obligations for payment or otherwise incumbent on the said B. and his foresaids under these presents, or at common law, or otherwise, shall be punctually and duly fulfilled during the whole currency of this lease, and including all obligations outstanding on its expiry: Declaring that the said C. and his foresaids shall not be entitled to exercise the option of break hereinbefore conferred upon the tenant. in the event of the said C. dying during the currency of this lease, the tenant shall be bound to find a new cautioner in the foresaid terms, and that as regards both the past and the future, and that within three months after the death of the said C., and so on the death of any such new cautioner, failing which it shall be in the option of the landlord to terminate this lease, and he shall be entitled to apply to the sheriff of the county or other competent authority for a warrant of summary ejection. On any such occasion the following rules shall apply: the landlord shall be the sole judge of the sufficiency of any proposed cautioner. The cautionary obligation shall be annexed to this lease. The expense thereof shall be paid by the tenant. obligation of the prior cautioner or cautioners shall not be discharged unless the landlord shall do so expressly, which he shall be entitled to do without prejudice to the new obligation of caution.
 - 8, 9, 10, and 11, on p. 616, may be added.

If the arbitration clause is inserted, add to it:

and the said C. as well as the said B. bind themselves and their foresaids to implement all decrees-arbitral, interim and final, to be pronounced under all such submissions.

In any case add: (1) consent to registration for execution, and (2) inventory of fittings.

AGRICULTURAL LEASE, WITH WHITSUNDAY ENTRY

It is contracted between A. (who and his heirs and successors in the owner-ship of the subjects hereby let are hereinafter referred to and included wherever the expression "the landlord" is used throughout these presents), on the one part, and B. (who and his heirs and successors in the right of occupation of the said subjects are hereinafter referred to and included wherever the expression

"the tenant" is used throughout these presents), on the other part, in manner following; That is to say-

GRANT, DESTINATION, ENTRY, ENDURANCE

1. The said A., in consideration of the rent and other prestations hereinafter written, hereby lets to the said B. and his heirs, but excluding (1) heirsportioners, the eldest female or her representative always succeeding without division, (2) assignees, whether legal or conventional, (3) sub-tenants, and (4) trustees and managers for creditors, and always with and under the reservations and whole other conditions and clauses hereinafter contained, All and Whole the lands and farm of X. in the parish of Y. and county of Z., as at present occupied by C. [and extending to acres imperial or thereabouts, but which measurement is not guaranteed and is not of the essence of or material to the contract], and that for nineteen years and crops from and after the term of Whitsunday 1904 as to the houses, offices, grass, and fallow land, and the separation of the crop in the same year as to the remainder of the holding, which are hereby declared to be the terms of the tenant's entry, notwithstanding the date hereof.

RESERVATIONS 1

2. But this lease is granted under the following reservations in favour of the landlord, namely:—

1. MINERALS

(1) All coal, stone, shale, lime, clay, marl, sand, gravel, and all other minerals, substances, and things in and under the said lands, with power to search for, work, win, smelt, calcine, burn, and otherwise treat, manufacture and store the same, and also substances and things of the same or a like nature from other lands, farms, and places, and to sink pits, open quarries, drive levels and mines; to erect works, machinery, and houses; to make roads, tramways, railways, canals, ponds, and aqueducts; to form and maintain heapsteads, including heapsteads of waste; and to do all other matters and things which may be necessary or conducive to the said operations, and all on the lands hereby let, the tenant being always entitled to deduction from the rent for land resumed, and to compensation for injury to the remainder, as the same may be fixed by arbitration.

2. woods

(2) All woods and plantations on the farm, and the grass therein, and all other contents and products thereof; and further the landlord shall be entitled to plant and enclose further ground from time to time, on condition of allowing deduction from the rent for the actual ground so enclosed, as the same may be fixed by arbitration, and the ground so enclosed shall thereafter be reserved and excepted from this lease; and the landlord shall also be entitled to cut down and remove wood at all times.

3. EXCAMBIONS AND MARCHES

- (3) Power to excamb with adjoining proprietors, and to alter and straighten
 - ¹ A selection will be made from these reservations according to circumstances.

marches with them, and with his own adjoining farms and holdings, and for these purposes to add to, or take from, the lands hereby let, the rent being increased or diminished as the same may be fixed by arbitration.

4. WATER

(4) All water in streams, runs, and springs rising in or flowing past or through the farm, subject to the use thereof by the tenant only for the purposes of the farm only; and the landlord shall be entitled to regulate and alter the course of such streams and runs, and to communicate the use thereof to others, subject as aforesaid, and to construct and allow others to construct such conduits, tracks, and pipes as may be necessary or convenient for these purposes, and to enter to inspect, clean, and repair the same, the tenant being allowed all surface damages in respect of construction of such conduits, etc., as the same may be fixed by arbitration.

5. sewers

(5) Power to construct and to empower others to construct sewers for any purpose through the farm, and to enter to inspect, clean, and repair the same, the tenant being allowed all surface damages in respect of the construction of such sewers, as the same may be fixed by arbitration.

6. BUILDING, FEUING, ETC.

(6) Power to resume any part or parts of the farm for the purpose of building, feuing, or letting on long lease, or for the purpose of making or constructing a railway or tramway, or giving additional ground or facilities to a railway or tramway, the tenant receiving compensation by abatement of rent, as the same may be fixed by arbitration.

7. ROADS

(7) All roads on the farm, subject to the tenant's use thereof for the purpose of the farm only, and the landlord shall be entitled to alter the said roads as regards their direction, width, condition, and otherwise, and to make new roads, and to take the materials therefor from the farm.

8. GAME AND FISH

(8) All game and ground game on the farm, subject as regards the latter to the provisions of the Ground Game (Scotland) Act, 1880, and all fish in the waters on or adjoining or flowing through the farm, with right and power to the landlord and those holding his authority or permission to take the game, ground game, and fish, and to shoot, fish, hunt, and sport over and on the farm, and the tenant shall do all in his power to protect the game and fishings, and to prevent the same from being disturbed or destroyed, and shall warn away and dismiss all poachers and trespassers, and inform the landlord of all persons who shall hunt, course, shoot, or fish upon the farm without the landlord's permission. The tenant shall have no claim for compensation for damage done by hares and rabbits, and as regards other game, he shall have no claim for compensation for damage done in any year unless the sum shall exceed £10, and then only for the excess beyond such £10.1

¹ See Roddan v. M'Cowan, 1890, 17 R.1056.

9. MOSSES

(9) All peat mosses on the farm, with power to cut and carry away the same, but with power to the tenant to cut and carry away such peats as may be required for the domestic use of his household and farm-servants, but on no account for sale or for any other purpose, and in cutting peat for such domestic purposes the tenant shall observe the regulations and directions of the landlord or his factor.

10. HEATHER-BURNING

(10) Power to burn heather upon the farm in strips and patches, and the tenant shall give the assistance of his servants, free of charge, for sufficient periods at the proper season, and they shall work under the direction and superintendence of the gamekeeper or other responsible person appointed by the landlord, and the tenant shall not be entitled to burn any heather at his own hand.¹

11. RIGHT OF ENTRY

(11) Right of entering upon the farm and to the buildings thereon at all times, not only in connection with the said reservations, but also in order to see the state of the land, buildings, and others, and generally for any other purpose.

COMPENSATION AND DAMAGES

Declaring, with reference to all the foregoing reservations of property rights and powers, that in the case of resumption of ground the tenant shall be entitled to payment for any crop, seed, and labour on or in such ground, and also to such claims, if any, as would have been competent to him for unexhausted improvements thereon if the lease had expired at the date of such resumption, all which claims shall be forthwith settled by arbitration; but except to that extent, or except where otherwise hereinbefore expressly stated to the contrary, the tenant shall have no claim for any abatement of rent or other compensation, nor any claim of damages or other claim in respect or on account of the exercise of the said reservations, or of the consequences of such exercise, or of anything that may follow thereon.

WARRANDICE

3. Which lease, under the reservations and conditions before and after written, the said A. binds himself and his heirs and successors to warrant to the tenant at all hands.

OBLIGATION FOR RENT²

- 4. For which causes, and on the other part, the said B. binds himself, and his heirs, executors, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, to pay to the landlord, or his factor in his name, the sum of \pounds of yearly rent for the farm, and that at two terms in the year, Whitsunday and Martinmas, by equal
- ¹ A 'penal' rent may still be stipulated ² For other arrangements as to payment for a breach of this condition. A. H. Act, of rent, see p. 632. 1900, s. 6.

portions, beginning the first term's payment thereof at the term of Whitsunday 1905, and the next at Martinmas thereafter, and these in full of the first year's rent and for crop 1905, and continuing the payment of the said rent half-yearly at these terms during the currency hereof, with a fifth part more of each term's rent of liquidate penalty in case of failure, and with interest on each term's rent at the rate of five per cent. per annum from the term when the same becomes payable till paid.

CONDITION OF BUILDINGS, ETC.

5. The tenant accepts of the houses, buildings, hedges, dykes, fences, gates, roads, drains, ditches, and watercourses as in good order and in proper tenantable condition and repair, and binds himself to uphold and maintain the same in good order, condition, and repair during the whole currency of the lease, and to leave them in that state at its termination, but excepting always from this obligation all fences round plantations, which the landlord shall be bound to maintain at his own expense, except in so far as they may be destroyed or injured by the tenant or by his servants or stock, or by others for whom he is responsible, in which case the tenant shall be bound to restore or repair at his own expense; and particularly, but without prejudice to the said generality, the tenant shall clean and dress the hedges, repair the dykes, fences, gates, and roads, and clean out the ditches and watercourses once every year.

ARRANGEMENTS ON ENTRY

6. With reference to the arrangements on the tenant's entry, the following provisions shall apply:—Notwithstanding the foresaid terms of entry, (1) the tenant shall at any time after 1st February 1904 have access to the fallow land, and accommodation on the farm for four horses and two men and ploughs during such time or times as may be reasonably necessary for working such land; and (2) on the other hand, the outgoing tenant shall be entitled to the use of the barn, barnyard, threshing mill, engine and boiler, and one cothouse, and accommodation for four horses and carts, till the term of Whitsunday 1905. The tenant shall relieve the landlord of the obligation in the subsisting lease of the farm, being that in favour of the said C., to take over and pay for the dung, grass seeds, fallow break and ploughing, and the threshing-mill, engine and boiler, and the tenant shall pay for these, and shall carry through all arrangements and arbitrations in order to fix the price thereof, and shall relieve the landlord of all expenses and all other claims in connection therewith. But as regards the straw of the said C.'s waygoing crop, the tenant shall receive the same without payment or compensation, with this exception, that the said C. shall be entitled to have and use so much of the straw as may be necessary for heading the stacks, covering the potato pits, and also for such horses as may be reasonably necessary for threshing and marketing the crop, the tenant receiving the manure made from such straw.

MANAGEMENT 1

7. As regards the management of the farm, the following provisions shall apply:—The tenant shall reside on the farm. He shall at all times keep a

1 For a different set of management clauses, see p. 633.

sufficient stock (being his own property) on the farm. He shall labour, manure, and crop the farm in all respects according to the rules of good husbandry as practised in the district, and shall not deteriorate or run out the soil by undue cropping or penury of manure; and without prejudice to the foregoing generality, he shall be entitled to cultivate and crop the lands as he thinks most advantageous, subject to the following regulations:—He shall never have less than two-fifths of the land in grass nor more than two-fifths in white crop (beans and pease being reckoned as white crop). [During the last five years of the lease] the tenant shall not be entitled to take two white crops (including beans and pease) in succession from the same land. [During the last five years of the lease] the tenant shall not be entitled to break up for cropping any land until it shall have lain in grass for at least two successive years. The tenant shall annually consume on the farm all the straw, chaff, fodder, turnips, and other green crops (hay and potatoes excepted) that may be produced on the farm. He shall apply to the land annually the whole manure made on the farm. If hay or potatoes are sold or carried off the farm, the tenant shall purchase and lay down on the farm at least twenty cart-loads of dung for every acre of crop so sold or carried off, or an equivalent thereto in bone manure.

ARRANGEMENTS TOWARDS, AND AT, EXPIRY

8. With reference to the arrangements towards, and at, the expiry of this lease, the following provisions shall apply:-Notwithstanding the terms of expiry following from the terms of entry before expressed, (1) the tenant shall be entitled to the use of the barn, barnyard, threshing-mill, engine and boiler, and one cot-house, and accommodation for four horses and carts, till the term of Whitsunday 1924, and (2) on the other hand, the tenant shall be bound to allow the landlord or incoming tenant, at any time after 1st February 1923, to have access to the fallow land, and accommodation on the farm for four horses and two men and ploughs during such time or times as may be reasonably necessary for working such land. The landlord or incoming tenant shall have power to sow grass seeds with the tenant's waygoing crop or any part thereof, the tenant being bound to harrow and roll the same free of charge, and to give due notice to the landlord or incoming tenant before sowing the crop. The landlord or incoming tenant shall be bound to take,1 and the tenant shall be bound to leave and sell, the whole dung made on the farm after the turnip crop is sown in the penultimate year of the lease, at such price as shall be fixed by arbitration. The tenant shall also be entitled to payment from the landlord or incoming tenant for the fallow break, and also for ploughing the same if such ploughing shall have been done by the tenant at the request of the landlord or incoming tenant. The tenant shall leave the whole of the last year's crop of straw on the farm without compensation, with the same exceptions as on his own entry, and he shall be bound to thresh out and deliver the straw in a regular and customary manner, and so as to keep the live stock of the landlord or incoming tenant in a full supply of straw for food and litter. The ground sown with grass seeds with the

¹ See p. 637.

tenant's penult crop shall not be pastured with cattle or horses at any time, nor with sheep after the term of Candlemas 1923.

FIRE INSURANCE

9. The tenant shall pay to the landlord as at the term of Whitsunday 1904, and at the same term in each subsequent year of the lease, but not in the year of removal, one-half of the premium of fire insurance on a policy to be effected by the landlord in his own name, covering the houses and other buildings to the extent of £, and all sums to be recovered under the policy shall be expended by the landlord in reinstating the property destroyed or damaged. The tenant shall effect and maintain in his own name an insurance of his stock, stocking, and crops with a responsible insurance company to the extent of £, and shall produce the policy and the yearly premium receipts to the landlord.

LANDLORD'S OPTIONS TO TERMINATE

10. If at any time during the currency of this lease the tenant shall have an award of sequestration or cessio pronounced affecting his estate, or shall grant a trust deed for behoof of creditors, or become notour bankrupt (whether any of these shall happen at the instance of the landlord or any other party), then, in the option of the landlord, this lease shall ipso facto come to an end, and the landlord shall be entitled to apply to the sheriff of the county or any competent authority for a warrant of summary ejection, the tenant being always entitled to the rights of an outgoing tenant as if this lease had run to its natural termination.

OBLIGATION TO REMOVE, ETC.

11. The tenant binds himself to flit and remove himself, and his family, servants, cottars, goods, and gear, from the farm and buildings thereon at the expiry or sooner termination of this lease, without any warning or process of removing to be used to that effect; and should he refuse or neglect to do so, he shall pay at the rate of an annual rent of £ [twice the rent] for the time he shall remain in possession after such termination, which increased rent it is hereby agreed shall be pactional and not penal. And without prejudice to the foregoing obligation to remove without notice or warning, it is agreed that notices under sec. 28 of the Agricultural Holdings (Scotland) Act, 1883, are hereby dispensed with, and neither party shall be entitled to found to any effect upon the failure of the other to give the notice thereby required.

ARBITRATION

12. All questions and disputes of every kind which may arise between the landlord and the tenant, and their respective heirs, executors, representatives, and successors whomsover, whether before or on the commencement, during the currency, or on or after the termination of this lease, are hereby referred to the amicable and final decision of two arbiters, one to be named by each

¹ This obligation on the landlord is not implied. Clark v. Hume, 1902, 5 F. 252.

² Quære whether this is struck at by s. 6. of the A. H. Act, 1900.

party, and failing the arbiters agreeing, then by an oversman to be named by them before they enter on the business of the submission. In every case which shall occur requiring a settlement by arbitration, if either of the parties fail to name an arbiter within fourteen days after being required to do so, it shall be competent to the other party to apply by summary petition or otherwise to the sheriff of the county for the nomination of an arbiter on behalf of the party so failing to name one; and in like manner, if in any case the arbiters, however named, shall fail to agree upon or to appoint an oversman before entering on the business of the submission, or within fourteen days after they are both themselves appointed, it shall be competent for either of the parties to apply to the sheriff for the nomination of an oversman. The arbiter and oversman shall have power inter alia to award and assess damages. No arbitration shall fall by the death of either or both of the parties.

REGISTRATION, ETC.

13. All the obligations hereinbefore contained on the part of the tenant shall bind not only the said B. and his successors in the occupation under this lease, but also his heirs, executors, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order: And both parties consent to registration hereof, and of all decrees-arbitral interim and final, to be pronounced under the foregoing clause of arbitration, and all other proceedings thereunder, for preservation and execution.—In witness whereof.

AGRICULTURAL LEASE, WITH (1) MARTINMAS ENTRY, (2) BREAK, (3) POSTPONED RENTS

[Preceding form, to statement of endurance.]

and that for nineteen years and crops from and after the 28th day of November 1904, which, notwithstanding the date hereof, is declared to be the term of the tenant's entry under this lease.

BREAK

But notwithstanding the term of endurance before written, it shall be in the power of either landlord or tenant to put an end to this lease at the 28th day of November 1914, provided the party desirous of taking advantage of this break shall give notice in writing to the other party on or before the 28th day of November 1913.

RESERVATIONS AND WARRANDICE

[See preceding form, pp. 626-8.]

OBLIGATION FOR RENT

4. For which causes, and on the other part, the said B. binds himself, and his heirs, executors, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, to pay to the landlord, or his factor in his name, the sum of \pounds of yearly rent for the farm, and that at two terms in the year, Candlemas and Lammas, by equal portions, beginning the first term's payment thereof at the term of Candlemas 1906, and

the next at Lammas thereafter, and these in full of the rent for the first year of this lease and crop 1905, and continuing the payment of the said rent halfyearly at these terms during the currency hereof, with a fifth part more of each term's rent of liquidate penalty in case of failure, and with interest on each term's rent at the rate of 5 per cent. per annum from the time when the same becomes payable till paid: But declaring, notwithstanding what is before written, that upon the expiry of this lease, whether by break or otherwise, the whole rents shall become payable and be paid at the term of removal, unless the tenant shall find sufficient caution or security to the satisfaction of the landlord for the due payment of such rents as would not be payable until after that term if the lease had not come to an end, and that at the terms at which the same would otherwise have become payable, and with interest after such terms, and with penalty all as aforesaid; and if the tenant elects to pay in full at the term of removal, he shall be entitled to discount at the rate of four per centum per annum for the periods between that term and the respective terms at which the rents would otherwise have been payable.

CONDITION OF BUILDINGS, ETC.

5. [See preceding form, p. 629.]

ARRANGEMENTS ON ENTRY

6. With reference to the arrangements on the tenant's entry, the following provisions shall apply:—Notwithstanding the foresaid term of entry, the outgoing tenant shall be entitled to the use of the barn, barnyard, threshing-mill, engine and boiler, and one cot-house, and accommodation for four horses and carts till the term of Whitsunday 1905. The tenant shall relieve the landlord of the obligation in the subsisting lease of the farm, being that in favour of the said C., to take over and pay for the threshing-mill, engine and boiler, and the dung on the farm made after the sowing of the 1904 turnip crop, and he shall carry through all arrangements and arbitrations to fix the price thereof, and shall relieve the landlord of all expenses and all other claims in connection therewith. As regards the straw of the said C.'s waygoing crop [as on p. 629, or, if it is to be paid for, it will be included above along with the dung].

MANAGEMENT 1

7. As regards the management of the farm, the following provisions shall apply:—The tenant shall reside on the farm. He shall at all times keep a sufficient stock (being his own property) on the farm. He shall labour, manure and crop the farm in all respects according to the rules of good husbandry as practised in the district, and shall not deteriorate or run out the soil by undue cropping or penury of manure; and particularly, without prejudice to the above general obligation, he shall never take two successive white crops without the intervention of a green crop, pease and beans being reckoned as white crops. But if after a crop of turnips or potatoes, grass seeds are sown with a white crop, and if the grass seeds fail on account of the season, the tenant shall be

¹ For a different set of management clauses, see p. 629.



allowed to take a Spring crop of oats or barley, the land to be first at least once ploughed, and grass seeds to be again sown down with such white crop. Wheat shall not be sown except after a crop of turnips or potatoes, the land being sufficiently dunged for such green crop; and further, during the last four years of the lease wheat shall not in any one year be sown to a greater extent than shall have been done regularly during the previous years of the lease. The lands under cultivation shall at the expiry be left in regular breaks or rotations of cropping. During the last four years of the lease one-fourth of the farm shall always be in sown grass or pasture. The whole dung made on the farm shall be applied to the ground, and in the last year of the lease the whole dung made prior to the sowing of the waygoing turnip crop shall be applied to that crop. Further, if any straw or turnips are sold or carried off the farm, a full equivalent quantity of manure not made on the farm shall be applied to the land.

ARRANGEMENTS TOWARDS, AND AT, EXPIRY

8. With reference to the arrangements towards, and at, the expiry of this lease, the following provisions shall apply:-Notwithstanding the term of expiry following from the term of entry before expressed, the tenant shall be entitled to the use [as on p. 630]. The landlord or incoming tenant shall have power to sow grass seeds [as on p. 630]. The tenant shall not allow any horses, cattle, sheep, or bestial of any kind to pasture upon any part of the lands after the separation of his last crop from the ground where grass seeds have been sown with such crop; and if he act to the contrary, he shall pay an additional liquidate sum at the rate of £10 per acre for the ground so pastured. The landlord or incoming tenant shall be bound to take, 1 and the tenant shall be bound to leave and sell, the threshing-mill, engine and boiler, the waygoing turnip crop, and the whole dung made on the lands after that turnip crop is sown, all at such prices as shall be fixed by arbitration. The valuation of the turnips shall be made between 20th October and 15th November, and that as if the turnips might unconditionally be, and were to be, removed from the farm. The tenant shall leave the whole of the last year's crop of straw [as on p. 630; or if the straw is to be paid for it will be included above along with the mill, etc.].

[Complete as in preceding form].

A SHORT FORM OF LEASE OF A SMALL FARM

[Form on p. 625 to the words specifying the endurance] and that for years after the term of Martinmas 1904.

- 2. The following are reserved to the landlord [take in such of the reservations on pp. 626-8 as are really necessary, according to circumstances, making it clear as to abatement of rent or other compensation, or not].
- 3. The landlord grants absolute warrandice, subject to the other clauses herein contained.
 - 4. The rent shall be £ $per \ annum$, which the tenant binds himself

 1 See p. 637.

to pay at Whitsunday and Martinmas by equal portions, beginning at Whitsunday 1905 for the half-year preceding, with a fifth part more of each term's rent of penalty in case of failure, and with interest on each term's rent at the rate of five per centum per annum from the term the same becomes due till paid.

- 5. [Clause as to condition of buildings, etc., on p. 629, so far as necessary.]
- 6. The tenant shall pay the outgoing tenant for the grass seeds sown with the latter's waygoing crop, and shall relieve the landlord thereof, and of all expense of ascertaining and settling the amount. The tenant shall in like manner receive at the expiry of this lease, from the landlord or incoming tenant, the value of the grass seeds sown with his waygoing crop, on production of a respectable tradesman's account vouching the amount, and a declaration by the tenant if required.
- 7. The tenant shall reside on the farm. He shall at all times keep a sufficient stock (being his own property) on the farm, and shall labour, crop, and manure the farm in all respects according to the rules of good husbandry as practised in the district. He shall never have less than two-fifths of the land in grass, nor more than two-fifths in white crop. He shall never take two white crops in succession from the same ground. He shall annually consume on the farm all the straw, chaff, fodder, turnips, and other green crop, and shall apply to the land annually the whole manure made on the farm [or substitute the provisions at the end of article 7 on p. 630].
 - 8. [Fire insurance, p. 631, if desired.]
 - 9. [Bankruptcy, p. 631.]
 - 10. [Obligation to remove, p. 631.]
 - 11. [Arbitration, p. 631.]
 - 12. [Registration, etc., p. 632.]

A STILL SHORTER FORM FOR A SMALL PIECE OF LAND

[After the introductory paragraph, proceed]

- 1. The said A. lets to the said B. and his heirs, but excluding subtenants and assignees, whether legal or conventional, the piece of land [identify it], extending to or thereabouts, but which measurement is not of the essence of or material to the contract, and that for years from
- 2. This lease applies to the surface only, and for agricultural purposes only and for no other purpose whatever.
- 3. Without prejudice to the foregoing article, there are reserved to the landlord—
 - (1) Power to resume land for building, feuing, or letting on long lease, the tenant being entitled to abatement of rent and to payment for any crop, seed, manure, and labour on or in such ground, all as the same, failing agreement, may be settled by arbitration by two arbiters to be mutually appointed or by an oversman appointed by them before entering upon the submission.
 - (2) Power to shoot and sport over the land and to let these rights.

- 4. [Rent, pp. 634-5.]
- 5. The tenant accepts of the land, buildings, hedges, fences, gates, drains, and everything else as in good order and in proper tenantable condition and repair, and binds himself to keep the same in such order, condition, and repair during the currency of the lesse, and to leave them in that state at its termination.
- 6. The tenant shall labour, crop, and manure the lands according to the most approved rules of good husbandry, and so as not in any manner to deteriorate or run out the same, but on the contrary shall use his utmost endeavour to improve the land and keep it in good heart.
- 7. [Gruss seeds, clause 6, p. 635, or the following] In the last year of the lease the landlord or incoming tenant shall be entitled to sow grass and clover seeds with the tenant's white crop. The tenant shall give six days' previous notice in writing to the landlord or incoming tenant before beginning to sow his last Spring crop, and he shall be bound to harrow and roll in the seeds in a proper manner without any charge therefor, and shall not be entitled to cut or pasture with stock of any kind or otherwise injure the land so sown down after the last crop has been reaped.
- 8. If at any time during the currency of this lease the tenant shall have an award of sequestration or *cessio* pronounced affecting his estate, or shall grant a trust deed for behoof of his creditors, or become notour bankrupt (whether any of these should happen at the instance of the landlord or any other party), then in the option of the landlord this lease shall *ipso facto* come to an end.

Lastly.—Both parties consent to registration hereof for preservation and execution.—In witness whereof.

LEASE OF A SHEEP FARM

[Form on p. 625, to statement of endurance] and that for years from and after the term of Whitsunday 1904, which is hereby declared to be the term of the tenant's entry, notwithstanding the date hereof.

RESERVATIONS

- 2. But this lease is granted under the following reservations in favour of the landlord, namely [specify them, having special regard to heather-burning, see p. 628].
 - 3. [Warrandice, p. 628.]
- 4. [Rent, p. 634, but the first rent payable at Martinmas 1904, and the next at Whitsunday 1905.]
 - 5. [Buildings, etc., p. 629, but specify fanks and folds.]

SHEEP STOCK ON ENTRY

6. The tenant shall take over the sheep stock on the farm at the date of his entry, and shall pay therefor to the outgoing tenant C., and the tenant shall relieve the landlord thereof, and of all expenses in connection with ascertaining and settling the amount. The price shall be fixed by arbitration between the tenant and the said C., in terms of the lease in favour of the said C.

SHEEP STOCK

7. [Further] as regards the sheep stock, the following provisions shall apply:—The tenant shall keep the farm duly stocked, but not over-stocked. The stock shall be the tenant's own property. The stock shall not be changed during the last four years of the lease. On the tenant's removal, whether at the natural ish or at any other period, he shall dispose of the stock to the landlord or incoming tenant if required so to do in writing dated not later than the 1st day of March in the year of his removal, except in the case of termination before the natural ish by exercise of the landlord's option to that effect in the event of any cause arising to give occasion for such exercise in terms of this lease, in which case the written notice may be given at the same time as, or within one month after, the intimation of the exercise of such The price shall be fixed by arbitration, failing agreement. In like manner, in the event of the tenant dying during the currency of the lease, the stock shall not be removed from the farm; but in case, from the tenant's testamentary writings or otherwise, the stock shall then belong to someone other than the party succeeding to the lease, the stock shall be disposed of to such latter person, who shall be bound to take, as the other party shall be bound to make over, same at a price to be fixed as aforesaid; and failing arrangements to that end being made and carried through, the price paid, and evidence on all these matters produced to the landlord, all within six months after the tenant's death, then this lease shall, in the option of the landlord, come to an end without any declarator or other process, and the farm may be immediately re-let, in which case the landlord or incoming tenant shall have the option of purchasing as hereinbefore expressed.

Or,

if the landlord or incoming tenant is to be bound to take the stock, the clause will run thus:

7. [Further] as regards the sheep stock, the following provisions shall apply:—The tenant shall keep the farm fully stocked, but not over-stocked. The stock shall be the tenant's own property, and it shall not be changed during the lease. The stock shall be bound to the ground; and on the expiry of this lease, whether at the natural ish or any other period, the tenant shall be bound to leave and sell the same to the landlord or incoming tenant, and the landlord or incoming tenant shall be bound to take and pay for the same.\(^1\) The price shall be fixed by arbitration, failing agreement.

Insert such clauses applicable to the arable land, if any, as may be appropriate under the circumstances, and necessary general clauses from the preceding forms.

¹ Note that, at least when the clause is expressed so as to bind the landlord, but to leave an option to the tenant, if the tenant's trustee in bankruptcy requires the landlord to take over the stock in terms of the lease, this entitles the landlord to set off rent and arrears against the price. Craig's Tr. v. L. Malcolm, 1900, 2 F. 541. The obligation is enforceable against the landlord even in the event of an irritancy of the lease through

the tenant's default. Stewart v. M. of Breadalbane, 1903, 5 F. 359. A succeeding heir of entail is not liable. Panton v. Mackintosh, 1903, 10 S. L. T. No. 485. Quære whether a singular successor is bound? Ibid. An obligation by lessor to take new tenant bound is very defective, for (a) he may prefer to take the farm into his own hands on expiry, and (b) in any case a new tenant may not be found. Ibid.

LEASE BY HERITABLE CREDITOR IN POSSESSION [510]

It is contracted between the parties following, viz. :- A., heritable creditor in possession of the estate of X. in the county of , of which the subjects hereby let form part [or of inter alia the subjects hereby let], conform to decree of mails and duties at his instance against B. [the debtor] obtained in the Court of Session [or Sheriff Court at], dated and , [and specially authorised to grant these presents conform extracted to decree obtained in the Sheriff Court at [or the said Sheriff Court], and extracted]: Declaring that the said A., and his successors and assignees so long as they remain in possession, and thereafter the said B. and his heirs, or other the party or parties for the time being entitled to the said subjects or the rents thereof, are hereinafter referred to and included wherever the expression "the landlord" is used throughout these presents, of the first part, and C., who and his heirs in the right of occupation under this lease are hereinafter referred to and included wherever the expression "the tenant" is used throughout these presents of the second part, in manner following: That is to say [proceed as in ordinary form].

GRASS PARKS

- Conditions of roup and lease of grass parks at belonging to A., distinguished as follows, viz.: (first) the Haugh Park, being No. on the Ordnance Survey Map signed as relative hereto, (second) [distinguish them in like manner], which parks are to be let by public roup for the season 19 by the said at on at o'clock noon, on the conditions following or at such other time and on such other conditions as may be specified in any minutes to be annexed hereto.
- 1. The upset rents shall be as follows: (1) the Haugh Park £ [and so on, or The proprietor reserves a right to make one bid during the exposure of each park, or both of these clauses may be united]. The proprietor shall be entitled to reject any offerer, in which case no offer on his behalf shall be received; and if required all offerers shall state on whose behalf they are offering.
- 2. The parks are to be let for the period from [1st April 19] to [30th November 19] both inclusive.
- 3. The parks are to be let for pasture only, and only by horses or cattle, and the following are excluded, viz.: (1) bulls; (2) animals suffering from disease; and (3) wild or fence-breaking animals. Any animal which after admission shews symptoms of disease or of wildness or fence-breaking habits shall be forthwith removed.
- 4. No guarantee is given as to the extent of the respective parks or as to accesses, fences, shelter, water, or as to any matter or thing whatever. Offerers must satisfy themselves on all points. No error or deficiency in any or all of the matters before referred to or in any other respect, nor any loss resulting

therefrom, shall affect the contract or entitle the tenant to resile or to claim any abatement of rent or to claim damages, or to any other remedy. The proprietor is not to be responsible for any accident, damage, or loss to or of stock from whatever cause arising.

- 5. The parks shall be sufficiently, but not over-pastured.
- 6. All injury to other stock or to ground, buildings, crops, trees, fences, gates, or otherwise caused by the tenant, or by his stock, or by his servants, or those employed by him, or for whom he is responsible, shall be made good by the tenant. The tenant shall further relieve the proprietor of any liability which he may incur for any such injury so arising to the property of third parties.
- 7. All manure made by the stock shall be the property of the proprietor, free of any claim.
- 8. Forty-eight hours' notice shall be given to the proprietor or his factor when stock is to be put on or removed from any of the parks. The accesses used shall be those pointed out on behalf of the proprietor.
 - 9. Assignees and sub-tenants are excluded.

4 per cent. per annum will be allowed.

- 10. The proprietor reserves the following rights and powers exerciseable by himself and his lessees and others having his authority, viz.:—(1) rights of access, perambulation, hunting, sporting, shooting, and fishing; (2) to perform cartages of all kinds across or through the parks; (3) to cut and pull out thistles and weeds, which, however, he shall not be bound to do; and (4) to cut wood and quarry stone and to remove same.¹
- 11. Each person preferred to any of the parks shall sign a minute in the form annexed hereto, and the same shall also be signed by a cautioner to be provided by him. The cautioner shall be to the satisfaction of the proprietor, who shall be entitled to reject any cautioner without reason assigned. The minute shall be signed by or on behalf of the tenant at the roup, and if not then signed by him personally, it or another copy of the same shall be signed by him. If the minute be not in the hands of the proprietor's agents having duly attested signatures by the tenant and a sufficient cautioner within six days after the roup, the proprietor may in his option hold the offerer as tenant, or cancel the contract and hold the offerer liable in one-fourth part of the rent as liquidate damages. The stamp duty on the minute and promissory note aftermentioned shall be payable, one half by the proprietor and the other half by the tenant.
- 12. The rent shall be payable at Martinmas, 11th November 19, with interest thereafter at the rate of 5 per cent. per annum till paid. Before a tenant's stock is allowed to enter he shall grant a promissory note along with his cautioner jointly and severally for the amount of the rent payable in the Bank at on 8th November 19. The tenant shall be entitled to prepay the rent at any time, in which case discount at the rate of
- 13. B. shall be judge of the roup, with power to decide all questions arising at the roup as well between the proprietor and offerers as among the offerers themselves.
- ¹ This last reservation ought to be omitted essential for shelter. If power to resume for if not really necessary. The wood may be feuing, etc., be desired, see p. 627.

- 14. All questions and disputes after the roup between any of the parties, including cautioners, as to the meaning and effect of these conditions and the carrying out of the same or otherwise in connection with the lease and occupancy, and all claims between the parties, are referred to C., whom failing to D., as sole arbiter.
- 15. In all matters of judicial procedure the proprietor, offerers, tenants, and eautioners subject themselves to the jurisdiction of the Sheriff Court of at .
- 16. These conditions are not to be altered or modified by advertisements or other information given, or statements made, by or on behalf of the proprietor or by the judge of the roup, whether before, at, or after the roup.—In witness whereof.

MINUTE

I, E., become tenant of the Haugh Park identified in the foregoing Conditions at the rent of £ for the period and on the terms and conditions therein specified, all which I, the said E., as principal, and I, F., as cautioner, adopt and bind ourselves jointly and severally to fulfil and observe in all respects.—In witness whereof.

[Place and date.]

Accepted on behalf of the proprietor

Holograph.

The

(Signature)

Stamp.—As a lease.

If by private bargain make the following changes:-

Title.—Omit all reference to roup.

Art. 1. Omit it.

Art. 11 will read as follows:-

Each person accepted as tenant of any of the parks, and his cautioner, shall sign a minute in the form annexed hereto. If the minute duly signed by tenant and cautioner, and attested, be not in the hands of the proprietor's agents within six days after the posting of the intimation of acceptance of offer, the proprietor may, etc., etc.

Art. 13. Omit it.

Art. 14. Omit "after the roup."

Art. 16. Stop at "proprietor."

Add new Article at end as follows:-

Offers will be received by Messrs G. & H. on or before highest or any offer may not be accepted.

OFFER

[Place and date.]

I, E., offer £ of rent for the park for the period and on the terms and conditions above stated. And I offer F. as cautioner.

SEPARATE ACCEPTANCE

[Place and date.]

On behalf of the proprietor we accept your offer of \pounds for the [specify the park].

[Minute as above.]

SECTION XXXVIII

REVERSIONARY INTERESTS

A REVERSIONARY interest may be defined as an interest in property, which may or may not be vested in the meantime, but of which, in either case, the beneficial enjoyment is postponed by the existence of some prior estate or interest, such as a liferent. The paramount question regarding every such interest is: Is it vested? and the reports are largely filled with answers to that question in particular cases, decisions which it will be found very difficult to reconcile.

As the law is at present developed, a reversionary interest may, as regards vesting, be in any one of three positions:—

- 1. It may be absolutely and indefeasibly vested.
- 2. It may be vested subject to defeasance in a certain event.
- 3. It may be not vested at all, but contingent.

Absolute Vesting.—It is easy to understand, but not very easy to define, what a vested reversionary interest is. It would be incorrect to say that, though the actual enjoyment is postponed, it is already the absolute property of the person entitled to it. That would be a contradiction in terms, for full dominium involves the rights of drawing the fruits and alienating the corpus. But the results and effect of vesting are easily understood, and briefly they are: that the right is subject to the debts and deeds, inter vivos and mortis causa, of the person entitled to it. That is to say, his creditors may attach it by diligence, it will fall under his bankruptcy, he may alienate and mortgage it, he may bequeath it, if there is any destination affecting it under the titles he may alter the destination, and (apart from any destination left unaltered) if he die intestate, it will go to his heirs ab intestate, subject to liability for his debts, according to the ordinary rules of law.

Vesting subject to Defeasance.—This is a doctrine which, though long established in certain relations, has recently been very much developed. It takes its origin from the rule of tailzied succession, that though the nearest heir in existence at the death of the last proprietor is entitled to make up title and enter into possession, still, if a nearer heir be subsequently born, the heir who has entered

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into possession must denude in favour of the nearer heir, and that whether the latter was or was not in utero at the death of the last proprietor. A case in point is a destination to the sons of A. in their order, whom failing to B. A.'s then only son is in possession and dies; B. succeeds; A. then has another son; B. must denude in favour of the second son of A. The rule is different in succession by force of law apart from any tailzied destination, for then the nearest heir in existence at the opening of the succession acquires an indefeasible right unless there is then a nearer heir in utero. Starting from this basis, the principle of defeasance manifests itself in various forms, of which the following are the most frequent:—

- 1. The first is the ordinary case of a trust provision for A. in liferent only and her issue in fee, without any clause of survivorship or other element to suspend vesting. In that case each child in existence at the testator's death, or subsequently coming into existence during A.'s life, takes a vested interest at the testator's death, or at birth respectively, subject, however, to partial defeasance in the event of more children being born. The further children will take shares, thus reducing the shares of those already in existence; but still the share of each child, though liable to diminution, is a vested interest.1 The rule applies to heritage also, and was applied in a case where trustees were directed, at the testator's death, to convey heritage to A. in liferent and to her issue in fee; a child born after the testator's death during A.'s lifetime was held entitled to participate.2 In any transaction with any of the children, allowance must be made for the possibility of reduction in the amount of the share owing to future births, or there must be an insurance against further issue.
- 2. The second case of defeasance is that of a trust provision for A. in liferent only and her issue in fee, with a power of apportionment to A. Here, there being no survivorship clause or other element to suspend vesting, each child takes a vested interest; but the result of the exercise of the power of apportionment may be to make the shares most unequal, and even to cut out any one, or all but one, of the children. The right is thus vested subject to partial or even total defeasance. A transaction is impossible with any of the children unless the mother will consent to make an irrevocable appointment of a sufficient sum in favour of the child in question. In calculating what sum is required in loan transactions, allowance must be made for the fact that the borrower may pay no interest. It is at least desirable that the deed of appointment should declare how the appointed sum is to rank upon the whole fund (see p. 857).
- 3. The third case of defeasance is (or was) a trust provision for A. in liferent only, and her children in fee, with a direction that in the event

¹ M'Laren, Wills, 787; Beattie's Tr. v. ² Simpson v. Marshall, 1900, 2 F. 447. Cooper's Trs., 1862, 24 D. 519.

of any of her children predeceasing A., their issue shall take the share which would have fallen to their parent if he or she had survived. This is further dealt with on p. 657. Here it is enough to say that in Dalhousie's case 1 in 1889 the view taken was that this was an instance of possible defeasance only, so that if X., a child of A., predeceased A. leaving issue, the issue took in their own right, but that if X. left no issue he had an absolutely vested right though he did not survive A. Then in later cases the view was taken that this clause of reference to issue had no effect at all in qualifying vesting. This was carried very far. It was extended to cases in which the clause was so expressed that it was hopeless to suggest that it was limited to the first beneficiaries predeceasing the testator. Decisions to this effect have been given both before 2 and after 3 Bowman. But it is with deference suggested that some of them, e.g. the two just cited, cannot stand even apart from Bowman. And they are now apparently discarded.

According to the latest and most authoritative decisions regarding the vesting of rights subject to a conditional institution in favour of issue, the contingent rights of the issue of the immediate legatees have the effect of suspending the vesting of the estate until the period of payment,⁵

unless earlier vesting be otherwise indicated.

4. A fourth important example of the rule of vesting subject to defeasance is the case where a father in his will sets out by directing his trustees to divide his estate among his children, and then adds a rider to the effect that, as regards his daughters' shares, his trustees shall retain them for the daughters in liferent, or liferent allenarly, and their issue respectively in fee. On first consideration it would appear that each daughter has a liferent and nothing more; but the construction has been reached that, so far as the daughter is concerned, the leading intention in the testator's mind is to give her a fee—as is thought to be shown by the initial direction to divide his estate among all his children—and that the subsequent restriction to a liferent is merely from favour to her issue, if any, and is to be confined to the accomplishment of that purpose. Accordingly, if there be no issue, the purpose and object of the clause disappear, and the clause itself is made to disappear also. The result of that is, that there is left standing only the initial direction to give the daughter a share of the estate, and it now operates to give her a fee.6 That at least is the popular way of putting it; but the theory is that the daughter starts with a fee, and retains it unless and until it is divested in favour of her own issue. The rule is limited to cases where there is found

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<sup>1</sup> Dalhousie's Trs. v. Young, 1889, 16 R.
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² Ross's Trs. v. Ross, 1897, 25 R. 65.

³ Matheson's Trs. v. M.'s Trs., 1900, 2 F. 556.

⁴ Bowman v. B., 1899, 1 F. (H. L.) 69. ⁵ Parlans's Trs. v. P., 1902, 4 F. 805.

⁶ Lindsay's Trs. v. L., 1880, 8 R. 281; Dalglish's Trs. v. Bannerman's Ecrs., 1889, 16 R. 559.

in the will, in the first instance, a gift or direction to pay to the daughter.¹ It does not appear to be definitely decided whether the mother's fee is divested by the birth of a child, or whether to have that effect the child must survive her, but there are expressions which favour the latter view.² Turning to the practical result of the rule in the class of cases within which it operates, it may be regarded from the point of view of a transaction with the mother or with one of the children.

The Mother.—Even though she has no child, and has had no child in life since the testator's death, still if she is not in fact past the age of child-bearing, it must be assumed that she has a liferent only. and an insurance must be effected against issue. If a policy be effected it should be made payable on the birth of a child, or at least on the mother's death if she shall have had a child born after the date of the policy, whether the child survive her or not. This is on the possible view that her right to the fee might be divested by the mere birth of a child irrespective of survivance. If, again, the mother be past the age of child-bearing, then, if she has no child and has never had a child in life since the testator's death, the result is that she has a fee which may be relied upon. If she has had a child, and that child is surviving, it is plain that her liferent only can be relied upon. But even if her child be then dead, the result is the same, in view of the question as to the date of vesting of the child's right. that case, however, it is possible that she may represent the child in whole or in part. It will be understood that all that has been said as to the mother dealing with the fee in certain events is subject to it being a case to which the rule applies at all (as to which see the distinction between the cases already quoted and Fulton 3); and that what has been said as to the mother dealing with the liferent is subject to the condition that it is not made alimentary under the will.

The Children.—Apparently it would not be safe for a purchaser or lender to proceed on any footing other than that in these cases the children take no vested interest unless and until they survive their mother. Accordingly life insurance will be necessary. As to the extent of each child's share, regard must be had to the possibility of more children coming into existence if the mother is not past the age of child-bearing.

5. A fifth case of vesting subject to defeasance is under a trust destination for A. in liferent and for her issue in fee, but in the event of her not leaving issue, then for B. If and so long as A. has no issue, B. takes a fee vested subject to defeasance.⁴ But two points must be kept

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A direction to hold and apply is not enough. Young's Trs. v. Young, 1901, 3 F.
 616.
 2 Lindsay's Trs., supra, at pp. 285, 287;
 M'Laren, Wills, 816.
 Trs. v. F., 1880, 7 R. 566.
 Steel's Trs. v. S., 1888, 16 R. 204;
 Cumming's Trs. v. Anderson, 1895, 23 R.
 94.

in view. The first is that if the ultimate destination is not to B. simply, but to him and his heirs, executors, and successors (or similar words, e.g. issue 1), these are, on the dictum of Lord Pres. Inglis in Steel, sufficient to prevent vesting even subject to defeasance. The second is expressed by Lord M'Laren in Cumming:

Of course if there had been issue (of A.) in existence at the death of the testator, a different question would have arisen, as it would have been impossible to hold that there was vesting in a conditional institute when there were objects in existence answering to the prior destination.

This would be so though the issue had not yet taken a vested right; but in that case, if they were to die out before taking, it would appear that B.'s right would vest subject to defeasance only if further issue of A. came into existence. On the other hand, if the destination over to B. were so expressed as to take effect only if A. never had a child,² or if A.'s children could take a vested right though they did not survive their parent, it is obvious that B.'s right might be absolutely defeated though all A.'s children predeceased both A. and B.

6. A reference to (say) a liferenter leaving issue naturally creates the impression that any reversionary gift to her issue is contingent on their surviving her.3 But regard must be had to the exact terms of the clause. Thus suppose trust directions to hold for A. in liferent, and on her death "leaving lawful issue I direct my trustees to divide amongst her issue" the fund liferented by her. A. has children, of whom some survive her, and others predecease her. The surviving children may put forward a claim to the whole fund, contending that nothing vested in the predeceasing children. This view was upheld in the Court of Session, but on appeal it was reversed,3 the ground of judgment being that there is no survivorship clause as amongst the children—that the word "leaving" simply means that the bequest fails if A. does not leave any issue, and that each child takes a vested interest subject to defeasance only if all should predecease. In this view the survivance of any one of the class maintains the vesting in all. If this view—which is well recognised in England—be relied on, it has a very material bearing on the nature and expense of the life assurance which is necessary. Suppose the liferentrix has four children, A., B., C. and D., then all that is required in dealing with A. is a policy payable only if all four children predecease their mother, which will obviously cost less than a policy payable if A. predecease her. The greater the number of children the less the risk becomes, and so the cheaper the premium. Indeed, if there be a large family it may be thought that insurance may be dispensed with.

¹ Corbett's Trs. v. Pollock, 1901, 3 F.

² So held under a destination over to survivors, if "any of my daughters die with-

out issue." Steel's Trs., 1902, 10 S. L. T. No. 282.

³ Hickling's Trs. v. Garland's Trs., 1896, 23 R. 598, rev. 1898, 1 F. (H. L.) 7.

The imposition of a personal qualification such as marriage prevents the application of the rule of *Hickling's* case.¹

Bankruptcy.—Reference is made to the remarks infra as to the effect of bankruptcy in the case of a contingent interest. There is apparently no authority on the question in the case of an interest vested subject to defeasance. But on principle it would seem that there is clear ground for a distinction between the two cases, and for the view that an interest vested subject to defeasance passes to the trustee. An interest of that nature is property in the person of the bankrupt, though subject to a condition which may result in its being taken from him. Of course, if it passes to the trustee it can only be subject to the same condition, but the point is that at the date of the bankruptcy it is the bankrupt's property. It would appear, therefore, that the trustee has a good title to sell the reversionary interest, though of course the necessity for life insurance will be the same as on a sale by the bankrupt himself, with this additional difficulty, that it may be impossible to get him to appear for medical examina-It will be kept in view in all these cases that if the interest is of the nature of heritable estate, it will not, in any event, pass under a cessio without a disposition omnium bonorum. A sale, unless with the consent of the bankrupt and the creditors, ought to be by

Contingent Interests.—This expression is used to denote interests which are not vested in any sense of the word, and which will not become vested unless and until a certain condition be fulfilled. The most common condition is that the party claiming shall survive some other person, who is generally the liferenter or liferentrix of the fund. In many senses contingent interests occupy a very curious position. They are not "property," and therefore they do not fall under sequestration or cessio2; nor can individual creditors attach them by adjudication or arrestment.8 But they may be assigned. As regards transmission by assignation, the assignee will of course have no better or higher right than the assigner, that is to say, he will never take anything unless the original condition be fulfilled. And there may be difficulty regarding completion of the assignee's If it is the case of a trust estate intimation to the trustee will be effectual, and will cut out all subsequent competitors. the case of entail expectancies and other spes successionis, where the element of infeftment comes in, there is a difficulty, as to which see p. 450.

¹ Wilson's Trs. v. W., 1901, 3 F. 967.

² Reid v. Morison, 1893, 20 R. 510. But (1) an undischarged bankrupt may not assign a spes. Obers v. Paton's Trs., 1897, 24 R. 719; and (2) his discharge may be refused

except on condition of at least a partial assignment to the trustee for the creditors. Leslie v. Cumming and Spence, 1900, 2 F. 643.

⁸ Trappes v. Meredith, 1871, 10 M. 38.

Life Assurance.—In cases of contingent successions there can be no transaction without the protection of life assurance. The exact terms of the policy require careful consideration. If A.'s interest vests by mere survivance of B., then an ordinary survivorship policy will be sufficient, i.e. payable only if A. shall predecease B; at least that is the usual form, though strictly it ought to be payable unless A. shall survive B. in order to guard against simultaneous death. But the period of vesting may be the first term of Whitsunday or Martinmas occurring three or six months after B.'s death, in which case the policy ought to cover a year after B.'s death; or the period of vesting may be the first of these terms occurring after the expiry of a year from B.'s death, in which case the policy ought to cover two years after B.'s death; or the period of vesting may be the actual date of payment, in which case an ample reasonable allowance of time must be made for realisation and division according to the nature, or probable then nature, of the subjects or investments.1

As to the amount of the insurance, see p. 449. As to other matters requiring attention, see p. 686 et seq.

The Extent of the Contingent Share.—Before relying on any increase by survivorship, it is necessary to keep in view the possibility of claims of legitim and the rights of issue of predeceasing children and the possible combination of these two claims.

- 1. If under the will nothing vests in the children till, say, the death of the widow, then if a son predecease her, it will clearly be in the interest of, say, his creditors and his widow to claim legitim, and it may be assumed that they will do so if he has not barred himself by accepting the provisions of the will in lieu of his legal rights.
- 2. If the deceased children have left issue, the issue will no doubt come in their parent's place. As to the extent of their claim, see p. 657, and as to its nature it will be remembered that, subject to the terms of the will, it may vest in the issue on the death of their parent though the vesting of the original share is postponed.²
- 3. Further, these two sets of claims may operate in combination. Thus a son of the testator predeceases the term of vesting, insolvent, and leaving issue. The will contains a conditional institution of issue. It either contains no clause declaring its provisions in lieu of legal rights, or if it does the clause does not extend to the second generation. The son has not discharged legitim. Under these circumstances it appears that (1) the trustee in the son's sequestration may claim legitim, and (2) the son's issue will nevertheless still take under the conditional institution.

Macdougall v. M'Farlane's Trs., 1890,
 See p. 649.
 R. 761.
 See p. 805.



FURTHER VESTING RULES

It would be rather out of place here to attempt to deal fully with the question of vesting, but it may be useful to have a record at least of the authorities on the points which occur most frequently in practice, in addition to those already noticed.

- 1. So far as testamentary instruments are concerned, it is usual to say that on the question of vesting, as in all other matters of construction, the controlling consideration is the testator's intention. But, after all, that means only that effect will be given to the fair meaning of the instrument when read as a whole; and in particular, it is not allowable to give effect to one's conviction, though clearly formed on a perusal of the will, that if a certain point had been put before the testator he would have provided for it in a particular way, if in point of fact he has not done so.¹
- 2. The presumption is, in the case of testamentary instruments, for vesting at the testator's death, and in the case of marriage contracts, for vesting not later than at the dissolution of the marriage.²
- 3. The clearest rule of all, and the most easy of application, is that a survivorship clause is presumed to refer to the period of distribution, and so suspends vesting.³ Thus a trust provision "to A. in liferent only and her children and the survivors and survivor of them in fee," gives her children no vested right unless and until they survive her. At her death the fee will vest in those of her children who are then in life, subject to the operation of the conditio si sine liberis if the relation of the parties and other circumstances are such as to let it in.

But if during the liferent the class should be reduced to a sole survivor, and if there be nothing else against vesting, the fee will vest in the sole survivor irrespective of his survivance of the liferenter.⁴

- 4. It has been said that a conditional institution or destination over is not so clear against vesting as a survivorship clause, but the contrary also has been laid down,⁵ and an intending lender or purchaser must proceed on the footing that a clause of this nature is effectual to suspend vesting. This is the case of a trust provision for A. in liferent, and on her death to pay to B., whom failing to C. There is authority for extending the rule to a marriage contract destination "failing children," holding these words to mean failing children surviving.⁶
- 5. But this rule No. 4 does not apply to a direct testamentary conveyance (without a trust) of heritage to A. in liferent, and to B., whom failing to C. in fee. In heritage the rule is substitution not con-

⁶ Gavin's Trs. v. Johnston's Trs., 1901, 4 F. 278.



¹ Dickson v. D., 1854, 1 Macq. 729.

² M'Laren, Wills, 786.

³ Young v. Robertson, 1862, 4 Macq. 314.

⁴ Lord Watson in *Muirhead's Trs.* v. *Muirhead*, 1890, 17 R. (H. L.) 45, at p. 48. Lord M'Laren in *Thompson's Trs.* v.

Jamieson, 1900, 2 F. 470; Ferguson's Trs. v. Readman's Exrs., 1908, 10 S. L. T. No. 446. 5 Hay's Trs. v. Hay, 1890, 17 R. 961. In

⁵ Hay's Trs. v. Hay, 1890, 17 R. 961. In this case Lord M'Laren analyses the elements in questions of vesting.

ditional institution; and B. takes an absolutely vested fee on the testator's death with a mere substitution in favour of C., which B. may defeat at pleasure.¹ The same has been held in the case of a direct conveyance of specific heritage and general residue.²

- 6. Where there is a survivorship clause coupled with a declaration that the issue of any of the class who may predecease the period of payment shall take their parent's share, and one of the class dies before the period of payment and does leave issue, the issue take a vested right at their own parent's death, irrespective of whether they do or do not survive the period of payment.3 This is on the assumption that there is nothing to shew a contrary intention. The basis of the rule is that the only clause of survivorship is directed to the first generation, and that there being no similar clause applicable to remoter issue, the latter have the benefit of the presumption in favour of vesting. It does not appear whether this rule would hold in a similar case but with this difference, that the issue claimed in virtue, not of an express clause, but of the implied conditio. The rule is striking and peculiar, and it would not be safe to assume its extension beyond the exact facts in Martin's case. Where a fund was destined by a father to his son, contingently on the latter attaining thirty, with a conditional institution of issue, the son dying under thirty, his issue were held to take a vested interest at his death.4
- 7. Name.—A matter often dealt with in connection with entails, but not much discussed in questions of vesting, is a condition in the instrument requiring the beneficiary to assume a certain name. This may be represented as a condition personal to the beneficiary, and so suspending vesting. But that hardly disposes of the whole question. Thus suppose a liferenter is subject to the condition, complies with it, assigns or mortgages his liferent, and then drops the prescribed name. Or suppose a reversioner subject to the condition adopts the name pending the liferent, sells his reversion, and then drops the name before the period of payment. Cases such as these may raise very serious questions of vesting or divesting. In England it has been unsuccessfully argued that the reversioner having predeceased the period of payment without adopting the name, the fulfilment of the condition becomes impossible by the act of God: the gift was held to have lapsed.
 - 8. Mutual Wills.—See p. 819.

Express Clause.—It might be supposed that when the deed or will expressly declares when the right is to vest, that would end the matter. But, "the term 'vesting' is open to construction," and these clauses have been disregarded when they were inconsistent with the

¹ Turner v. Gaw, 1894, 21 R. 563; Fraser v. Croft, 1898, 25 R. 496. In the latter case there was a liferent to A., "and after the death of A., I dispone to B., whom failing," etc.

² Bruce's Trs. v. B. 1898, 25 R. 796.

³ Martin v. Holgate, 1866, 1 Law Reports Eng., Ap. 175.

⁴ Cattanach's Trs. v. C., 1901, 4 F. 205. ⁵ Goodhart v. Woodhead [1902], 2 Ch. 198.

⁶ Alston's Trs. v. A., 1902, 4 F. 654.

other parts of the document. In Croom's case 1 there was a survivorship clause and also a declaration of vesting a morte. The latter was disregarded in order to let the former take effect, and the result was that an assignation granted by one of the beneficiaries who predeceased the period of distribution was held inept. The conveyancer must therefore be on his guard against being carried away by the presence of a clause declaring vesting which may seem to remove all doubt. He must keep Croom's case in mind, and see whether there is nothing in the instrument repugnant to vesting. Further, it must not be too hastily assumed that a declaration that the estate is not to vest, until, say, the beneficiary's majority is equivalent to saying that it shall then vest without reference to other conditions.²

The following pages contain notes on some of the matters, in addition to vesting, which most frequently require attention. They are arranged alphabetically.

Alimentary.
Annuities.
Appointment.
Appropriation.
Capital and revenue.
Claims against estate.
Claims against beneficiary:

1. Debts.

Trusteeship.
 Indemnities.
 Counter liabilities.

5. Payments on account. Conditio si testator.

Conditio si institutus.

Divorce.
Domicile.
Future births.
Government duty.
Heritable or moveable.

Legal rights.
Liferent or fee?

Living persons, estate of.³

Mutual wills.

Trustees, purchases by.

Alimentary (see p. 22).—It is now clearly decided that a capital sum cannot be made alimentary. The case was a favourable one for the clause receiving effect. It was a testamentary trust for the liferent of the widow, and on her death to pay inter alia a legacy of £350 to A.; and there were clauses which suspended vesting in A. until the widow's death, and a declaration that the legacies should be "strictly alimentary, and not assignable by the legatees, nor arrestable, nor attachable by the diligence of creditors." But it was laid down by Robertson, L.-P., that "as soon as the money came into the pursuer's (legatee's) hands she could do what she liked with it, and it was in no way protected from her creditors. Even before it came into her hands it was quite open to her to assign her prospective interest for what it was worth, and such an assignation would have been quite good." But of course it would be different if the trustees had power to restrict the legatee to an alimentary liferent or otherwise, as to which see p. 816.

¹ Croom's Trs. v. Adams, 1859, 22 D. 45.

² Booth's Tr. v. B., 1898, 25 R. 803.

⁸ See p. 23.

⁴ Rothwell v. Stuart's Trs., 1898, 1 F. 81.

Annuities.—When the fund proposed to be dealt with is burdened with an annuity, it will be kept in view that if the income after paying expenses should be insufficient for the annuity, capital is liable unless there are words limiting the annuitant to the income. And even though there be such a limitation, it may be the case that there has been an interim distribution of capital, which may practically have the effect of nullifying the restriction so far as regards the estate retained in the trust. Annuities are presumed to be chargeable, primarily, against the heritable succession.¹

Appointment.²—When the title depends upon the exercise of a power of appointment, the chief points are: (1) whether the power authorizes an *inter vivos* or testamentary exercise, as the case may be; (2) whether the deed is irrevocable and delivered; (3) whether it is confined to objects of the power, attaches no incompetent condition, and is in all respects *intra vires*; (4) whether it is the only exercise of the power, as to which see p. 855; and (5) if the power was given to A., now dead, whom failing to B., and B. has exercised it on the assumption that A. has not, have in view that A.'s will may be an express or implied exercise.

Appropriation.—It is sometimes an important matter to consider whether, as regards the provision with which it is proposed to deal, the trustees have specifically set apart or appropriated certain investments to meet it, so that, on the one hand, if there should be loss on those investments, the beneficiaries in that provision shall have no claim against the general estate, and, on the other hand, that that provision shall not be liable to make up losses on other parts of the estate. It must suffice to draw attention to this point, and to refer to the cases noted,³ which leave the question of appropriation in an unsatisfactory state. When there is no effectual appropriation, gains and losses fall to be apportioned among different shares according to their original proportions, without regard to partial payments. Thus a fund of £1000 is held for two families equally; one receives £250 on account; a loss of £500 subsequently occurs; the other family are entitled to the whole £250 which remains.⁴

Capital and Revenue.—Whether it be proposed to deal with the liferent or with the fee, the accounting between capital and revenue is of much importance. It applies to both the income and the expenditure sides of the account. As regards income there are questions as to the apportionment of dividends at the testator's death, and on the occasion of sales and purchases of stock,⁵ and questions as to such income as

¹ See p. 809.

² See p. 848 et seq.

Robinson v. Fraser's Tr., 1881, 8 R.
 (H. L.) 127; Scott's Trs. v. S., 1895, 23 R.
 52; see Juridical Review, 1896, 214.

⁴ Lynch's factor v. Griffin, 1900, 2 F. 653.
5 As to the English law on the occasion

of investments and realisations (when no apportionment is allowed), see Lewin, Trusts, 350

casualties of superiority,1 bonus dividends,2 new shares of a company issued to represent capitalised profits,3 mines, quarries,4 and shares of profits from partnership concerns payable for so many years after death.5 There is also the question as to such assets as reversionary interests or life policies forming part of the estate. Suppose a testamentary estate of which a liferent is given embraces a valuable paid-up policy on the life of a third party still living, are the trustees entitled, or bound, to surrender or sell the policy and to give the liferenter the income of the price? and assuming that they do not do so, will the liferenter or his executors have any claim to an apportionment as between capital and revenue when the policy falls into possession by the death of the life assured? There is little authority in Scotland, but in England there are various cases in which an apportionment has been decreed in favour of income. rule adopted is to find the sum which, invested one year after the testator's death at 4 (or it may be now at 36) per cent., and accumulated with yearly rests and deducting income tax, would with these accumulations have amounted, on the day when the policy actually fell in, to the amount which was then actually received. The sum so ascertained is held to be capital, and the balance is income. But the rule may, of course, be displaced by the terms of the instrument, e.g. a discretion to the trustees to postpone realisation, but only if exercised and fairly and properly exercised. But it is not a reason for ousting the rule that the funds in question are already, under some other instrument, liferented by the person who claims the benefit of realisation or apportionment, though the result is to give him or her a double liferent of the same funds.7 This matter has been referred to in some detail because it is probable that the English rule would be adopted here: it was so in the Outer House in the case noted,8 which was one of double liferent. At the same time no one proposing to deal with the liferenter should rely upon this accretion, while any one dealing with the fee should have it in view as a risk, as well as the other possibility of the trustees actually realising, which might be even worse.

¹ Gibson v. Caddall's Trs., 1895, 22 R. 889; Montgomerie-Fleming's Trs. v. M.-F., 1901, 3 F. 591; Ross's Trs. v. Nicoll, 1902, 5 F. 146.

Bouch v. Sproule, 1887, L. R. 12 App.
 Cas. 385, Cunliff's Trs. v. C., 1900, 3 F. 202.

³ Cunliff, supra. This case shews that on this and similar questions, including bonus dividends, very much depends not only upon the constitution and articles of the particular Company, but also on the exact form and terms in which the distribution is made. See also Gunnie' Trs. v. G., 1903, 11 S. L. T. No. 225.

⁴ The rules are (1) Landlord's interest. The liferenter gets the profits of opened

mines and quarries (Nugent v. Nugent's Trs., 1899, 2 F. (H. L.) 21), including those let by testator though not worked in his lifetime, in which case the trustees may grant a new lease (Dick's Trs. v. Robertson, 1901, 3 F. 1021). (2) Tenant's interest. The whole net profits properly ascertained go to the liferenter, and he is not bound to allow a deduction from profits to maintain capital at its original amount (Mein's Trs. v. M., 1901, 3 F. 994).

⁵ See p. 100.

⁶ Re Goodenough [1895], 2 Ch. 537.

⁷ Rowlls v. Bebb [1900], 2 Ch. 107.

⁸ Stewart v. S.'s Trs., 1898, 36 S. L. R. 625.

Then, as regards expenditure, there is always the matter of the incidence of trust expenses as between capital and revenue, and there may be similar questions as to many other outgoings. The only other matter which need be specially referred to is the case of instalment loans due by the estate when capital and income are paid off by half-yearly or other instalments. In the ordinary case each instalment must be split up into its component parts as between capital and revenue, and each be charged with its part. But improvement loans are (at least usually) an exception.

In connection with all these matters it will of course be kept in view that, if the practice has been wrong, not only may it require to be put right in the future, but there may be claims in respect of the past, unless the liferenter be personally barred as to the past.⁴

Claims against Estate.—It is manifestly of first importance to know that the estate relied on exists as represented, and that involves not only a verification of the assets, but also the ascertainment of what claims, if any, exist against the estate. There may be debts and liabilities of the testator, or incurred by the trustees. Special matters which should have attention are; (1) liability for uncalled capital on shares of companies; (2) cautionary obligations; (3) liabilities on heritable bonds which may have been taken over by other persons, but of which the estate has never been discharged by the creditors; (4) claims for aliment by widow, children, and all others whom the deceased was under a natural obligation to maintain, and that notwithstanding that the claimants may have accepted conventional provisions in full of legal rights, and though the claims may infer encroachment on capital 5; (5) claims for illegitimate children, which in cases of incapacity to maintain themselves may result in sweeping away the whole estate to the entire exclusion of the lawful children 6 ; (6) Government duty $(q_iv.)$; and (7) trust expenses. As to these last it is important to keep in view that in the event of a litigation between the trustees and a beneficiary, in which the latter is successful, the result may be that no part of the expenses of the litigation will be chargeable against the share of the successful litigant in the trust estate.7

Claims against the Beneficiary.—This refers to claims at the instance of the estate against the beneficiary which, being put against his claim upon the estate, may extinguish, and will certainly diminish, it.

1. Debts.—The beneficiary may have borrowed money from the testator or from the trustees, or the testator may have incurred obligations for him which may have been paid or may yet have to be paid.

¹ Pearson v. Casamajor, 1840, 2 D. 1020; Smith v. Bennie, 1890, 18 R. 44.

² Ellis v. E.'s Trs., 1895, 22 R. 764.

Improvement of Land Act, 1864, 27 &
 Vict c. 114, s. 66.

⁴ Heath v. Baxter's Trs., 1903, 10 S. L. T. No. 300.

⁵ Anderson v. Grant, 1899, 1 F. 484.

⁶ Oncken's factor v. Reimers, 1892, 19 R.

⁷ Easson's Trs. v. Mailer, 1901, 3 F. 778.

2. Trusteeship.—It is evident that if the beneficiary whose interest is proposed to be dealt with be or have been a trustee, there is a risk of claims already existing against him at the instance of the estate in respect of his actings or omissions, which claims will clearly be preferable charges on his share. So far that may be more or less guarded against by inquiries. But suppose the beneficiary continues to act as a trustee after the transaction, similar claims may arise in the future, and thus the question comes in, are these future claims preferable to the assignee? In England it has been held that they are, i.e. where the beneficiary was a trustee at the date of the transaction, but not if he was appointed to the trusteeship subsequently to the transaction.1 The matter has been settled by authority. It is said that at the moment of the commission of the breach of trust she had assigned all her property to the trustees of her settlement. In the case of Morris v. Livie 2 before the commission of the breach of trust the cestui que trust had assigned for value all his interest as cq.t. It made no difference, and it was held that he had assigned his interest subject to the possibility of an equity to be asserted against him as trustee. It is no matter whether the assignment was made before the breach of trust or after; the rule is that the trustee cannot take anything until after the breach of trust has been made good. The equity is paramount to any right of the trustee. There are many other cases besides the one I have cited.8

It is not known that there is any authority in Scotland, but the risk of the English rule being followed must be kept in view.

3. Indemnities, etc.4—The beneficiary may have incurred an obligation of indemnity to the trustees in respect of ultra vires actings. Attention must be paid to the exact relation established between the beneficiary and the trustee in respect of these consents and indemnities. Suppose one of two beneficiaries gives an undertaking of this nature to the trustee with respect to the investment of the fund, and the other beneficiary does not, and there is a loss; the question is, how far is the consenting beneficiary committed? Three results are possible: (a) he may be bound simply not to object; (b) he may be bound to allow the other beneficiary's share to be paid in full out of the salvage before he himself receives anything; (c) he may be bound personally to relieve the trustee of any claims at the instance of the other beneficiary. Suppose the trust fund is £1000, that the two beneficiaries, A. and B., are equally interested, that A. gives such an undertaking as is now under consideration with reference to an ultra vires investment of the £1000, which investment results in a loss, leaving only £400-A. may be in any of the three following positions: (a) he may be entitled to claim £200,

⁴ See Section XLVIII. for further treatment and authorities,



¹ Lewin, Trusts, 10 Ed. 1898, p. 850.

² 1842, 1 Y. & C. C.C. 380.

³ Per Kay, J., in re Hervey, 1889, 61 L. T. N. S. 429.

being half of the £400; (b) he may be bound to allow the £400 to go to B., and to make no claim; (c) he may be bound to pay £100 to enable the trustee to pay B. his full £500. A proper indemnity or obligation of relief will have this last result; and the 1891 Act empowers the Court to raise a mere "consent" and still more a "request" or "instigation," to the position of an indemnity, limited apparently to the granter's whole interest in the estate. It must be assumed that this will be the result in judging of these matters in connection with any proposed transaction with the share of the beneficiary who has given the consent, etc.

Further, indemnities granted by contingent beneficiaries are in a very peculiar position. In the first place, it is obvious that they give but a doubtful protection to the trustees. But what is here more in point is their possible effect upon the granters of them or their assignees. The risk here facing an assignee of a share is obvious, viz., that the full liability, and not only a proportion, may fall upon that particular share. It will be observed that it arises only if the assigner survive the period of payment. For if he should predecease, then the claims of the assignee will be met out of the life policy which will of course have been effected to meet that case. It is thus important to see that, if any consents or indemnities have been given, at least all the beneficiaries are in the same position, and that all have vested interests. Amongst the beneficiaries the liferenter or liferentrix must not be omitted. For otherwise, in addition to having to suffer the loss of part of the capital, the fiars would require to allow the remaining capital to be encroached upon in order to make up to the liferenter the income on what was lost. And it will be remembered that this is just what may happen if the liferent is alimentary, in which case a consent by the liferenter is not binding.1 But of course, as between the fiars and the trustees, the incidence of the loss will depend on the terms of the indemnity.

- 4. Counter Liabilities.—There may be counter obligations by the beneficiary in the trust deed. This occurs especially in marriage contracts. Take the case of a settlement by the husband of a life policy on his life with an obligation to pay the premiums, and a settlement by the wife of funds for herself in liferent and thereafter for her husband in liferent. The husband survives his wife, and wishes to borrow on his liferent of her funds. The risk is that if he should fail to pay the premiums on his life policy, the trustees would be entitled to set off that liability against his, or his assignee's, claim to the income of the wife's fund. As to trust expenses, see supra, p. 653.
- 5. Payments on Account may have been made to the beneficiary, and may require to be equalised against him or his assignee. Even if the payments have been equal in amount, they may have been unequal

 1 Sanders v. S.'s Trs., 1879, 7 R. 157.

in point of time, and there may be a claim for equalising interest. But as to payments made under powers in the will or deed, it is not necessarily to be assumed that interest is chargeable at all unless expressly so arranged.¹

Conditio si testator sine liberis decesserit.—This refers to the implied revocation 2 of a will by the subsequent birth of a child. Its clearest application is in the case of a will disposing of the universitas of the estate, when the testator dies shortly after the birth of the child. It has been held that the right of challenge is personal to the child excluded. The conditio operates though there were children in existence when the will was made, if another is subsequently born, in which case great injustice may result from the will being held as absolutely revoked. It is a presumption of law, and may be rebutted by facts occurring either before or after the birth of the child. In one case it was held to be rebutted by the facts "that the child was amply provided for in the knowledge of her mother, and that in the personal knowledge and expectation of the birth of a child, [and in expectation of her own death], and having an opportunity of revising her will, she allowed it to stand unaltered."

Conditio si institutus sine liberis decesserit.—This is the condition (express or implied) attached to a testamentary provision, to the effect that if the person originally instituted shall fail to take a vested interest, his issue, if any, shall take as conditional institutes. The chief points are: (1) to what cases does it apply? (2) what share does it carry? and (3) to whom?

- 1. The first of these questions is of course limited to the implied conditio proper. The conditio applies to the relationship of parent and child, grandparent and grandchild, and uncles or aunts, and nephews and nieces.⁶ It does not apply to brothers and sisters,⁷ still less to cousins.⁸ The other leading condition of its application is that the original provision shall not have implied any delectus personæ. Apart from the qualification of relationship, it is not easy to be certain when the conditio shall, and when it shall not, operate.
- 2. In considering what share is carried it is apparently necessary to distinguish between (1) the *conditio* proper on the one hand, and (2) express or implied clauses of conditional institution of issue on the other. The question is: are the issue to be entitled to participate in accrescing shares? The case supposed is a provision to the children of X. of say £9000. When the will is made there are three children, A., B., and C. A. predeceases leaving issue; B. predeceases leaving no

¹ Dallmeyer v. Dallmeyer [1896], 1 Ch. 372.

² Elder's Trs. v. E., 1894, 21 R. 704.

³ Smith's Trs. v. Grant, 1897, 35 S. L. R. 129, per Lord Stormonth Darling.

⁴ Elder, supra.

⁵ Stuart-Gordon v. S.-G., 1899, 1 F. 1005.

⁶ Waddell's Trs. v. W., 1896, 24 R. 189.

⁷ Hall v. H., 1891, 18 R. 690.

⁸ Rhind's Trs. v. Leith, 1866, 5 M. 104.

⁹ Neville v. Shepherd, 1895, 23 R. 351.

issue; C. survives. It being admitted that A.'s issue are to share, the question is, to what extent? Do they take one-half or one-third—£4500 or £3000? The usual way of putting the question is, do A.'s issue take only A.'s "original" share? i.e. his share on the assumption that A., B., and C. had all survived, or do they take A.'s "accrescing" share? i.e. the additional share which, owing to B.'s death without issue, would certainly have accresced to A. himself if he had survived. It is surprising that this question is so uncertain as on the decisions it is seen to be. Taking the three cases separately—

- (1) The Conditio Proper.—It might be supposed that here it was certain that the issue take the "original" share only, but in Neville's case Lord Kinnear expressly reserved his opinion on that point; and even the subsequent case of Bowman v. Richter, which may appear to be conclusive against the larger claim, is open to the remark that by the express terms of the will accrescing shares were given to the survivors of the original class.
- (2) Express Clause.—Obviously each clause must be judged of on its own terms. If it expressly gives the issue the original and accrescing shares, cadit quastio. If, on the other hand, the shares of those dying without issue are expressly destined to the survivors of the original legatees, this necessarily excludes the issue of predeceasers. This is the leading case of Young v. Robertson, which has been followed in many subsequent decisions,3 even where the issue were declared to succeed "in the same manner and as fully in all respects as their parent would have done if he had survived." For an example of an indefinite clause which was held sufficient to carry the accrescing share. see M'Culloch'; and as regards indefinite clauses generally, and the common idea that it is beyond doubt that the issue take the original share only, it is important to quote Lord M'Laren's words in M'Culloch. where he said: "I think it right to say that the question, although supposed to be concluded by authority, is one which I think must remain for subsequent consideration when a case properly raising it shall arise."
- (3) Implied Clause.—This case is well exemplified in Neville. The facts were that there was a gift to a class, with no conditional institution of their issue; there was a destination over, to take effect failing all the members of the first class without leaving issue; and in other parts of the will which did not come into operation there were references to issue taking "the share of my said estates which would have fallen to his or her deceased parent under these presents if he or she had been alive." On these facts it was properly held that there was an implied conditional institution of the issue of predeceasing

¹ 1900, 2 F. 624.

² 1862, 4 Macq. 837.

³ Cumming's Trs. v. White, 1893, 20 R.

^{454;} White's Trs. v. Chrystal's Trs., 1893, 20 R. 460.

⁴ M'Culloch's Trs., 1892, 19 R. 777.

members of the first class, and the question came to be how much they were to take. The Court read in a clause similar to that which occurred elsewhere in the will, as just quoted, and on the construction of that clause it was held that it carried the accrescing shares. This is a very important case, for it necessarily means that an express clause in the same terms ought to receive the same extended meaning, which it is thought was not the common understanding, nor reconcileable with the decided cases.

The practical conclusion is, that if there is an express clause giving the issue accrescing shares, or destining these shares to the survivors of the original class, these clauses respectively may be relied on as conclusive in favour of, or against, the claim of the issue to the shares in question, but that apart from these cases there is no certainty, and the only safe course is to rely on the *minimum* only, that is to say, to assume that the issue may be limited to the original share when dealing with them, and to assume the contrary when dealing with a survivor of the original class.

3. As regards the question: to whom is the share carried? the main point is that in the case of the *conditio* proper it operates to carry heritage to the heir-at-law of the original beneficiary. There seems no warrant for a similar conclusion in the case of an express or implied clause in favour of "issue."

Divorce.—This is a risk which exists with reference to provisions under marriage contracts. It arises from the fact that, as regards all provisions of that nature, and the spouses' legal rights (except the husband's jus relicti²), the result of a divorce is to put the innocent spouse in the same position as if the other were dead. Thus suppose a husband settles a fund for himself in liferent and thereafter for his wife in liferent. He wishes to borrow on the security of his liferent. The risk in question is, that if a divorce should be obtained at the instance of his wife, his liferent would cease, and his wife's would begin as if he were dead. Various other cases may be figured.

Domicile.—This is mentioned only because it is very apt to be overlooked, more especially in the case of dealings with additional shares claimed by a beneficiary as in right of another beneficiary who has died. As to cases of English domicile, it may be noted: (1) that when the succession passes to collaterals, brothers and sisters of the half blood come in equally with those of the full blood, which will probably be found to be the rule also in most of the Colonies; and (2) that when an intestate, dying after 1st September 1890, leaves a widow but no issue, the widow is entitled to his whole estate, real and personal,

children's provisions, Gavin's Trs. v. Johnston's Trs., 1901, 4 F. 278, affd. 11 S. L. T. No. 182; and as to the divorced spouse's powers, see p. 849, infra.



¹ Grant's Trs. v. G., 1862, 24 D. 1211.

² Eddington v. Robertson, 1895, 22 R. 430.

³ Note that the divorced spouse is not held as dead to the effect of accelerating the

if it does not exceed £500, and if it is over £500 she has a first charge to that amount, in addition to her ordinary share.1

Future Births.—This is a risk which one is sometimes apt to lose sight of. Take the case of a testamentary direction to give a liferent to A. and the fee to his children. In ordinary cases all his children, whether born before or after the death of the testator, will be entitled to participate, whether born of the same mother or not. If A. be a woman, she may be past the age of child-bearing; but in the case of a man, the risk cannot be got rid of in that way.

Even in the case of a woman the general rule is that the Court will not find that the age of child-bearing is past, but under certain circumstances it will be declared that trustees are entitled to denude, as in the case of a woman fifty-seven years of age ²; in that case a guarantee policy against the risk of future issue was part of the arrangements.

The chief points in connection with these insurances are-

- 1. The vesting of the claim, i.e. whether the event which is to make the policy payable is to be, e.g. (1) the birth of a child, or (2) birth and attainment of majority or any other age, or if a female, being married or (3) birth and survivance of the liferentrix or any period after her death. The exact risk must be at least covered, and particularly it will be kept in view that even though a child may predecease the date of vesting, he or she may leave issue who take a vested right, and in this connection reference is made to the case of Martin v. Holgate, dealt with on p. 649.
- 2. In utero.—The reference to issue in the policy ought when necessary to meet this point thus, "a child [or remoter issue] born after the date of this policy whether conceived before or after that date."
- 3. Term of Payment.—It may quite well be that although the claim must vest before the period of distribution of the fund, it is not necessary to have it payable until that period. Thus under a trust "for A. in alimentary liferent and for her child or children to vest at birth, and if she never has a child then the fund to be at her disposal subject to her alimentary liferent," in any transaction with A. there must, unless she is past the age of child-bearing, be an insurance against issue, and the claim under the policy must vest on the birth of a child, for the fund would vest in the child at birth and the mother would be cut out; but it is not necessary that payment should be received till A.'s death, for that is full indemnification against the issue risk, seeing that even if there had been no issue the fund would not have been available till her death.
- 4. Indemnity.—These being indemnity policies, it would appear that they can pass only with the interest and the risk. Further there may on their terms be questions as to their assignability at all, and particularly whether a policy effected by a creditor can be made over to a

 1 53 & 54 Vict. c. 29.

 2 M'Pherson's Trs. v. Hill, 1902, 4 F, 921.



purchaser at a sale under the powers or can be effectually dealt with by the debtor when the debt is repaid. No assignation should be taken without these points being made quite clear with the Company and the policy endorsed accordingly, or a new policy may be better.

- 5. Age and interest will be admitted by the Company on the policy.
- 6. Stamp, 6d.

Government Duty.—This is a matter of great importance in calculating the value of a reversion, and accordingly it is usual to find an express stipulation in the contract that the duty shall not exceed a certain rate. Apart from stipulation it is said that the duty is not an encumbrance which the seller must clear off.¹ The purchaser is liable for the duty only on what he has purchased, for there is apparently nothing in the Acts which gives the Revenue a general lien over one portion of the property of the deceased in respect of the duty which is or may be payable on account of another and different portion of it.² The Inland Revenue will be found most courteous in stating in any given case what the claims are or will be, and if there be any room for doubt a certificate should be obtained. The following points may be noted, as they constantly occur:—

- 1. The estate duty is a charge on the general estate and thus falls on the residuary legatee. Settlement estate duty falls on the settled estate,⁵ but only if the deceased died on or after 1st July 1896.⁴ As to what may be a settlement, see p. 811. Settlement estate duty is not payable (1) on settlements coming into effect before 2nd August 1894,⁵ nor (2) merely because a liferent is given to husband or wife,⁶ nor (3) more than once during the continuance of the settlement.⁶
- 2. If inventory (or probate) duty has been paid, there is no claim for estate duty though the estate passes on a death, unless the person so dying was competent to dispose of the property. Take the ordinary case of a liferented estate, the testator dying before the passing of the Finance Act, what claim will there be for estate duty on the death of the liferenter? The answer depends on whether inventory duty was paid on the testator's death. So far as that duty was paid, estate duty will not be payable, but estate duty will be payable on (1) heritable estate, (2) foreign estate, and (3) other estate which for any reason did not pay inventory duty on the testator's death.
- 3. Aggregation.—The result of the introduction of this principle in the Finance Act is that it is not possible to know what the duty will amount to, inasmuch as, for fixing the rate of duty on the fund, it may fall to be aggregated with other property passing or deemed to pass on

¹ Nisbett's Trs. v. Learmonth, 1845, 8 D. 69; Bliss v. Putnam, 1843, 7 Beav. 40.

² Hanson, 4th. Ed., 410.

³ F. A. 1896, s. 19.

⁴ In re Gibbs, Thorne v. Gibbs [1898], 1

⁵ F. A., 1894, ss. 21 (4) and 24.

⁶ F. A., 1894, s. 5.

⁷ F. A. 1894, s. 21.

the same death. Under the 1894 Act 1 this did not apply to inter alia estate passing, under an instrument not made by the deceased, to some person other than the husband or wife or ancestor or issue of the deceased. Accordingly in the case of an estate liferented by A. under B.'s will, and passing on A.'s death to persons other than A.'s husband or wife or ancestor or issue, there was no aggregation under the 1894 Act. this is altered under the Finance Act, 1900, "except as regards property in which the deceased never had an interest." This alteration is, however, subject to two modifications, viz.: (1) sales prior to 9th April 1900 are let off from aggregation, and in the case of mortgages prior to that date the additional duty is postponed to the mortgage; and (2) in the case of property settled by some one dying before 2nd April 1894, and passing on the death of some one dying on or after 9th April 1900, then if the settled property would have been liable to estate duty on the death of the settler if he had died on or after 2nd August 1894, aggregation is not to enhance the duty on the settled property, or any other property passing, by more than one-half per cent.

- 4. When estate duty is paid there is no claim for (1) any one-percent. duty, (2) the additional one-half per cent. and one and a half per cent. put upon the succession duties under 51 & 52 Vict. c. 8.2
- 5. Further, if the net estate does not exceed £1000, the estate duty clears all other duties.³
- 6. Reversionary transactions entered into on or before 1st August 1894 are protected from estate duty. See also above as to s. 12 of the Finance Act, 1900.
- 7. "Free of Duty."—When legacies are given free of duty the duty of course falls upon the residuary legatee. But if there is a deficiency to pay legacies and duties, and assuming that the legacies rank pari passu, there must be a proportionate abatement. In adjusting the legatees' claims inter se, the legacies given duty-free rank for both legacy and duty, so that three legatees of £100 each will all draw different sums, assuming that A.'s legacy is not given free of duty, that B.'s and C.'s are, and that B. is liable in three-per-cent. duty, and C. in ten-per-cent. A., B., and C. will rank for £100, £103, and £110 respectively. But then each legatee must pay his own duty to the Inland Revenue on the sum which he draws in respect of his legacy and duty.⁵ It is otherwise when a legatee compromises with the residuary legatee his claim for a legacy which is left duty-free by the will.⁶
- 8. Successive Devolutions.—In these cases confirmation may be necessary as a title, and if so regard will be had to s. 7 (6) of the Finance Act, 1894, under which there is an option to postpone payment

¹ S. 4.

² F. A. 1894, s. 1.

³ Ibid. s. 16 (3).

⁴ Ibid. s. 21 (3).

⁵ Lord Adv. v. Miller's Trs., 1884, 11 R.

⁶ Lord Adv. v. Watherston's Trs., 1901,

⁸ F. 627.

of the estate duty until the reversion falls in. Under this section it is held that the executor is entitled to an immediate grant of confirmation, including the reversion, although he exercises his option of postponing payment of the duty. This procedure is a novelty in Scotland, and it is not apparent that there is anything in the section which necessarily leads to this result, but it is the view which is taken by the Inland Revenue, and is accordingly acted on by the Sheriff and Commissary clerks. This suggests that production of a confirmation is no evidence of payment of duty in these cases, and that separate proof should be required. If the duty be paid at once, it is paid on the reversionary value; if postponed, on the full value in possession.

9. Mutual Wills.—See p. 664.

Liferent or Fee?—In dealing with the fee it is, of course, essential that the liferenter shall be a bare liferenter. Three points may be noted which may raise the liferent to a fee, viz., (1) under provisions to parent and children without the word "allenarly," (2) under the Entail Acts of 1848 and 1868, as stated on p. 806, and (3) in the case referred to on p. 643, where a daughter's share is given in fee and then cut down to a liferent to her and the fee to her children; if she *leaves* no children it appears that she has the fee.

Heritable or Moveable.—This point may arise in many different connections—

- 1. Intestacy.—The most obvious case is that of a pure intestate succession. Regard must of course be had to domicile and right of collation. See Domicile, Collation (p. 740).
- 2. Conversion or no Conversion.—It is often a very difficult matter to determine whether the right of a beneficiary under a will is heritable or moveable.¹ This is of course of vital importance in cases where his trustee in sequestration or cessio, or his heir or executor, offers to sell. Further, it is important to remember that even where conversion is ordered by the will, it has effect only for the purposes of the will, and that if these should fail and intestacy or partial intestacy result, the conversion is disregarded, and you are thrown back upon the actual position of the estate as at the death.²
- 3. Minor's Capacity.—The question of heritable or moveable is important in judging of what is carried by a will made by a minor. A minor may dispose mortis causa of moveable property only. This, however, covers all estate which at his death is de facto in a moveable form though it may be heritable destinatione, e.g. a surrogatum for heritage, and bonds excluding executors.³

¹ See Brown's Trs. v. B., 1890, 18 R. 185; Playfair's Trs. v. P., 1893, 21 R. 836; Anderson's Extrx. v. A.'s Trs., 1895, 22 R. 254; Watson's Trs. v. W., 1902, 4 F. 798.

² Cowan v. C., 1887, 14 R. 670; Moon's Trs. v. M., 1899, 2 F. 201.

³ Brand's Trs. v. B.'s Trs., 1874, 2 R. 258; 3 R. (H. L.) 16; Brown's Tr. v. B., 1897, 24 R. 962 (price of heritage sold by factor l.t. under special powers).

4. Legal Rights.—The special rules of heritable and moveable in regard to legal rights of surviving husband, widow, and children must be kept in view. See Legal Rights.

Legal Rights.¹—The existence of the legal rights of terce, jus relictæ, mournings, interim aliment, jus relicti, and legitim, make it necessary to inquire, in all cases of succession, whether the deceased was survived by husband or widow, as the case may be, or by children; and if so, whether they have discharged their legal rights, or whether those rights are barred. There are a few points which may be specially mentioned:

- 1. In the case of widows especially there is a great difficulty, owing to the leniency which the Court has shown in allowing them to go back upon their actings, even after a long course of years, if they have not had full and accurate information as to facts and law, and have not been separately advised.²
- 2. Sometimes a wife signs her husband's will in token of her assent thereto and of her acceptance of its terms, including an acceptance of its provisions in lieu of her legal rights. But this cannot be relied on as binding, in view of the right of revocation of donations inter virum et uxorem which may be exercised by the donor even after the death of the donee.
- 3. In the case of a provision to a daughter or son in liferent and her or his issue in fee, the intended liferenter may repudiate the liferent and claim legitim, and yet the issue will be entitled to the capital of the trust provision on the death of their own parent. Meantime the income of the trust provision will, on the principle of equitable compensation, go to restore what has been taken away as legitim; but if the intended liferenter die soon, this may come to almost nothing. This risk of double payment must be kept in view in any transaction with any of the other beneficiaries. Another risk of the same nature is referred to on p. 647.
- 4. It is not to be too hastily assumed that because an intended beneficiary has claimed his or her legal rights the testamentary provision is totally forfeited. There is, under certain circumstances, the risk that, in addition to the legal right, the testamentary provision may also be partially claimable under the rule of equitable compensation, as to which see p. 804.
- 5. The burden of satisfying legal rights falls on the residuary legatee,³ and the result of their being claimed may thus be to defeat his interest altogether. Take the case of a testamentary trust to give the widow the liferent, and on her death to pay certain legacies, and then to give the residue to X. If the widow claim her legal rights, the legacies must still be paid in full if there are funds enough, and

² Stewart v. Bruce's Trs., 1898, 25 R. 965.

the residuary legatee will get only what is left, which may very well be nothing. Suppose the testator leaves personal estate only, value £10,000, and all of such a nature as to be liable to contribute to jus relictæ, and that the legacies directed to be paid on the widow's death amount to £5000. The widow claims jus relictæ, and (there being no children) draws £5000, and the other £5000 is required to pay the legacies, leaving nothing for the residuary legatee. No doubt he might be entitled to the interest on the legacies during the widow's life, but in any case she might die immediately. An insurance by him on her life might be practicable.

Liferent of Dwelling-House.—It is very common to find that trustees are directed to allow a beneficiary the liferent use of a certain house, and perhaps the furniture therein, or there may even be an absolute gift of the furniture. In these cases there ought always to be a direction in the will as to the incidence of feu-duty, ground-annual, landlord's taxes, repairs, and interest of heritable debt. In the absence of this direction it is believed that very often the liferenter is in practice saddled with these; but it appears that in many cases this is wrong, and that the liability is truly on the general estate, to the relief of the liferenter. This must be kept in view in any transaction with the fee, or with the liferent of the remainder of the estate. It is just an additional preferential burden, and, of course, if the practice in the past has been wrong, there may be a claim by the liferenter of the house for arrears, with or without interest.

Mutual Wills:—The questions as to (1) revocation and (2) vesting, which are dealt with on pp. 818-9, may be very important in dealing with reversions arising under mutual wills. To these may be added (3) the obvious fact that the survivor may dissipate his or her estate. That might not in itself be of much importance, as no doubt that estate would not be relied on, but it may become of importance in connection with the two points next noted. (4) The will may be so expressed as to make both estates liable for the debts of both testators. (5) The effect, as between legacies and residue, of revocation by one of the testators is referred to on p. 819. But the effect may be very different if one of them, say the survivor, leaves no estate or practically none, for then it would appear that the legacies must be paid in full, and the whole loss will fall on residue. (6) The rates of legacy and succession duty will be regulated by the kinship between the legatee and each of the testators, one-half each.

Trustees, Purchases by.—When what is proposed is a purchase, by the trustee of the estate, of a beneficiary's interest, or when the title offered is derived through a previous transaction of that kind, it is necessary to have regard to the severe standard which the law applies to dealings between parties standing in a fiduciary relation.

¹ Bayne's Trs. v. B., 1894, 22 R. 26.

The position of a trustee towards a beneficiary is a fiduciary one, and the law views with extreme suspicion any transaction whereby the trustee acquires the interest of the beneficiary in the estate. There are cases, no doubt, in which such a transaction may be upheld, as where the beneficiary has urged it upon the trustee and has received a full and fair consideration. But I think all such cases postulate not only that the parties are dealing with each other at arm's length, but that they stand upon an equal footing. If the trustee takes advantage of the known necessities of the beneficiary to procure from him a bargain which is prejudicial to him and correspondingly advantageous to the trustee, the transaction must, I think, be condemned by the law.¹

ARTICLES OF ROUP OF A REVERSIONARY INTEREST

ARTICLES OF ROUP of the share and interest of A. in the means, estate, and succession of the late B. under his trust disposition and settlement, dated , and registered , which share and interest (hereinafter referred to as "the reversion") are to be exposed to sale by public roup by the said A. (hereinafter called "the exposer") within [place] on the day of at o'clock [after]noon, or at such other time and place as the roup may be adjourned to, and that under the following articles, or such other articles as may be inserted in the minutes of roup to follow hereon:—

First. The reversion is [first article, p. 171].

Second. In the event of the death of C. [the liferenter] before actual payment of the price, the sale shall eo ipso be null and void, and neither party shall have any claim against the other. For the purpose of this article consignation shall not be equivalent to payment.

Third. The reversion is exposed tantum et tale as it exists; and particularly, but without prejudice to the said generality, it is exposed without reference to any advertisements or particulars or information supplied to the purchaser or offerers. The purchaser and offerers are held to have satisfied themselves before offering as to the existence, validity, nature, description, amount, and value of the reversion, as to the amount and security of the funds available for payment thereof, as to the ages of the said C. and of the exposer, as to Government duties, as to all conditions and burdens affecting the reversion, and as to all other matters which do or might be alleged to affect the same.

Fourth. The purchaser and offerers are held to have satisfied themselves before offering as to the validity, sufficiency, and regularity of the title, and on all other points which do or might be alleged to affect the transaction.

Fifth. Without prejudice to or by the terms of the preceding articles, the purchaser and all offerers shall be held to be satisfied and ready, if preferred to the purchase, to complete the same, and to accept an assignation from the exposer, and to pay the price to the exposer, all in terms of these articles, without any question, objection, requisition, or condition of any kind whatever.

¹ Per Lord Stormonth Darling in Dougan v. Macpherson, 1900, 3 F. 553, 4 F. (H. L.) 7.

Sixth. The price shall be payable to the exposer in [place] on ,¹ with a fifth part further in name of liquidate damages and expenses in case of failure in the punctual payment thereof, and with interest on the price at the rate of per centum per annum from the said until payment, but without prejudice to the exposer's rights and powers in the event of failure in punctual payment of the price.

Seventh. In the event of the purchaser failing in punctual payment of the price, he shall, but only in the option of the exposer, forfeit his purchase and be liable to the exposer [complete the article as on p. 173, altering the words "failed in implementing this article or any part thereof" to "failed to make punctual payment of the price."]

Eighth. Upon due payment of the price, with interest and penalty, if any, the exposer shall grant in favour of the purchaser an assignation of the reversion under the conditions contained in these articles, and in the said trust disposition and settlement, or otherwise affecting the reversion, and subject to all claims for Government duties and trust expenses and other liabilities. The exposer will grant warrandice from fact and deed only, and no other warrandice shall be expressed or implied.²

Ninth. There shall be delivered with the assignation to the purchaser the documents specified in the inventory annexed and signed as relative hereto. The exposer shall be under no obligation to deliver or procure exhibition of any other documents, or to procure or produce any further evidence or information on any matter or thing whatever.

Tenth. Lastly. The 8th and last articles, pp. 173-4.

If the sale is by a creditor under power of sale, the above form will easily be adapted as suggested on p. 698 in the case of a life policy.

ASSIGNATION OF A LEGACY PAYABLE ON THE DEATH OF A LIFERENTER

I, A., in consideration of the sum of £ now paid to me by B., of which I hereby acknowledge the receipt and discharge him, have sold and do hereby assign to the said B. and his executors and assignees whomsoever, absolutely and irredeemably, All that the legacy of £ bequeathed to me by the late C. under his trust disposition and settlement, dated , whereby the said legacy is directed to be paid to me on the death of his widow, D., who is years of age and resides at , together with all interest to accrue thereon: With power to the said B. and his foresaids to uplift, discharge, sell, assign, and otherwise deal with the said legacy, and to do everything regarding the same and the estate of the said C. which I could have done before granting these presents, or which I or my representatives might have acquired right to do if the same had not been granted: And I grant absolute warrandice.—In witness whereof.

or indemnity to the trustees, this should be excepted from the warrandice. As to warrandice generally in these matters, see p. 695.



¹ The day of payment of the price will usually be very shortly, say ten days, after the sale.

² If the exposer has granted any consent

ASSIGNATION OF RESIDUE BY SOLE RESIDUARY LEGATEE

I, A., in consideration of the sum of £ now paid to me by B., of which I hereby acknowledge the receipt and discharge him, have sold and do hereby assign to the said B., his executors and assignees whomsoever, absolutely and irredeemably, All and Whole my 1 right to the residue of the estate, heritable and moveable, real and personal, of the late C., and the said residue itself, which was bequeathed to me under the trust disposition and settlement of the said C., dated , and registered , and thereby directed to be paid to me on the death of his widow D., who is years of age and resides at : Declaring that the said residue at present embraces the investments and assets specified in the list annexed and signed as relative hereto; but the said list is stated for convenience merely, and the said B. and his foresaids are not to be held as bound thereby against their interest, or limited thereby, the same being without prejudice to the full effect of the foregoing assignation: With power [complete as in preceding form, altering "legacy" to "residue"].

ASSIGNATION OF A SHARE OF RESIDUE, SUBJECT TO AN ANNUITY

I, A., considering that the late C. (hereinafter called "the testator"),

NARRATIVE OF WILL

by his trust disposition and settlement, dated , and with codicil, , registered , conveyed his means and estate to dated certain persons as trustees for the purposes therein specified, and inter alia, after providing for payment of his debts and funeral and testamentary expenses (which have been paid so far as known and to date), he directed his trustees to pay a sum of £100 to his widow D., and certain legacies to other persons amounting to £1000, all as soon as convenient after his death (which sums, amounting to £1100, have been paid): And, in the fourth place, he directed his trustees to pay to his widow the said D. an annuity of £200 during her lifetime after his death, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas after his death for the period between his death and that term, and so forth at the said two terms for the half-year to each term: And, in the last place, he directed his trustees to pay to his children the residue of his means and estate, including the sum which should be set aside to meet the said annuity on its being set free by the death of his widow:

NARRATIVE OF CODICIL

Further considering that by the said codicil the testator increased the said annuity to £250, but declared that in the event of the said D. entering into a

¹ If the deed be granted by a derivative owner, say, "the right which formerly belonged to X. [the original legates], and

which now by assignation as after mentioned belongs to me"; and the title will be deduced. second marriage, the annuity should as at and after the date of such second marriage be restricted to an annuity of £100:

FAMILY AND ESTATE

Further considering that the testator had five children, namely, E., F., G., H., and myself, but the said E. and F. predeceased him without leaving issue, and the said G., H., and myself alone survived him: Further considering that, shortly after the death of the testator, each of the said G., H., and myself received from the testator's trustees a payment of £1000 on account of our respective shares, and that the remaining estate is retained by the trustees to meet the said annuity: Declaring that the said estate at present embraces the investments and assets specified in the list annexed and signed as relative hereto; but the said list is stated for convenience merely, and the assignee under these presents shall not be bound thereby against his interest, or limited thereby, the same being without prejudice to the full effect of the assignation hereinafter written:

SELLER'S SHARE

In virtue of which trust disposition and settlement and codicil I have an absolutely vested right to one-third of the testator's estate in the hands or under the administration of his trustees, and estate (if any) yet to be received by them, and all income thereof, current and future, and arrears and accumulations (if any), but subject to payment of the said annuity of £250, restrictable in the event foresaid to £100, which annuity of £250 has been paid for the period up to and including the term of :

SALE AND PRICE

And now seeing that I have sold my said one-third share to B. at the price of \mathcal{L} , and that I have received payment of the said price from him, of which I hereby acknowledge the receipt and discharge him:

Assignation

Therefore I do hereby assign to the said B. and his executors and assignees whomsoever, absolutely and irredeemably, All that my right and claim to one-third of the testator's estate in the hands or under the administration of his trustees (including, without prejudice as aforesaid, the investments and assets specified in the said list), and of estate, if any, yet to be received by the trustees, and all income thereof, now current and future, and all present arrears and accumulations (if any), and the said one-third share itself, but subject to payment of the said annuity (restrictable as aforesaid) for the period subsequent to the said term of : With power to the said B. and his foresaids to uplift, discharge, sell, assign, and otherwise deal with the said share and consequents, including all partial and interim as well as full and final payments of capital, and all surplus income, and to do everything regarding the same and the testator's estate which I could have done before granting these presents, or which I or my representatives might have acquired right to do if the same had not been granted: And I grant absolute warrandice. -In witness whereof.

ASSIGNATION OF CONTINGENT SHARE OF RESIDUE, WITH THE BENEFIT OF SURVIVORSHIP

I, A., considering that the late C. (hereinafter called "the testator"),

NARRATIVE OF WILL

by his trust disposition and settlement, dated , and registered , conveyed his means and estate, heritable and moveable, real and personal, to certain persons as trustees for the purposes therein specified, and *inter alia*, after providing for payment of his debts and funeral and testamentary expenses (which have been paid so far as known and to date), he directed his trustees to hold his estate for behoof of his widow D. in liferent and his children and the survivors and survivor of them in fee:

FAMILY AND ESTATE

Further considering that the testator had four children, namely, E., F., G., and myself, all of whom survived him, and all of whom are still in life: Further considering that the testator's estate embraces the investments and assets [complete the clause as on p. 668]:

SELLER'S SHARE

In virtue of which trust disposition and settlement I shall be entitled to payment on the death of the said D. (who is at present years of age, and resides at), if I am then in life, of not less than one-fourth of the testator's estate, and I may by survivorship become entitled to a further or larger share or to the whole of his estate, and the said one-fourth share and the benefit of all such increase are included in the assignation hereinafter written:

SALE AND PRICE

And now seeing that I have sold all my rights and interests in the testator's estate to B. at the price of \pounds , and that I have received payment of the said price from him, of which I hereby acknowledge the receipt and discharge him:

Assignation

Therefore I do hereby assign to the said B., and his executors and assignees whomsoever, absolutely and irredeemably, All and Whole the shares and interests, present and future, now belonging or which may hereafter belong to me in, to, or out of the testator's estate, whether under the said trust disposition and settlement, or otherwise on any other title, or in any character, or in any manner of way: With power to the said B. and his foresaids to uplift, discharge, sell, assign, and otherwise deal with the said shares and consequents, and to do everything regarding the same and the testator's estate which I could have done before granting these presents, or which I or my representatives might have acquired right to do if the same had not been granted: And I grant absolute warrandice.—In witness whereof.

ASSIGNATION OF CONTINGENT SHARE OF RESIDUE, ALREADY INCREASED BY SURVIVORSHIP, AND WITH THE FUTURE BENEFIT OF SURVIVORSHIP

[Preceding form, to end of narrative of will]:

FAMILY AND ESTATE

Further considering that the testator had five children, namely, E., F., G., H., and myself, all of whom survived him, but the said E. has since died without leaving issue: Further considering that the testator's estate embraces the investments and assets [complete the clause as on p. 668]:

SELLER'S SHARE

In virtue of which trust disposition and settlement, and the death of the said E., I shall be entitled to payment [complete the clause as on p. 669]:

[Complete the deed as in preceding form.]

ASSIGNATION OF CONTINGENT SHARE, BUT RESERVING ALL BENEFIT OF SURVIVORSHIP

[Narrative of will and family and estate, as on p. 669]:

SELLER'S SHARE

In virtue of which trust disposition and settlement I shall be entitled to payment on the death of the said D. (who is at present years of age, and resides at), if I am then in life, of not less than one-fourth of the testator's estate, but any additional share (beyond one-fourth) to which I may be or become entitled by survivorship or otherwise is not included in this assignation:

SALE AND PRICE

And now seeing that I have sold the said one-fourth share in the testator's estate to B. at the price of \pounds , and that I have received payment of the said price from him, of which I hereby acknowledge the receipt and discharge him:

Assignation

Therefore I do hereby assign to the said B., and his executors and assignees whomsoever, absolutely and irredeemably, my said one-fourth share of the testator's estate: But reserving to me any and all further or additional share or shares of the said estate to which I am or may become entitled by survivorship or otherwise: With power to the said B. and his foresaids to uplift, discharge, sell, assign, and otherwise deal with the said one-fourth share, and to do everything regarding the same and the testator's estate so far as relative thereto, which I [complete as on p. 669].

ASSIGNATION OF SHARES UNDER SETTLEMENTS BY BOTH SPOUSES IN THEIR CONTRACT OF MARRIAGE, AND DEED OF APPORTIONMENT, INCLUDING ADDITIONAL SHARES AND ALL FUTURE SHARES

I, A., considering that by antenuptial contract of marriage entered into between my father X. and my mother Y., dated the , and registered ,

NARRATIVE OF PROVISIONS BY FATHER

my father bound himself to pay to certain persons therein named as trustees the sum of £1000, to be by them invested and held in trust for the spouses and the survivor of them in liferent for their liferent use only, and for the children to be procreated of their marriage in fee: And my father further thereby assigned to the trustees in trust for my mother in liferent, in case she should survive him, and for the child or children of the said marriage in fee, a policy of assurance on his life with the Z. Insurance Company for the sum of £2000, and he directed the trustees to hold the proceeds thereof in trust for the liferent use of my mother in liferent only in case she should survive him, and for the child or children of the said marriage in fee: And he further conveyed to the trustees the whole household furniture, etc., in the house occupied by him at the time of his death for behoof of my mother in liferent only, and after her death for the children of the marriage: And he declared that it should be in his power to divide the fee of the said sum of £2000 contained in the said policy of assurance, and profits or additions that might accrue thereon, in such shares and proportions among the children of the marriage as he should think proper:

NARRATIVE OF PROVISION BY MOTHER

And, on the other part, my mother conveyed to the said trustees the sum of £3000 in trust, that they should invest the same for behoof of herself and her husband and the survivor in liferent only, and for the children of the marriage in fee:

DEED OF APPORTIONMENT

Further considering that by deed of apportionment, dated , and registered , my father directed the trustees acting under the said contract of marriage to make payment, on the death of the longer liver of the spouses, of the fee of the sum of £2000 contained in the said policy, and profits and additions thereto, among the children of the marriage as therein directed, and inter alia to pay the sum of £750 to me on my attaining 21 years of age:

FAMILY AND ESTATE

Further considering that my father died on , survived by my mother (who is years of age, and resides at), that six children, including myself, were born of the said marriage, of whom one (L.) died in infancy, that the five others survived the dissolution of the marriage, but that one of them, namely, M., died on unmarried and intestate:

Further considering that the estate in the hands of the trustees derived from all the various sources before referred to (and which and all other and future assets, investments, and increase thereof are hereinafter called "the trust estate") embraces the investments and assets specified in the list thereof annexed and signed as relative hereto; but declaring with reference to the said list that the same is stated for convenience merely, and that the assignee under these presents is not to be held as bound thereby against his interest, or limited thereby, the same being without prejudice to the full effect of the assignations hereinafter written: Further considering that under the said contract of marriage and deed of apportionment I have a vested right to the said sum of £750; and further, under the terms of the said contract of marriage. I have a vested right to my original share (being in each case one-fifth, or at least one-sixth) of each of the following, namely, (first) the said fund of £1000, (second) the said fund of £3000, and (third) the said furniture, etc.; and still further, in consequence of the death of the said L. and M., I have derivative rights in the share or shares, if any, which may have vested in the said L. and in the share or shares which vested in the said M., or otherwise I have increased shares by reason of their deaths:

SALE AND PRICE

Further considering that I have sold my rights and interests as hereinafter assigned to B. at the price of \pounds , which he has instantly paid to me, and of which I hereby acknowledge the receipt:

Assignation

Therefore I do hereby assign to the said B., and his executors and assignees whomsoever, absolutely and irredeemably, (first) All that the said sum of £750 appointed to me as aforesaid; (second) All those my original shares (being in each case one-fifth, or at least one-sixth) of each of the following, namely, (1) the said fund of £1000, (2) the said fund of £3000, and (3) the said furniture, etc.; (third) All rights passing to me (1) in the share or shares, if any, which vested in the said L. in any of the provisions contained in the said contract of marriage, and (2) in the share or shares which vested in the said M. in any of the provisions contained in the said contract of marriage and deed of apportionment, and also or otherwise all increased or further shares anywise belonging to me by reason of the deaths of the said L. and M.; and (fourth) All other the shares, rights, and interests, original and derivative, present and future, vested and contingent, belonging, or which may hereafter fall to me of and in the trust estate, under the deeds hereinbefore referred to, or by reason of the failure of either of them to take effect, or by testate or intestate succession to other beneficiaries, or otherwise by reason of the death of other beneficiaries or intended beneficiaries, or otherwise on any title and in any character and in any manner of way: With power to the said B. and his foresaids to uplift, discharge, sell, assign, and otherwise deal with each and all of the said shares, rights, and interests, and to do everything regarding the same and the trust estate which I could have done before granting these presents, or which I or my representatives might have acquired right to do if the same had not been granted: And I grant absolute warrandice.—In witness whereof.

ASSIGNATION OF REVERSIONARY RIGHT TO SPECIFIC HERITAGE HELD UNDER TRUST AND SUBJECT TO A LIFERENT

I, A., considering that by her trust disposition and settlement, dated , X. conveyed to certain persons therein , and registered named as trustees her whole estate, heritable and moveable, in trust for the purposes therein mentioned, and inter alia, in the third place, she directed her trustees to hold her heritable property in King Street, Aberdeen, consisting of her dwelling-house 1 King Street, garden, and pertinents, for behoof of her son Y., my father, in liferent only, and for behoof of me, his only daughter, in fee, it being declared that after the death of the said Y. the trustees should denude themselves of said heritable property in my favour: And now seeing that I have sold all my rights and interests in the said subjects and others to B. at the price of £ , which he has instantly paid to me, and of which I acknowledge the receipt: Therefore I do hereby assign and dispone to the said B., and his executors 1 and assignees whomsoever, absolutely and irredeemably, All that my right and claim to the said house 1 King Street, Aberdeen, garden, and pertinents, under the said trust disposition and settlement, or otherwise in any manner of way, and the said house, garden, and pertinents themselves [and any other property or funds which may hereafter represent the same],2 and my right to demand a conveyance thereof, and that either upon the expiry of the liferent of the said Y., or on his renunciation or other earlier termination of such liferent, or by arrangement with him: And I grant absolute warrandice.—In witness whereof.

ASSIGNATION OF LIFERENT OF RESIDUE

I, A., in consideration of the sum of £ now paid to me by B., of which I hereby acknowledge receipt and discharge him, have sold and do hereby assign to the said B., and his executors and assignees whomsoever, absolutely and irredeemably, All and Whole the right for the whole remainder of my life to the liferent of the residue of the estate, heritable and moveable, real and personal, of the late C., which liferent was bequeathed to me under the trust disposition and settlement of the said C., dated , and registered , and all income, past, current, and future, payable and to become payable in respect of the said liferent, and all arrears and accumulations thereof 3 : Declaring that the said residue at present embraces [complete this clause as on p. 667]: With power to the said B. and his foresaids to uplift and discharge all sums payable to him under these presents, and to discharge, sell, assign, and otherwise deal with the said liferent right, and to do every-

³ On the contrary, it may be desired to define strictly the term of the assignee's entry to the liferent and income.

¹ Looking to the nature of the right, it may be desired to take the title to "heirs (excluding executors)."

² If the trustees have no power of sale, it may be preferred to omit these words.

thing regarding the same and the estate of the said C. which I could have done before granting these presents, or which I or my representatives might have acquired right to do if the same had not been granted: And I grant absolute warrandice.—In witness whereof.

BOND AND ASSIGNATION IN SECURITY OVER A VESTED REVERSIONARY INTEREST

I, A., grant me to have instantly borrowed and received from B. [proceed as in ordinary personal bond, p. 14]:

Assignation

And in security of the obligations hereinbefore and hereinafter undertaken, I assign to the said B, and his foresaids, but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole my right to the residue of the estate, heritable and moveable, real and personal, of the late C. [proceed as on p. 667, to and including "the foregoing assignation"], which right and residue hereby assigned are hereinafter referred to as "the mortgaged premises":

CREDITOR'S POWERS

Declaring that the said B. and his foresaids shall have full powers, and the same are hereby conferred on them, to do every matter or thing in relation to the mortgaged premises, or for recovery thereof, which I could have done before granting these presents, or which I or my representatives can or may come to have or acquire right to do; and particularly, but without prejudice to the said generality, the following powers are hereby conferred on the said B. and his foresaids, all to be exercised or not in their sole discretion, without the consent of me or my foresaids, namely, (first) to sue for and recover the mortgaged premises from the trustees of the said C., and from all others who are or may be liable to pay or make over the same, when and as they shall respectively become payable or transferable; (second) to give discharges for the mortgaged premises, which shall to every intent and purpose be good and effectual to the trustees of the said C. and to all others paying or making over the same; (third) to adjust, compound, refer, and compromise all accounts, Government duties, charges, matters, and things whatsoever relating to the mortgaged premises; and (fourth) to use the names of me and my foresaids in all or any of the proceedings foresaid: And I bind myself and my foresaids to repay on demand all sums which the said B. or his foresaids may disburse in paying accounts, Government duties, or any other charges in respect of or relating to the mortgaged premises (which they are hereby in their sole discretion empowered, but shall not be bound, to pay), and that with a fifth part more of liquidate penalty in case of failure in punctual repayment, and with interest at the rate of per cent. per annum from the respective dates of disbursement till repaid: And further I bind myself and my foresaids to ratify and confirm whatever the said B. or his foresaids shall do or cause to be done under any of the powers foresaid or otherwise in the premises, and also to grant such other deeds as shall be required by the said

B. or his foresaids for giving them an effectual title to the mortgaged premises, or enabling them to deal with, obtain possession of, or realise the same: And I agree and declare that the amount due to the said B. or his foresaids at any time under these presents shall be sufficiently ascertained and constituted by a certificate under the hand of the said B. or his foresaids, and that no suspension of a charge or threatened charge for any sum so ascertained shall be applied for or pass except on consignation only:

POWER OF SALE

And further declaring that, in the event of failure in payment of any sum due or to become due under these presents within three months after a written demand of payment intimated by the said B. or his foresaids, or by his or their agent, to me or any of my foresaids, addressed to the last known address and posted in ordinary course (a certificate signed by the said B. or his foresaids, or by his or their agent, being sufficient evidence of such demand and postage; and the validity of such demand, and of any sale following thereon, being nowise affected by the pupillarity, minority, or legal incapacity of the person to whom such demand may be addressed), then and in that case it shall be lawful to and in the power and option of the said B. or his foresaids, at any time after the expiration of the said period of three months, and without any other intimation or procedure, to sell the mortgaged premises in whole or in lots, and that either by public roup or private bargain, and with or without advertisement: and I hereby grant power of sale accordingly: Declaring that any purchaser or purchasers, and the trustees of the said C., and all other parties, shall be fully exonered by the discharge of the said B. or his foresaids, and the purchaser or purchasers shall acquire an absolute and irredeemable right and title to the mortgaged premises by the assignation or other deed of the said B. or his foresaids, all without the consent of me or my foresaids; and no purchaser, nor the trustees of the said C., nor any other party, shall he bound to inquire whether any money remains due under these presents, or as to the legality of any sale, whether by public roup or private bargain, or as to whether such demand and failure as aforesaid have been made, or as to the sufficiency of the demand, or otherwise as to the necessity, propriety, or regularity of the sale, or as to the title of the said B. or his foresaids, or be bound to see to the application of the price or other money paid to the said B, or his foresaids, and the title of the purchaser or purchasers shall not be impeachable on the ground that no case had arisen to authorise the sale, or that such demand and failure as aforesaid were not made, or that the power was otherwise improperly or irregularly exercised: And further declaring that in accounting and otherwise the said B. and his foresaids shall be liable for their actual intromissions only, and nowise for omissions, nor shall they be bound to take proceedings or to do diligence unless or further or otherwise than as they think fit:

WARRANDICE: REDEMPTION: EXPENSES: REGISTRATION

And I grant absolute warrandice: And I reserve power of redemption at any term of Whitsunday or Martinmas on three months' notice in writing, and that by payment or consignation in the [said bank] of the said principal sum,

penalties if incurred, interest, disbursements, interest thereon, and expenses: And I bind myself and my foresaids for the expenses which may be incurred by the said B. and his foresaids in enforcing or endeavouring to enforce the obligations hereby undertaken, or in exercise of the powers hereby conferred, or otherwise in consequence hereof or in relation hereto or to the premises in any manner of way, and the expenses of assigning and discharging this security: And I consent to registration hereof for preservation and execution.—In witness whereof.

BOND AND ASSIGNATION IN SECURITY BY THREE BORROWERS OVER (1) CONTINGENT REVERSIONARY INTERESTS, AND (2) LIFE POLICIES

We, A., B., and C., considering that our uncle X. by his trust disposition and settlement, dated , and with codicils thereto, registered conveyed to certain persons therein named as trustees his whole estate, heritable and moveable, but that in trust always for the purposes therein mentioned, and inter alia, in the seventh place, he bequeathed the residue of his estate and effects to our father Y. in liferent only, and the fee or capital to the children of the said Y. and the survivors and survivor of them, to be equally divided among them, share and share alike at the first term of Whitsunday or Martinmas after the death of the liferenter: Further considering that the said Y. is vears of age, and resides at and that we, as three of his twelve children, will each be entitled to payment of one-twelfth of the said residue on the death of the said Y. if we are respectively then in life; and further each or any of us may be or become entitled to a further or larger share or to the whole of the said residue, all which shares and interests are included in the assignation hereinafter written: Declaring that the said residue embraces the investments and assets specified in the list thereof annexed and signed as relative hereto; but the same is stated for convenience merely, and the assignee under these presents is not to be held as bound thereby against his interest or limited thereby, the same being without prejudice to the full effect of the assignation hereinafter written: And now seeing that we have applied to D. for a loan of £ which has been agreed to on condition of these presents being granted, and that we have received the amount of the said loan:

Bond

Therefore we grant us to have instantly borrowed and received from the said D. the said sum of £, which sum we all [insert joint and several personal obligation for principal, interest, and penalties]:

SECURITY (1) A., B., AND C.'S REVERSIONARY INTERESTS

And, in the first place, in security of the obligations hereinbefore and hereinafter undertaken, we all do hereby assign to the said D. and his foresaids, but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All those our said respective three one-twelfth shares, and also all other shares, rights, and interests, present and future (including all accresced

shares, and all shares which may yet accresce), now belonging or which may hereafter belong to us and each or any of us under the said trust disposition and settlement, and all sums, capital and income, to become payable in respect thereof:

(2) A.'s Policy

In the second place, in further security of the obligations hereinbefore and hereinafter undertaken, I the said A. do hereby assign to the said D. and his foresaids, but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, the policy of assurance granted by the Z. Insurance Company in my favour on my own life for the sum of £, payable in the event of my dying in the lifetime of the said Y. or within six months after his death, which policy is numbered and dated, and on which there is a premium of £ payable on the day of in each year, together with the said sum of £ therein contained, [and all bonus additions 1 which have accrued and which may accrue thereon], and my whole right, title, and interest, present and future, therein:

(3) B.'s Policy

In the third place, in still further security of the obligations hereinbefore and hereinafter undertaken, I the said B. do hereby assign [his policy in like manner as A.'s above]:

(4) C.'s Policy

And, in the fourth place [assignation in like manner]:

OBLIGATION FOR MAINTENANCE OF POLICIES

And we all bind ourselves and our foresaids, all jointly and severally as aforesaid, to fulfil all the conditions necessary for the upkeep of the said policies and all policies which may be substituted therefor, and to keep and preserve the said original and substituted policies in force; and for that purpose to make payment to the respective assurance companies in each year of the premiums and extra or increased premiums which may become payable in respect thereof, and that so long as the sums due or to become due under these presents, or any part thereof, shall remain unpaid, and to exhibit discharges thereof to the said D. and his foresaids fourteen days at least before the last day of grace for payment of each such premium; and in case the said original or substituted policies of assurance, or any of them, shall from any cause become void or expire, then to renew the same, and to pay all fines and make all other payments necessary for that purpose, or to effect in name of the said D. or his foresaids, and to deliver to him or them, a new policy or new policies of assurance upon the same life as the lapsed policy, and in place thereof, with an assurance office approved of by the said D. or his foresaids, and that for such sum or sums, payable in such event, and on such terms and conditions, as may be required by the said D. or his foresaids: And should the said D. or his foresaids at any time advance the premiums or extra or increased. premiums necessary for the upkeep of the said original and substituted policies of assurance or any of them, or be at the cost and expense of renew-

¹ In point of fact all survivorship policies are non-participating.

ing any of the said original or substituted policies, and paying any fines or making other payments for that purpose, or of effecting a new policy or new policies as aforesaid (all of which they are hereby in their sole discretion empowered, but shall not be bound, to do), then to repay on demand all sums so disbursed, with a fifth part more of liquidate penalty in case of failure in the punctual repayment, and with interest thereon respectively at the rate of per cent. per annum from the respective dates of disbursement till repaid:

CREDITOR'S POWERS

Declaring that the said D. and his foresaids shall have full powers, and the same are hereby conferred on them, to do every matter or thing in relation to the said shares, rights, and interests hereinbefore assigned, and the said original and all substituted policies (all which shares, rights, and interests, and original and substituted policies, are hereinafter referred to as "the mortgaged premises"), or for recovery thereof, which we or any of us could have done before granting these presents, or which we or any of us or our representatives can or may come to have or acquire right to do; and particularly, but without prejudice to the said generality, the following powers are hereby conferred on the said D. and his foresaids, all to be exercised or not in their sole discretion, without the consent of us or any of us or our foresaids, namely, (1, 2, and 3 as on p. 674); (fourth), to exercise all options which are or may become available under the said original and substituted policies of assurance, and to carry out the same, and to recover all sums payable in respect thereof, and to give valid and effectual discharges therefor, and also to make total or partial surrenders of bonus additions accrued or to accrue or both, and that in exchange for cash payments which the said D. and his foresaids shall have power to receive and discharge, or in payment of premiums, or towards reduction of premiums permanent or temporary, or in extinction of premiums or otherwise, and generally to arrange for and carry out from time to time such changes as the said D. and his foresaids may think proper in the terms of the said original and substituted policies of assurance, and in the amount payable thereunder, and in the nature and conditions of the assurance itself, and in the amount of premium payable therefor; and (fifth) to use the names of us and our foresaids [proceed as on pp. 674-5, making all the obligations joint and several, to the words "And I (we) grant power of sale accordingly"): Declaring that in the case of the said original and substituted policies of assurance the power of sale may be exercised by way of surrender to the respective assurance companies; And further declaring that any purchaser [as in preceding form, p. 675, to and including "otherwise than as they think fit," but introduce a reference to "the assurance companies" wherever the trustees are mentioned]:

WARRANDICE: REDEMPTION

And we grant absolute warrandice: And we reserve power of redemption at any term of Whitsunday or Martinmas on three months' notice in writing, and that by payment or consignation in the [said Bank] of the said principal sum, penalties if incurred, interest, premiums and extra or increased premiums, all other disbursements, interest thereon respectively, and expenses:

EACH GRANTER'S OBLIGATIONS AND SECURITY TO STAND ALONE 1

And we each hereby agree and declare as follows, (first) that the obligations undertaken by us respectively shall be effectual against us respectively and our foresaids notwithstanding the non-existence of the others, or any defect or nullity in, or any failure or extinction of, the obligations undertaken or intended to be undertaken by the others, or in or of any of the securities constituted or intended to be constituted, and that the securities constituted by us respectively shall remain in full force notwithstanding such nonexistence as aforesaid, or any defect or nullity in, or any failure or extinction of, the obligations undertaken or intended to be undertaken, or in or of any of the other securities, the said D. and his foresaids being nowise responsible for the validity, sufficiency, or continuance of any of the obligations or securities; (second) that in any case these presents shall be in all respects binding and effectual as regards any one or more who do subscribe though one or some should not subscribe, or though any of the other signatures should not be genuine, or should be null or reducible, or should otherwise be or become ineffectual; and (third) that the parties subscribing are all principal debtors to the said D. and his foresaids, and further that he and his foresaids shall in the most absolute sense be entitled to treat each one as if such one were solely and alone liable; and particularly, but without prejudice to the said generality, the said D. and his foresaids shall not only be entitled to all rights and powers competent to creditors at common law and under statute, but shall also be entitled to the following rights, powers, and discretions, all to be exercised or not in their sole discretion without the consent of us or any of us or our foresaids, namely, (1) to accept a dividend under any private arrangement with reference to the affairs of any of the parties, and thereupon to discharge the obligant from whose estate or on whose behalf such dividend is paid, (2) to give time, (3) to part with securities with or without consideration, and (4) to discharge any obligations or securities with or without consideration, all without prejudice to the continuing full liability of us and our foresaids so far as not expressly discharged, and also without prejudice to the securities so far as not expressly renounced:

EXPENSES: REGISTRATION

And we bind ourselves and our foresaids, all jointly and severally as aforesaid, for the expenses [complete as in the preceding form].

BOND AND ASSIGNATION IN SECURITY OVER CONTINGENT REVERSIONARY INTERESTS, THE CREDITOR HOLDING LIFE POLICIES TAKEN IN HIS OWN NAME

[As in preceding form, to end of assignation of the reversions, and proceed] And whereas, as further security for the obligations hereinbefore and hereinafter undertaken, the following policies have been effected with the Z. Insurance Company in name of the said D., namely, (first) a policy of assurance on the

¹ These clauses will be modified if and as may be considered judicious to meet the circumstances of each case.



life of me the said A. for the sum of \pounds , payable in the event of my dying in the lifetime of the said Y. or within six months after his death, which policy is numbered and dated , and on which there is a premium of \pounds payable on the day of in each year; (second) a policy of assurance on the life of me the said B. [describe it in same manner]; and (third) [C.'s policy in like manner]: Therefore we all bind ourselves and our foresaids, all jointly and severally as aforesaid, to fulfil all the conditions [complete as in preceding form].

BOND AND ASSIGNATION IN SECURITY OVER VESTED REVERSIONARY INTEREST, FOR FURTHER ADVANCE

I, A., considering that I have an absolutely and indefeasibly vested right to a one-fourth share of the residue of the trust estate of my father the late B., subject to the liferent of my mother C., under the following documents, namely, (first) the trust disposition and settlement of the said B., dated , and (second) deed of apportionment by the said C., and registered , and in respect of the facts and circumdated , and registered stances set forth in, and all as more fully specified in, the bond and assignation in security for £1000 granted by me in favour of D., dated hereinafter referred to as "the first bond," and which is here specially referred to and held as repeated brevitatis causa: Further considering that I have applied to the said D. for a further loan of £500 on the same security, and that he has agreed to grant such further loan on condition of these presents being executed, and that I have received the said additional sum of £500: Therefore I grant me to have instantly borrowed and received from the said D. the said sum of £500, which sum I bind [obligation for principal, interest, and penalties]:

Assignation

And in security of the obligations hereinbefore and hereinafter undertaken, I assign to the said D. and his foresaids, but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole the one-fourth share and all other share and interest now belonging or which may hereafter belong to me in, to, or out of the estate, heritable and moveable, real and personal, of the said B., and that whether under the said trust disposition and settlement and deed of apportionment, or otherwise on any other title or in any character or in any manner of way, and all income to accrue thereon: And I grant to [complete as on p. 703].

ASSIGNATION OF A SECURITY OVER (1) A REVERSIONARY INTEREST, AND (2) A POLICY

I, A., in consideration of the sum of £1000 now paid to me by B., do hereby assign to the said B. and his executors and assignees the bond and assignation in security granted by C. in my favour for the sum of £1000, dated , together with the said sum of £1000 thereby due, interest 1

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thereon from the term of , and all other obligations therein contained, and also the securities thereby constituted, viz., (first) the one-fourth share of residue, and all (if any) other shares, rights, and interests, present and future (including all accresced shares and all shares which may yet accresce) now belonging or which may hereafter belong to the said C. under the trust disposition and settlement of the late D., dated and registered and all sums capital and income payable or to become payable in respect thereof, and (second) the policy of assurance granted by the X. Insurance Company in favour of the said C. on his own life for the sum of £ payable in the event of the said C. dying in the lifetime of E. or within six months after his death, which policy is numbered and dated and on which there is a premium of £ payable on the day of in each year, all as the said several securities are more fully described in the said bond and assignation in security which is here held as repeated, and with all the powers and with and under all the other clauses therein contained: And I grant warrandice 1 from my own facts and deeds only.—In witness whereof.

Enquiries must be made of (1) the debtor, (2) the trustees, and (3) the Insurance Company.

DISCHARGE OF A SECURITY OVER (1) A REVERSIONARY INTEREST, (2) A POLICY ASSIGNED IN THE BOND, AND (3) ANOTHER POLICY IN THE CREDITOR'S NAME

I, A., in consideration of the sum of £1000 now paid to me by B., do hereby discharge a bond and assignation in security for the sum of £1000 granted by the said B. in my favour, dated , and all interest due thereon and all obligations therein contained: And I re-assign to the said B. and his executors and assignees, (first) his one-fourth share of residue and all other his interests of whatever kind in the estate of the late C., and (second) the policy of assurance granted by the X. Insurance Company in his favour, No. for £ , and the whole benefit thereof, all as the said shares, policy, and others are more fully specified in the said bond and assignation in security which is here held as repeated: And further considering that the other policy of assurance hereinafter described though taken out in my name is truly held by me only in security of the obligations contained in the said bond and assignation in security, and that the said B. has paid or repaid all the premiums thereon, I assign to the said B. and his foresaids the policy of assurance granted by the said X. Insurance Company in my favour on his and dated life for the sum of £ , No. , with all bonus additions present (if any) and future, and my whole right, title and interest present and future therein: And I warrant the foregoing discharge at all hands, and quoad ultra I warrant these presents from my own facts and deeds only.-In witness whereof.

INTIMATION

Necessity of Intimation.—Intimation is unnecessary when the assigner is the sole holder of the fund, and this covers the case of one

1 See pp. 544 and 556.

of two or more trustees assigning his beneficial interest in the trust, and subsequently, by death or resignation of the others, becoming himself sole trustee.¹ Further, since the case of The Heritable Reversionary Co. v. Millar² there has always been at least a question whether a trustee in sequestration could found on the failure of a prior assignee to give intimation. This question was raised recently before Lord Pearson,¹ who held that Millar's case does not apply, and that failure to intimate is still fatal even in a question with a trustee in sequestration. But in applying this rule, and in connection with intimation generally, some points of much importance must be kept in view, viz.:—

Registered Titles.—In the case of property held on a registered title the vesting clauses of the Bankruptcy Acts do not of themselves give the trustee a title, and it therefore comes to be a race between him and the assignee for priority of registration.³

Contingent Interests.—A. assigns a contingent interest to B.; B. does not intimate at once; A. is sequestrated before the interest vests; B. thereafter intimates also before the interest vests; vesting occurs pending the sequestration; B. is preferable to the trustee. The point here is that when B. intimated, the trustee in the sequestration had no right at all, contingent interests not passing under the sequestration.

Bars.—It is obvious that a second assignee may be personally barred from claiming a preference over an earlier assignee who has omitted to intimate:—

- 1. Personal Knowledge.—In view of the cases of Petrie and Stodart quoted on p. 291 with reference to heritable rights, it may be taken as reasonably clear that a purchaser who, before he pays his price, knows, or has reasonable cause to know, that the property has been already sold and assigned to some one else would be held as barred from taking advantage of the competing assignee's failure to give intimation. But as between two assignees in security it is thought that this would not apply.
- 2. Competing Duty.—If the second assignee who claims to take advantage of the want of intimation of the first assignation had himself a duty to intimate the first assignation, then he cannot be allowed to found on his own failure of duty. Thus A. assigns her share of her father's estate to her marriage trustees B., C. and D.; that assignation is not intimated to the father's trustees; then B. in his individual capacity takes a security from A. over the share in question for a debt due to B. personally; held that he cannot be allowed to compete with the claim of the marriage trustees, and further—which is the most important point—that this disability attaches to anyone acquiring right

⁵ Graeme's Tr. v. Giereberg, 1888, 15 R. 691.



¹ Browne's Trs. v. Anderson, 1901, 4 F. 305; 9 S. L. T. No. 110.

² 1892, 19 R. [H. L.] 43.

³ Morrison v. Harrison, 1876, 3 R. 406.

⁴ Browne, supra.

to his debt and security. In the case in question this disability was enforced against his trustee in bankruptcy, but it seems that it would be equally enforced against a special, onerous, and *bona fide* assignee.

3. Terms of the Deed.—If by the terms of the second assignation it is expressly postponed or made subject to the first, then of course the second assignee must admit the preference of the first whether intimated or not. But it is not so clear that as between two assignees in security this result would follow if the clause took the form of an exception of the first deed from the warrandice in the second.

International Law.—Assuming that the fund is subject to the law of Scotland, two points are settled:—

- 1. The validity and sufficiency of the form of title or security held by the competitors, or any of them, fall to be determined by the law of the place where the transaction was entered into. Thus while a mere deposit of a life policy, if made in Scotland, would give no security even though followed by intimation to the insurance company,² the result is different if the deposit is made in England.³
- 2. But this last rule is not to be understood as dispensing with intimation, even though that might have been unnecessary according to the foreign law.⁴

Policies.—Every policy of life assurance must bear an endorsement stating the office or offices at which intimation may be given, and intimation will be given at that office accordingly. It may be under the Transmission of Moveables Act or under the Policies of Insurance Act. In the former case, a certified copy of the deed or its material parts will be sent to the insurance company, and an acknowledgment will be obtained. In the latter (which is the common) case, a notice (p. 707) in duplicate will be sent in, and one of the copies is returned with an acknowledgment thereon.

Trustees.—There are three ordinary methods:—

1. Acceptance of Intimation.—This takes the form of a tested minute annexed to the deed. It ought to accept intimation instead of acknowledging that the deed has been intimated, which is not the case. It ought to be signed by all the trustees. If only a majority and quorum sign, letters ought to be written to the others informing them of what has been done, and proof should be preserved of these letters having been sent. It is thought to be quite clear that the mere fact of accepting intimation would not by itself alone infer any representation or admission by the trustees as to the existence or nature of the rights of parties, the validity of the deed, or the non-existence of other deeds or claims to or at the instance of themselves or others. But if it is desired to protect

Scot. Prov. Inst. v. Cohen & Co., 1888,
 16 R. 112; M'Jannett, 1902, 9 S. L. T. 269.
 Donaldson v. Ord, 1855, 17 D. 1053;
 Wallace v. Davies, 1858, 15 D. 688.



See p. 428.
 U. K. Life Ass. v. Dixon, 1838, 16 S.
 1277.

the trustees expressly, the acceptance of intimation may be qualified, "but only to the same effect as if the same had been intimated to us notarially."

Even if the trustees (or others) should be willing to give an acceptance of intimation without requiring delivery of a certified copy of the deed, the copy should be delivered to them for the greater security of the assignee himself. For otherwise the matter might be forgotten, and it might be held that this result was due to, or had been contributed to by, the negligence of the assignee; and even if not, the fund might be away, and there might practically be no remedy.

- 2. Copies posted and acknowledged.—This is under sec. 2. of the Transmission of Moveables Act. It is not necessary that the acknowledgments be holograph. The copies must be sent through the post, i.e. to bring the case within the exact terms of the section.
- 3. Notarial intimation, as to which it is unnecessary to add anything.

Delegated Acceptance.—It seems contrary to principle that the person to whom intimation falls to be given can authorise anyone to accept intimation on his behalf. Though according to Scots law intimation means more than knowledge, it appears correct to say that it includes and requires knowledge, which in the case supposed would be wanting. Trustees sometimes pass a minute authorising their agent to accept intimation of all assignations by beneficiaries, but for the reason stated it is recommended that this should not be taken. But since the first edition of this work appeared it has been indicated judicially that law agents acting in the usual sense for trustees have implied authority to accept intimations, and it appeared to be assumed that the case of express authority would be quite clear. Browne, supra.

Informal Intimation.—The practical course is clear, namely, to insist on full and formal intimation of the deed in favour of one's client, but at the same time not to assume that any prior security or other deed is incomplete on the ground of defective or informal intimation, if in point of fact either the trustees (debtors) or any of them, or the proposed new assignee, or their respective agents, have knowledge of the existence of the prior deed.

Furth of Scotland.—What should be done when the person to whom intimation falls to be given is out of Scotland will depend on the circumstances. The case may not be regulated by Scots law, e.g. English trustees, i.e. trustees under an English trust, and English insurance companies. In the former case the practice is to send notices in duplicate as to an insurance company. In the latter case the Policies of Insurance Act of course applies. Then even if Scots law applies, the person who is abroad may be a trustee, and it may be held that under the terms of the will or trust deed he ceases to

be counted for a quorum by reason of being abroad, in which case see p. 683. Assuming, however, that Scots law applies, and that intimation to the person in question is essential, the procedure is by letters of supplement under the signet, whereupon notarial intimation is given edictally. At the same time the assignee should not omit, in addition, to see that the person receives notice in fact, and that there is a record of evidence to that effect. Indeed it is thought to be clear that the element of being furth of Scotland makes no difference except only in the case of edictal intimation, and that a person who is out of Scotland may quite effectually accept intimation, and may also quite effectually acknowledge receipt of a certified copy in terms of sec. 2 of the Transmission of Moveables Act, which indeed is just one form of accepting intimation.

Renewing Intimation.—The best case is that of an assumed Suppose an assignation is granted in 1890. A. and B. are then the only trustees of the fund which is assigned; intimation is given to them; in 1900 they assume C. as a trustee; and in 1904 A. and B. resign, leaving C. then sole trustee. The intimation to A. and B. completes the assignation; and therefore it is clear that, as matter of law, neither when C. is a third trustee, nor even after he becomes sole trustee, is it necessary to re-intimate the deed to him in order to maintain its preference against all future deeds. This opens up a distinct risk to new lenders and purchasers; for after C. is sole trustee they may make enquiry of him, and be honestly informed by him that he knows of nothing, yet the old deed will rank first. But on the other hand, if in point of fact C. does not know (at least if the facts were not such that it might be held that the knowledge was fairly within his reach, e.g. in the trust sederunt book, and that he ought to have known), he may pay away the fund to the assigner or any subsequent assignee, and he will not be liable for doing so. Therefore the only practical rule is that the assignee should from time to time inform himself as to the facts connected with the trusteeship, and see that all the trustees from time to time receive intimation of his deed.1

¹ As to intimation to less than all the 644 (sustained); Browne's Trs., supra (retrustees, see Jameson v. Sharp, 1887, 14 R. jected).

SECTION XXXIX

LIFE POLICIES 1

TRANSACTIONS by way of purchase, and loans on the security, of life policies are now very common, and represent a large amount of business. The following are some of the special matters which require attention in connection with these transactions:—

Value of Policy.—This depends on the standing of the insurance company, the principles on which it divides its profits, and the actuarial calculations based on these points and on the probabilities of life. The prices paid for policies are of course in excess of the official surrender value, otherwise there would be no sales at all, but surrenders only. In some cases, on the other hand, the surrender value is the full value of the policy, except to anyone who chooses to act upon special knowledge as to the state of health of the insured. Some other policies on the other hand—e.g. many policies of American companies—have no surrender value until certain future dates; in these cases sale is the only available method of realisation.

Bonuses.—With reference particularly to bonuses there are several matters of much importance as affecting the value of the policy. Two special ways of dealing with bonuses are (1) to apply them towards reduction of premiums, and (2) to declare bonuses which are not to vest unless and until the life insured shall survive a certain future date. As regards the former of these methods it is important to know whether the reduction of premium is permanent, or whether, on the other hand, it is limited to the particular year or until the next declaration of profits, the future reduction depending upon future profits. Again, if a contingent bonus be declared, it is of course open to the policy-holder to effect a separate insurance of it until the date when it vests. Another matter of much importance is to know whether the company pay an intermediate bonus for the period between the last declaration of profits and the death of the life insured. That may obviously make a very great difference.

¹ This subject has been placed here instead of among personal rights, because it is essentially of the same nature as reverestate.

sionary transactions (last dealt with), and these latter are no way limited to personal estate.

Indisputability.—It is always desirable to have the policy declared by the company to be indisputable on account of any wrong statement which may have been made at the time when the insurance was effected. This, under most companies' regulations, comes about automatically after the lapse of a few years. But in all cases fraud is excepted, and this affects onerous assignees.¹

World-wide Licence.—In like manner, the policy ought to be declared by the company to be free from all restrictions as to travel or residence. This benefit is regularly conferred for a small additional payment, and sometimes without any. But in all cases war-risk is excepted, unless expressly covered.

Insurable Interest.—This refers to policies effected by one person on the life of another. In order that the policy may be valid it is necessary that the person effecting the insurance have an interest in the life insured.² It must be a pecuniary interest,³ and it must be at least co-extensive with the insurance.³ The point of time at which the interest must exist is the time when the contract of insurance is entered into. If only there be then an insurable interest, no change of circumstances will vitiate the policy.⁴ The practical advice is to ask the insurance company to admit the interest. But it has been said "that the statute merely furnishes a defence to the insuring company against a claim on the policy, but that, if the company waive the defence, the question who is entitled to the proceeds of the policy falls to be determined as if the statute did not exist." ⁵

Admission of Age.—This must always be regarded as essential. If a certificate of birth cannot be obtained, there may be a certificate of baptism or a record in a family Bible; or, failing all these, a declaration by someone who has reasonable means of knowing the fact will usually be accepted. If one obtains a statement by the company of the date of birth stated in their proposal papers, and if the age is admitted on the policy, one will usually be content to be satisfied. But it will be observed that, strictly speaking, this is not proof of the age of the life insured. The position is peculiar in this respect, that while it does not matter to the company how much younger the life may be than was stated in the proposal for insurance, the interest of a purchaser or lender, on the other hand, is just exactly the reverse. For, while it does not matter to him how much older the life may be than the age stated, every year by which the life is younger so much diminishes the value of the purchase or security.

Proof of Death.—This is a matter of great practical importance. First, there is the risk of losing sight of the life insured and being

¹ Scot. Widows' Fund v. Buist, 1876, 3 R. 1078.

² 14 Geo. III. c. 48.

³ Simcock v. Scot. Imp. Ins. Co., 1902, 10 S. L. T. No. 177.

⁴ Dalby v. India and London As. Co., 1854, 15 C. B. 365.

⁵ Hadden v. Bryden, 1899, 1 F. 710, per Robertson, L.-P. But Gedge v. Royal Ex. Corpn. [1900], 2 Q. B. 214, contra.

left in ignorance whether he is alive or dead. The Presumption of Life Limitation Act has no application. Under these circumstances there is nothing for it but to go on paying the premiums, though of course return would be made of those which were ultimately found to have been paid after the date of death, but probably no interest would be allowed. Secondly, assuming that the death is known, it has to be proved, and in that connection it is usual for the insurance company to require certificates to be filled up by someone who has personal knowledge of the facts. To obtain these certificates, it may be necessary for an assignee to pay a fee. An attempt may be made to get over these difficulties by obtaining letters from the life insured, and a friend or friends, undertaking to give information from time to time regarding the residence of the former, and the latter also undertaking to fill up and sign any certificates the office may require to prove the death, all free of charge.

Expense of Discharge.—Is the company entitled to make any deduction from the amount due under the policy in respect of expense of examining title or preparing a discharge? In certain cases this claim is sometimes made, that is, when a policy has been assigned or if diligence has been used affecting it. The claim was based on the "professional rule" under head 22 of the former Table of Fees, which certainly provided that "in the case of a discharge of a policy assigned, or regarding which diligence has been used, the whole expense (of a discharge) shall be paid by policy-holder." Notwithstanding this, it has been held in more than one Sheriff-Court judgment, that if the company wish a discharge they must themselves pay their own The grounds of the judgments are: (1) that a solicitor's charges. simple receipt for the money is sufficient, and a deed is unnecessary: (2) that the obligation of the company under the policy for the full sum is clear, and has ex hypothesi been validly transmitted to the present holder, who is therefore in the position of an ordinary creditor under a document of debt; and (3) that the Table of Fees is ineffectual to bind an outside party who has never agreed to be bound by it. would seem to follow that if the company wish to have a formal deed, not only must they not charge the policy-holder for it, but they must pay his solicitor for revising it; but it is not known that the point has yet been urged to that length. The new Table of Fees does not contain the "rule" referred to, and it is understood that the companies do not now claim expenses.

The above is on the assumption that the policy-holder has a clear title. If there be anything defective about it, e.g. if the policy have been lost, and if, notwithstanding, the company agree to pay on a discharge and indemnity, then of course the policy-holder may be charged with the expense. Put otherwise, the company might refuse to pay in the meantime in the assumed position of matters, and if they

agree to pay, they may make their own conditions, one of which may be as to expenses.

TITLE

With reference more particularly to title, the following points may be mentioned:—

Trusts.—Trustees have an implied power of sale of personal property, including life policies; indeed, in the case of policies, it is their duty to see that the policy is not lost to the estate, as it will be if allowed to lapse owing to non-payment of premiums. But regard must be had to the nature of the trust purposes. The policy may have been settled by a husband for behoof of his wife in liferent and his children in fee. Under these circumstances it would appear to be the proper course to convert the policy into a paid-up insurance payable on the husband's death, and a sale might be held to be ultra vires.

Trustees have, it is thought, no implied power to borrow. But see M'Laren, p. 1191, and Lord Kyllachy in Barras.²

Policies for Behoof of Wife and Children under 43 & 44 Vict. c. 26.

Policies effected under sec. 1 of the Act by a married woman on the life either of herself or her husband, if expressed to be for her separate use, are her property, free from the jus mariti and right of administration, and are assignable by her without her husband's consent. This will not enable her by herself alone to grant an effectual bond and assignation in security over the policy.

Policies effected under sec. 2 by a married man (which includes a widower³) on his own life, and expressed upon the face of them to be for the benefit of his wife, or of his children, or of his wife and children, constitute a trust in the person of himself, his representatives, or any trustee to be named by him. The trustee may surrender.⁴ But the case cited gives no support to the view that it would be safe to purchase from, or lend to, the husband or other trustee in the knowledge that he intends to use the money for his own purposes. The wife is not entitled to deal with a policy of this nature stante matrimonio.⁵

Trustees in Bankruptcy.—It is not clear that trustees in bankruptcy in Scotland have power to sell policies except by public roup, unless they have the consent of the bankrupt and the creditors. It is otherwise in England, where the Bankruptcy Act, 1883, s. 56, authorises a sale by private bargain by the trustee alone.

Bankruptcy.—(1) Sequestration.—The act and warrant in favour of the trustee operates by itself alone as a completed title in his

¹ Inglis, L. P., in Schumann v. Scot. Widows Fund, 1886, 13 R. 679, at p. 682.

² Barras v. Scot. Wid. Fund, 1900, 2 F. 1094.

³ Kennedy's Trs. v. Sharpe, 1895, 23 R. 146.

⁴ Schumann, supra.

⁵ Scot. Life Ass. Co. v. Donald, 1901, 9 S. L. T. No. 158.

favour as at the date of the first deliverance, without the necessity of any intimation to the company.¹ This will exclude even the holder of an assignation, prior in date and otherwise unobjectionable, if not intimated before the date of the first deliverance. It is not a case of the assignee and the trustee running a race for priority of intimation. A policy, as being held on an unregistered title, is in this respect in an unfavourable position, from the point of view of the assignee, as compared with personal property held on registered title, such as shares in ships and in registered companies.²

- (2) Cessio.—The decree of cessio carries the policy as at its date without the necessity of any intimation, but it does not draw back in effect to the date of the first interlocutor in the petition. The special danger in connection with cessio is, that there is no compulsory immediate registration of cessio proceedings. It is not obligatory on the trustee or the sheriff clerk to give immediate intimation to the Accountant in Bankruptcy. Many do, and in that way information can usually be obtained ; but for further security recourse must be had to the Gazette and to the rolls of the Sheriff Court or Courts in which an application for cessio would probably be presented.
- (3) English Bankruptcy.—The English law is materially different from ours. The trustee cannot exclude a previous assignee, even although the latter have neglected to give notice to the company till after notice has been given by the trustee.⁵ Further, if the trustee neglect to give notice, it appears that even a subsequent assignee may by notice acquire a preference, provided he have acted in good faith and without knowledge of the bankruptcy.⁶

Stamps.—See the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 118, under which, unless an assignee's title is duly stamped, payment is not to be made to him by the company, and his discharge is invalid. The title of the assignee means not only the immediate assignation in his favour, but all deeds under which he claims. In practice, however, it is understood that it is not extended to include deeds of the nature of encumbrances subsequently discharged, nor even deeds which are in form or even in substance absolute assignments followed by re-assignments again vesting the policy in the original assigner. See p. 695.

Government Duty.—Policies may under certain circumstances be chargeable with the various death duties; and the Customs and Inland Revenue Act, 1889, s. 11, makes a special charge of succession duty on policies effected or kept up for the benefit of an assignee or nominee. But when a father effected policies, paid premiums for years, then assigned

⁶ Palmer v. Locke, 1881, 18 C. D. 381.



¹ Scot. Un. and Natl. Ins. Co. v. Fairley and ors., 1900, 8 S. L. T. No. 137.

² Morrison v. Harrison, 1876, 3 R. 406.

³ Gray v. G.'s Trs. 1895, 22 R. 326.

⁴ Accountant's Notes, s. III.

⁵ Ex parte Ibbetsen, re Moore, 1878, 8

them gratuitously to his daughter, who thereafter paid the premiums, held that the moneys were not, either wholly or partly, chargeable under that section, or under s. 2 of the Succession Duty Act, 1853, as being received under the father's disposition.¹

Inquiries.—It is necessary to make inquiries of the insurance company in order to verify the representations relied on regarding the age, bonuses, surrender value, etc., and also to ascertain what claims, if any, the company have against the policy, and what notices, if any, they have received affecting it. Most of the companies are extremely courteous in giving information and facilities. A few of them make a small charge, but most do not.

Claims by the Company.—It seems sufficiently clear—and certainly a prudent lender or purchaser will assume—that all claims by the company against the holder of the policy may be placed by the company against the liability on the policy itself, and that the company's power to do so will be preferable to any right which an assignee can obtain from the policy-holder, assuming that the company's claims have arisen prior to the intimation of the assignation.2 In a case where the assured was sequestrated but the company did not in fact know of the sequestration and made a loan to the assured after its date, held by Lord Low that the company could not retain the loan from the policy as against a purchaser from the trustee in the sequestration, notwithstanding non-intimation of the assignation.⁸ Apparently under similar circumstances a surrender or partial surrender would be protected under s. 111 of the Bankruptcy Act. Again, when loans by the company are paid off it is usually on the footing of a discharge of the debt. Sometimes, however, the transaction takes the form of an assignation of the debt. When this does occur it is apt to become a source of danger. So far as the company is concerned it is still simply payment of their debt; and accordingly, if they are subsequently asked by an intending lender or purchaser whether they have any claim against the policy, the answer will probably be a simple negative. If, therefore, a debt be assigned, special care ought to be taken by the assignee that the transaction is properly entered in the company's books; and, from the other point of view, it is desirable, in the case of a loan or purchase, that information should be required regarding all previous loans by the company, if any, even though not now subsisting.

Lien.—On the other hand a third party can obtain no preference by mere possession except (1) in cases regulated by foreign law, when it may give a preference, but even then there must be notice,⁴ and

1864, 2 M. 595.

¹ Lord Adv. v. Robertson, 1897, 24 R.

3 Scot. Un. and Natl., p. 690, supra.

4 See p. 683.

2 Borthwick v. Scot. Widows Fund,

(2) under a law-agent's lien, but only so far as that right extends.¹ Nor apparently does it make any difference that the advances for which the preference is claimed consist of payments of premiums made to keep the policy in force.¹

Undelivered Documents.—In cases where delivery and custody of documents of title cannot be obtained it will often be found a good plan to make a copy of them, and produce the principals and copies to the company at the time of the transaction. Many of the offices will under such circumstances be good enough to satisfy themselves regarding the correctness of the copies, and waive the future production of the principals.

Lost Policies: Indemnities.—This is a common case, but it is understood that the mere want of the policy is never in practice allowed to prove a bar to settlement of the claim. There is, of course, always the possibility that the policy may have been deposited as security and may be subject to lien in the hands of some third party, as to which see supra. A declaration should, however, be taken from the policy-holder stating as fully as may be the history of the document, and negativing the creation of any charge or lien. When the policy becomes a claim the company will in all probability require a special indemnity from the person receiving the policy moneys. The real purpose of an indemnity, and the true distinction between it and warrandice, appears to be that the obligation of warrandice infers no liability unless a successful demand be subsequently made by another claimant, whereas an indemnity is intended to cover all the expenses to which the company might be put in successfully resisting an unfounded claim. It will be proper that a purchaser—and even a lender -should in like manner take a similar indemnity from the seller or borrower.

Certificates of Title.—In many cases one feels that, though there may be defects or irregularities in connection with the title, still the seller or borrower has the substantial right to the policy, and one would have no hesitation in proceeding if it were not for the fear that the insurance company may at the end of the day raise objections, and refuse to pay until some further deed or consent has been obtained. This difficulty is now met by some of the companies by the issue of certificates of title, or by letters which are substantially of that nature. Sometimes a fee is charged; sometimes not. Sometimes it is a condition that the documents of title be left in the hands of the company; sometimes not. Of course in no case do the company guarantee the title, and equally of course no certificate by the company can be of any avail against third parties. But at the same time there are many circumstances under which an admission by the company is sufficient for practical purposes.

¹ Wylie's Exrs. v. M'Jannet, 1901, 4 F. 195.

English Law.—In practice it will often be found, in transactions affecting life policies, that some of the parties are domiciled in England, and that the title is affected by English law. Accordingly, some leading points most apt to occur have been dealt with in these notes, and for convenience are here referred to:

Bankruptcy as affecting title, p. 690.

Deposit, security by, infra.

Mortgagees selling, p. 689.

The following matters may also be mentioned:-

Execution of Deeds.—Under English law, where it applies, it is sufficient that the deed be signed on the last page, and not more than one witness is necessary.

Voluntary Settlements.—No deed by way of settlement or assignment without consideration other than what we should describe as "love, favour, and affection," can be relied upon as effectual until the lapse of ten years from its date. Within that time it may be set aside unless those claiming under it can prove that at its date the granter was solvent without the aid of the settled property¹; and with special reference to settlements of policies coupled with obligations to pay the premiums, it is of great importance to observe that it has been held that each payment of premium is a new settlement of so much of the policy proceeds as corresponds to it.² But assignees for value are not affected unless the settler was insolvent at the date of the settlement, of which the onus of proof is on the challenger.³

International Law.—The validity of an assignment or other dealing falls to be judged of according to the law of the place where the transaction is entered into. Thus a security by deposit in England of a Scottish policy, followed by notice to the company here, has been held good in the Court of Session,⁴ though such a mode of creating a security in Scotland is quite ineffectual.⁵ But at the same time deposit coupled with a letter (which should be properly stamped) in the following terms: "I hand you a policy of insurance on my life which I give you as an added security for the loans," has been held to create a valid security.⁶ On the other hand the English Courts have refused effect to an assignment which would have been good in England, on the ground that it was invalid according to the law of Cape Colony, where it was made.⁷

We now pass to consider points specially arising in connection with

- ¹ B. A., 1883, s. 47.
- ² Per Wright, J., in re Harrison [1900], 2 Q. B. 710.
 - ² 13 Eliz. c. 5, Law Notes, May 1897, 151.
- ⁴ Scot. Prov. Inst. v. Cohen, 1888, 16 R. 112, and see further, p. 683.
 - ⁵ Even though the advances for which a

preference is claimed consist of payment of premiums which have in effect created the policy fund. Wylie's Ex. v. M'Jannet, 1901, 4 F. 195.

⁶ Cal. Ins. Co. v. Beattie, 1898, 5 S. L. T. No. 442.

⁷ Les v. Abdy, 1886, 17 Q. B. D. 309.

SALES OF POLICIES

Premiums.—(1) Which is the first premium which the purchaser is to pay? This ought always to be made express. Practically, it includes two matters: (first) whether the seller is entitled to recover from the purchaser a proportion of the premium already paid by the seller for the year current at the date of sale, and (second) whether the seller or the purchaser is the party liable to pay a premium on which the days of grace are running at the date of the contract of sale. The first of these questions is sometimes raised, but it seems clear that, even though there is no express provision, the seller has no claim. The second question is more important. But assuming that the contract is silent on the point, it is thought that the seller is liable, and that the same would hold even though it were stipulated that the purchaser should pay all future premiums. This does not seem very fair, and the proper course is to insert an express condition.

- (2) Assuming that a premium becomes payable before the settlement of the transaction, for which premium the purchaser is to be ultimately liable, who is to pay it in the first instance? This is of considerable importance. Even though the purchaser is liable, the seller cannot safely be indifferent to the maintenance of the policy; and the purchaser cannot feel in safety to pay the premium, for the title may prove to be defective. The best plan is for the seller, by agreement, to pay the premium and add it to the price, with interest. Or the company may extend the days of grace.
- (3) Extra Premiums.—Is the seller bound to give an obligation to pay all extra premiums, if any, which may become due in the future? Arguments are available on both sides. But it is thought that the seller is not liable.

Death before Settlement.—Regard should be had to the possibility of the death of the life insured before the payment of the price. It is very natural for the seller to stipulate that, if that should occur, the contract is to be cancelled. This secures for him the full value of the policy as in possession, instead of its actuarial value as a reversion. But though in ordinary cases it is certainly a good condition, it is certainly not a clause which there is any duty on the seller to put into the contract, and there are cases in which it might be undesirable. For instance, if it is a sale under a power in a security, the insertion of the clause may put the seller in a difficult position, for how is he to know for certain whether or not the death has occurred?

Sales under Securities.—There is no implied power of sale in favour of mortgagees. Even if power is contained in the security-deed, it is limited to public sale unless it expressly authorises sale by private bargain. A purchaser will of course satisfy himself that the event has occurred in which sale is authorised, and that all conditions

attached to its exercise have been observed: and even though the power should be in very general terms, he will see (1) that the debt is past due and payable, (2) that it has been called up, and (3) that fair advertisement has been given. He should preserve evidence of (2) and (3).

The English law is much more favourable to mortgagees and purchasers from them. See the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19.

Warrandice.—When a debt is sold for a fair price the implied obligations of warrandice are said to be (1) from fact and deed, and (2) "that the debt is subsisting and due by the alleged debtor to the cedent at the time of granting the assignation." 1 Further, in one case, where the only express warrandice was from fact and deed, it was stated that "the warrandice expressed left the warrandice implied from the nature of the transaction untouched." 2 These rules will apply to assignations of policies granted on sale. It is difficult to see that they differ from an obligation of absolute warrandice, at least in any very substantial sense. There may, however, be this difference, that if the seller have the substantial right to the policy, but there is some defect in his title which admits of being cured, though that may entail expense, and if the defect be not due to his own act or deed, the implied warrandice may not make him liable to cure it, while he would be liable under absolute warrandice. In view of the dictum in Ferrier's case, if it is intended to limit the warrandice to fact and deed, not only ought that to be expressed, but there ought to be added, "and no further or other warrandice is granted or is to be implied."

Stamp Duty.—Under sec. 57 of the Stamp Act, 1891, if property is sold subject to a debt, you must add the debt to the sum actually passing in order to fix the price for stamp-duty purposes. It is no ground of exception or abatement that the debt is far in excess of the value of the property and could not be recovered.8 But it is held by the Board of Inland Revenue that loans by insurance companies on their own policies are an exception to this rule, which, however, applies if the lender is an outsider. This exception sometimes enables a considerable sum of stamp duty to be saved. Suppose a policy-holder has already borrowed £1000 from the company on the security of the policy, and subsequently sells at £1200. If the transaction is carried through in the form of the debt being paid off by the seller, and the purchaser paying the seller £1200, the stamp will be £6. But if in the deed it is set out that the policy has been sold on the footing of the purchaser paying the seller £200, and in addition taking over and relieving him of the £1000 debt, the stamp will be £1, thus effecting a saving of £5. this latter case the warrandice clause will contain an exception of the £1000 and of interest thereon from the date of settlement or other date



¹ Bell's Lect., 214.
³ Inl. Rev. v. N. B. Ry., 1901, 4 F. 27.

² Ferrier v. Graham's Trs., 1828, 6 S. 818.

agreed on, and the purchaser will undertake to relieve the seller thereof. The interest to the agreed-upon date will be allowed for by the seller in favour of the purchaser at settlement. After settlement there is no reason why the purchaser should not pay off the debt as soon as he pleases, and production of the receipt therefor will satisfy the seller that the obligation of relief has been implemented. Of course the receipt will bear that the debt has been paid by the purchaser. See p. 699.

It remains to refer to a few matters touching

SECURITIES OVER POLICIES

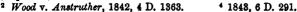
Keeping up Policy.—The security-deed will of course contain an obligation to pay premiums and extra premiums, if any; the obligation will apply both to the original policy and to any policy which may be substituted therefor; and the policy will be assigned in security, not only of principal and interest, but also of all premiums, extra premiums, and interest thereon. This obligation for maintenance gives the creditor no additional claim in bankruptcy. He will of course be entitled to include in his claim the premiums if any advanced prior to sequestration, with interest thereon to the date of sequestration, but he cannot claim for the value of the future premiums.¹

Coupled with Heritable Security.—When the security embraces both heritable property and a life policy the specialty is that, in connection with this obligation for keeping up the policy, attention must be paid to the rule that there can be no uncertain burden on heritage. For the machinery, see p. 444. An alternative is an ex facie absolute title.

Creditor's Powers.—(1) Sale and Surrender.—The creditor ought to have express and distinct powers of sale and surrender, and these will apply both to original and substituted policies, and will include power to deal with the bonuses separately by cash surrender or reduction of premium. The conditions of the exercise of these powers as regards failure and notice will be detailed. If power of sale should be omitted, it appears that it will be conferred or declared by the Court,² and even in the Sheriff Court.³ In a sequel 4 to Wood's case the creditor was found entitled to sell, along with the policy, the debtor's obligation to pay all premiums. This was on an averment and apparent proof that the policy could not be sold alone. This is not likely to be the case now, and in any event it is thought that the power would not now be given. For one thing, it would appear in its result to be inconsistent with the judgment of the House of Lords in Deering's 1 case.

(2) Realisation and Discharge.—There will also be power to uplift the policy moneys when they become due, and to give a discharge therefor.

¹ Deering v. Bk. of Ireland, 1886, L. R. ⁸ Murray v. Smith, 1899, 6 S. L. T. No. 12, Ap. Cas., 20. 436.



Policy in Creditor's Name.—This is sometimes convenient. It saves a certain amount of expense, as there is no assignation, and therefore no intimation. The insurable interest of the creditor will be admitted by the company on the face of the policy.

Survivorship Policies.—These are policies on the life of A., payable only in the event of his predeceasing B. The ages of both A. and B. will be admitted by the company. These policies have their chief importance in connection with dealings with contingent reversionary interests. (See pp. 676-9.)

ARTICLES OF ROUP of the Policy of Assurance granted by the X. Insurance Company in favour of A. on his own life for the sum of £, numbered and dated, together with all bonus additions [accrued and 1] which may accrue thereon, 2 which policy and bonuses 3 (hereinafter referred to as "the policy") are to be exposed to sale by the said A. (hereinafter called "the exposer") within [place] upon [day of the week], the day of, at o'clock afternoon, or at such other time or place as the exposure may be adjourned to, and that under the following conditions, or such other conditions as may be inserted in any minutes to follow hereon:—

First. The policy is [take in article 1, p. 171].

Second. In the event of the death of the exposer [as on p. 665].

Third. The policy is exposed tantum et tale as it exists; and particularly, but without prejudice to the said generality, it is exposed without reference to advertisements or particulars or information supplied to the purchaser or offerers. The purchaser and offerers are held to have satisfied themselves before offering as to the existence, validity, nature, description, amount, and value of the policy, as to the sums payable or which may become payable thereunder, the surrender value thereof, the premiums payable thereunder, as to the conditions and provisions of every kind affecting or which may affect the policy, as to the age, residence, and occupation of the exposer, and as to all other matters and things which do or might be alleged to affect the policy.

Fourth. Fifth. $\begin{cases} Fifth. \\ Sinth \end{cases}$ [as on pp. 665-6].

Seventh.4 In the event of the purchaser failing in punctual payment of the

- 1 Omit these words (a) if no bonus has accrued, or (b) if all accrued bonuses have been surrendered for cash or applied towards reducing premiums. If some of the accrued bonuses have been so surrendered or applied, say "together with all bonus additions already accrued (so far as not surrendered or applied) and which may accrue thereon."
- ² Omit all reference to bonuses (a) if the policy is non-participating, or (b) if under the terms of the policy there is no option but to apply the bonuses to reduce the premiums.
- 3 If there is no reference to bonuses, the words "and bonuses" will be left out, and the word "are" in the next line will be "is." If the reference to bonuses is qualified, as suggested in note 1, say here "and bonuses as aforesaid."
- ⁴ This article proceeds on the assumption that the date of settlement will follow so close upon the day of sale, that there is no room or necessity for requiring caution or deposit. But if wished, the whole of article 4, p. 172, may be adopted.

price, he shall, but only in the option of the exposer, forfeit his purchase [complete the article as on p. 173, altering the words "failed in implementing this article or any part thereof" to "failed to make punctual payment of the price"].

Eighth. Upon due payment of the price, with interest and penalty, if any, the exposer shall grant in favour of the purchaser an assignation of the policy under the conditions contained in these articles and in the policy itself, or otherwise affecting the policy. The exposer will grant warrandice from fact and deed only, and no other warrandice shall be expressed or implied.¹

Ninth. The purchaser shall pay the premium falling due on and all future premiums, including extra premiums, if any.²

Tenth. [Take in article 8, p. 173.]

Lastly. [Take in last article, p. 174.]

ARTICLES OF ROUP ON SALE BY AN ASSIGNEE

The following changes will be made on the preceding form:—

Title. If there is any doubt as to A.'s residence, say "believed to be residing at."

For "are to be exposed to sale by the said A." read "are to be exposed to sale by B."

Article 2. For "the death of the exposer" read "the death of the said A."

Article 3. For "age, residence, and occupation of the exposer" read "existence, identity, age, residence, and occupation of the said A." and add "the insurable interest."

There will be a provision with reference to the custody of the writ or writs forming the exposer's title.

ARTICLES OF ROUP ON SALE BY A CREDITOR

The following changes will be made:-

Title. If there is any doubt as to A.'s residence, say "believed to be residing at."

For "are to be exposed to sale by the said A." read

are to be exposed to sale by B. under the power of sale contained in the bond and assignation in security granted by the said A. in his favour, dated

Article 2. This article cannot stand as on p. 665. In any case it must be qualified so as to be in the *option* of the exposer. But as to whether the condition should be retained at all, see p. 694.

Article 3. For "age, residence, and occupation of the exposer" read "existence, identity, age, residence, and occupation of the said A."

Article 4. After "title" insert "and of the exposer's power to sell, and of the exercise thereof, and of the sale itself."

¹ If any clause is necessary as to delivery will be introduced as a separate article or non-delivery, or exhibition, of writs, it between 8 and 9 above.

² See p. 694.

There will be a provision as to the custody of the bond and any other writs. Unless the debt is fully paid, of course the bond will not be delivered.

ABSOLUTE ASSIGNATION OF POLICY

- I, A., in consideration of the sum of £ instantly paid to me by B., of which sum I hereby acknowledge the receipt, have sold and do hereby assign to the said B., and his executors and assignees whomsoever, absolutely and irredeemably, the policy of assurance granted by the X. Insurance Company in my favour on my own life for the sum of £ , numbered , and dated the , on which there is a day of premium of £ payable on the day of in each year; Together with the said sum contained in and due by the said policy of assurance, and all bonus additions which have accrued and which may accrue thereon, and my whole right, title, and interest, present and future, in or to the said policy of assurance, and in or to any claim, bonus, advantage, or benefit which has arisen or which may arise thereby in any manner of way: Which policy of assurance and the foregoing conveyance thereof I warrant absolutely 1: And in case I shall act so as to render necessary any payments or contributions in addition to the foresaid ordinary premiums in order to keep the said policy of assurance in force, I bind myself, and my heirs, executors, and representatives whomsoever, all jointly and severally, to make timely payment thereof in such way and manner as shall be necessary for keeping the said policy of assurance in force, and forthwith to deliver discharges thereof to the said B. or his foresaids; And in the event of the said B. or his foresaids paying the same or any of them, I bind myself and my foresaids, all jointly and severally, forthwith to repay the same with interest at five per cent. per annum from the respective dates of disbursement till repaid.2—In witness whereof.
 - ¹ As to warrandice, see p. 695.
 - ² As to this obligation for extra premiums, see p. 694.

ASSIGNATION OF POLICY SUBJECT TO DEBT DUE TO THE INSURANCE COMPANY

I, A., considering that I hold the policy of assurance hereinafter assigned, and that the same is subject to a debt of £1000 borrowed by me from the insurance company, on which interest is due from [insert date]: Further considering that I have agreed to sell the said policy to B. at the price of £200,¹ and on the condition that in addition he shall take over and relieve me of the said debt of £1000, and of the interest thereof after [insert date, or from the date of delivery of these presents]: And now seeing that the said B. has instantly paid to me the said sum of £200, of which sum I hereby acknowledge the receipt: Therefore I do hereby assign [take in description of policy, etc., as in last form]: Which policy and the foregoing conveyance thereof I warrant absolutely, excepting only the said debt of £1000, and the interest thereof

from and after the said [insert second date above mentioned], to which date I have paid or allowed for the interest at or prior to the delivery of these presents: Declaring that the said B. shall be bound, as by acceptance [or signature 2] hereof he binds himself, and his heirs, executors, and representatives whomsoever, all jointly and severally, to relieve me and my successors of the said debt of £1000, and the interest thereof from and after the said [insert last mentioned date, and continue as in preceding form].

- ¹ The stamp is £1. See p. 695.
- ² The seller may prefer that the purchaser sign the deed.

BOND AND ASSIGNATION IN SECURITY OVER A POLICY

I., A., grant me to have instantly borrowed and received from B. the sum of £ , which sum I bind myself, and my heirs, executors, administrators, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, to repay to the said B. or his executors or assignees whomsoever at the term of next, 19 within the head office of [bank] in [place], with a fifth part more of liquidate penalty in case of failure, and the interest of the said principal sum per centum per annum from the date hereof to the said term of at the rate of payment, and half-yearly, termly, and proportionally thereafter during the not-payment of the said principal sum, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the term of next for the interest due preceding that date, and the next term's payment thereof at following, and so forth half-yearly, termly, and proportionally thereafter during the not-payment of the said principal sum, with a fifth part more of the interest due at each term of liquidate penalty in case of failure in the punctual payment thereof:

Assignation of Policy

And in security of the obligations hereinbefore and hereinafter undertaken, I assign to the said B. and his foresaids, but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, the policy of assurance granted by the X. Assurance Company in my favour on my own life for the sum of £ , numbered , and dated which there is a premium of £ payable on in each year; together with the said sum contained in the said policy of assurance, and all bonus additions and all other sums which have accrued and which may accrue thereon; and my whole right, title, and interest, present and future, in or to the said policy of assurance, and in or to any claims, bonuses, advantages, or benefits which have arisen or which may arise thereby in any manner of way: With full power to the said B. and his foresaids in their sole discretion, without the consent of me or my foresaids, and before as well as after default, to do everything in relation to the said policy of assurance and any policy or policies which may be substituted therefor, or for recovery of the sums therein contained and proceeds thereof, which I could have done before granting these presents, or which I and my foresaids can or may come to have

right to do; and particularly, but without prejudice to the said generality, with power to the said B. and his foresaids to recover the sums contained in the said original and substituted policies of assurance and proceeds thereof, and to give valid and effectual discharges therefor; and also with power from time to time to exercise all options which are or may become available under the said original and substituted policies of assurance, and to carry out the same, and to recover all sums payable in respect thereof, and to give valid and effectual discharges therefor; and also with power from time to time to make total or partial surrenders of bonus additions, accrued or to accrue, or both, and that in exchange for cash payments, which the said B. and his foresaids shall have power to receive and discharge, or in payment of premiums, or towards reduction of premiums, permanent or temporary, or in extinction of premiums, or otherwise; and generally with power from time to time to arrange for and carry out such changes as they may think proper in the terms of the said original and substituted policies of assurance, and in the amount payable thereunder, and in the nature and conditions of the assurance itself, and in the amount of premium payable therefor:

OBLIGATION FOR MAINTENANCE OF POLICY

And I bind myself and my foresaids, all jointly and severally as aforesaid, to fulfil all the conditions necessary for the upkeep of the said original and substituted policies of assurance, and to keep the said original and substituted policies in force, and for that purpose inter alia to make payment to the respective assurance offices in each year of the premiums and extra or increased premiums which may become payable in respect thereof, and that so long as the sums due or to become due under these presents or any part thereof shall remain unpaid, and to exhibit discharges thereof to the said B. and his foresaids fourteen days at least before the last day of grace for payment of each such premium; and in case the said original or substituted policies of assurance or any of them shall, from any cause, become void or expire, then I bind myself and my foresaids, all jointly and severally as aforesaid, to renew the same and to pay all fines and make all other payments necessary for that purpose, or to effect in name of the said B. or his foresaids, and deliver to them, a new policy or new policies of assurance upon my life in place thereof, with an assurance office approved of by the said B. or his foresaids, and that for such sum or sums, payable in such event, and on such terms and conditions, as may be required by the said B. or his foresaids; And should the said B. or his foresaids at any time advance the premiums or extra or increased premiums necessary for the upkeep of the said original and substituted policies of assurance or any of them, or be at the cost of renewing any of the said original or substituted policies, and paying fines or making other payments necessary for these purposes, or of effecting a new policy or new policies on my life, all of which they are hereby, in their sole discretion, empowered but shall not be bound to do, I hereby bind myself and my foresaids, all jointly and severally as aforesaid, to repay on demand all sums so disbursed, with a fifth part more of liquidate penalty in case of failure in punctual repayment, and with interest per centum per annum from the thereon respectively at the rate of £ date of advance till repayment: Declaring, as I hereby agree, that the amount due at any time shall be sufficiently and conclusively ascertained and constituted by a certificate under the hand of the said B. or his foresaids, and that no suspension of a charge or threatened charge for payment of any sum so ascertained shall be applied for or pass except on consignation only:

POWER OF SALE

And it is hereby provided and declared that in the event of failure in payment of the principal sum, penalties, interest, advances hereby authorised, and interest thereon, all as before provided, and expenses as after mentioned, or any of them, or any part thereof, within three months after a written demand of payment addressed to me or any of my foresaids, at my present or at my or their last known address, by or on behalf of the said B. or his foresaids, and posted in ordinary course (a certificate signed by any person on behalf of the said B. or his foresaids, or in the employment of their agent, being sufficient evidence of such demand and postage, and the validity of such demand and of any sale following thereon being nowise affected by the pupillarity, minority, or legal incapacity of the person to whom such demand may be addressed), then and in that case it shall be lawful to and in the power and option of the said B, and his foresaids, at any time after the expiration of the said period of three months, and without any other intimation or procedure, to sell the said original and substituted policies of assurance, and that either by public roup or private bargain, and with or without advertisement, and I hereby grant power of sale accordingly: Declaring that the foresaid power of sale may be exercised by way of surrender to the respective assurance offices: Declaring further that all parties shall be fully exonered by the discharge of the said B. or his foresaids, and that the purchaser or purchasers shall acquire an absolute and irredeemable right and title to the said original and substituted policies of assurance by the assignation or other deed of the said B. or his foresaids, all without the consent of me or my foresaids, and that no purchaser or other party shall be bound to inquire whether any money remains due under these presents, or into the legality or regularity of the proceedings or sale, or be affected by notice of the illegality or irregularity thereof, or be bound to see to the application of the price, I only reserving right to the obligation for an accounting for the price, in which accounting and otherwise the said B. and his foresaids shall be liable for their actual intromissions only, and nowise for omissions, nor shall they be bound to take proceedings at law or to do diligence further or otherwise than as they think fit.

WARRANDICE: REDEMPTION: EXPENSES: REGISTRATION

Which policy of assurance and the foregoing conveyance thereof I warrant absolutely: And I reserve power of redemption at any term of Whitsunday or Martinmas, on three months' notice in writing, and that by payment or consignation in the said [bank] in [place] of the said principal sum, penalties if incurred, interest, advances, interest thereon, and expenses: And I bind myself and my foresaids, all jointly and severally as aforesaid, for the expenses which may be incurred by the said B. and his foresaids in enforcing or endeavouring to enforce the obligations hereby undertaken, or in exercise of the powers

hereby conferred, or otherwise in consequence hereof or in relation hereto or to the premises in any way, as the same shall be ascertained by the writ of the agents of the said B. or his foresaids, and for the expenses of assigning and discharging this security: And I consent to registration hereof for preservation and execution.—In witness whereof.

BOND AND ASSIGNATION IN SECURITY OVER POLICY FOR FURTHER ADVANCE

[As on p. 700, to end of Assignation, but not including powers.]

To Maintain Policy

And I bind myself and my foresaids to keep up the said policy, and any policies to be substituted therefor, and to pay premiums, and extra or increased premiums, fines, and other payments for that purpose, or for reviving or renewing any of the said policies, or effecting new policies, and to repay on demand to the said B. and his foresaids all sums which they may advance for any of those purposes, with interest at the rate of per cent. per annum from the respective dates of disbursement till repaid, all as these obligations are more fully contained in the previous bond and assignation in security for the sum of £ granted by me in favour of the said B., dated , which is hereinafter called "the first bond," and which is here specially referred to and held as repeated brevitatis causa:

CREDITOR'S POWERS

And I grant to and confer on the said B. and his foresaids all the powers, including power of sale by public roup and private bargain, and all the options, discretions, and immunities which are conferred in the first bond, and that all in the terms and with the clauses for the protection of the said B. and his foresaids, and of purchasers and others, all as contained in the first bond:

WARRANDICE: REDEMPTION: EXPENSES: REGISTRATION

And I grant absolute warrandice, excepting only the first bond: And I reserve power of redemption at any term of Whitsunday or Martinmas on three months' notice in writing, and that by payment or consignation in [bank] of the said principal sum of \pounds , penalties if incurred, interest, advances, interest thereon, and expenses, but declaring that the said B. and his foresaids shall not be compellable to accept repayment of the sums due and to become due under the first bond until the sums due and to become due under these presents are first repaid [Expenses as above]: And I consent to registration hereof for preservation and execution.—In witness whereof.

ASSIGNATION BY A CATHOLIC CREDITOR TO A POSTPONED CREDITOR

The case supposed is this: A. holds a bond for £1000 over two policies, viz., (1) by the X. Company on C.'s life, and (2) by the Y. Company on D.'s life. B. holds a bond for £100 over C.'s policy only, and has also made advances for interest on A.'s loan and premiums on

both policies. On C.'s death his policy pays (a) expenses of realisation; (b) A.'s £1000 and interest thereon so far as not advanced by B., and (c) leaves a balance of £100 which is paid to B. on account of his claims. Here B. is entitled to an assignation of the security over D.'s policy on two grounds, viz. (1) because, so far, his claim consists of advances of sums expressly secured over D.'s policy under A.'s bond, and (2) quoad ultra, because of the relation of catholic and secondary securities.

B.'s position will to a considerable extent depend on the clauses in A.'s bond as to interest on interest and on premiums. For this reason the better course, if available, will be to obtain a bond of corroboration for the accumulated amount of B.'s claims, and with satisfactory provision for interest in the future, and, of course, with a new assignation in security of D.'s policy concurred in by A. If this cannot be obtained, it may be possible to improve D.'s position by a charge and registration under sec. 5 of the Personal Diligence Act, and subsequent arrestment if in proper terms.

I, A., considering that I hold a bond and assignation in security for £1000 granted by C. in my favour dated , whereby security was constituted over the following two policies of life assurance, viz., (first) policy for $\boldsymbol{\pounds}$ granted by the X. Assurance Company in favour of the said C. on his own life, No. and dated ; and (second) policy for £ granted by the Y. Assurance Company in favour of D. on his own life, No. and dated to which the said C. had acquired right: Further considering that the said C. granted a bond and assignation in security in favour of B. for the sum of , on which interest to the amount of £50 is due as at the [date], making the sum of principal and interest together £150: Further considering that in addition the said B. advanced the interest and premiums due and secured under my bond to the extent of £250, which, with interest thereon, amounts as at the said [date] to £350, the cumulo amount of the claims of the said B. in respect of his said bond and advances being thus as at the said [date] £500, but declaring that these figures are inserted here as represented to me by the said B., and I incur no responsibility in respect thereof: Further considering that the said C. died on or about the said policy on his life was accordingly realised, the amount received thereunder being £ , which, after paying the expenses of realisation and the debt due to me, left a balance of £100, which has been paid to the said B. on account of his claims, which, after allowing for interest, leaves due to him the sum of £410, with interest thereon from the day of : And now seeing that the said B claims an assignation from me of the said bond and assignation in security in my favour quowl the personal obligations and the security over the policy on the life of the said D. to be held in further security as aftermentioned, and that both in respect of the relation of catholic and secondary creditors, and also in respect that the debt due to him is, as aforesaid, partly made up of advances secured under the said bond and assignation in security in my favour; and that under these circumstances it is reasonable that such assignation should be granted: Therefore I do hereby

assign to the said B. and his executors and assignees whomsoever, the said bond and assignation in security granted by the said C. in my favour and all obligations therein contained, including, without prejudice to the said generality, the arrears advanced by the said B. as aforesaid and all interest thereon, and also (to the effect of assigning the security over the same constituted by the said bond and assignation in my favour) the said policy of assurance on the life of the said D. with the Y. Insurance Company for the No. and dated , on which there is a premium of £ payable on the day of in each year, together with the said sum contained in the said policy of assurance and all bonus additions and all other sums which have accrued and which may accrue thereon, with the full benefit of all the powers and other clauses contained in the said bond and assignation in security: But the foregoing assignation is granted and shall be held only in security of the said sum of £410 and of all future premiums, with interest accrued and to accrue thereon at such rates and on such footing of computation as may be legally exigible under the terms of the said deeds or otherwise: And I grant warrandice from my own facts and deeds only.-In witness whereof.

A state of the accounting may be annexed; but in any case states will be prepared and preserved with the papers.

AGREEMENT WHEN A POLICY IS SOLD SUBJECT TO A RIGHT OF RE-PURCHASE¹

MINUTE OF AGREEMENT between A. (hereinafter called "the first party") and B. (hereinafter called "the second party").

Whereas the first party has purchased and is absolute owner of the following policy of assurance (hereinafter referred to as "the policy"), namely policy of assurance granted by the X. Insurance Company in favour of C. on his own life for the sum of \pounds , numbered and dated .

And whereas the purchase was made on the footing of these presents being entered into subject as is hereinafter mentioned: Therefore the parties agree as follows:—

If on or before [date] (time being of the essence of this agreement), the second party or his executors shall make actual payment in cash to the first party or his executors of a price amounting to the aggregate of the following sums and items, namely:

- 1. The sum of £ , being the price paid by the first party;
- 2. All premiums and extra premiums, if any, which the first party has paid or may pay;
- 3. All expenses incurred and to be incurred by the first party or his foresaids in connection with the first party's purchase, or otherwise in any manner of way in connection with the policy;
- 4. Compound progressive interest at the rate of per cent. per annum on all the sums and items included in the three preceding heads of these presents,
- ¹ Quære whether this would bind a trustee in bankruptcy or a liquidator. Wylte v. Duncan, 1803, Mor. 10269.

calculated from the respective dates of payment, and accumulated with halfyearly rests on the 30th day of June and 31st day of December in each year, the first half-yearly rest being made on the first of those dates after the last date of these presents, and the accumulation being brought down for any broken period at the end to the date of payment:

Then and in that case, but not otherwise (time being as aforesaid of the essence of this agreement), the first party or his executors will sell the policy to the second party or his executors, provided that the policy shall not previously have been allowed to lapse, there being no obligation on the first party to keep it in force. The first party or his executors will grant warrandice from fact and deed only. The second party or his executors will pay the whole expenses of such sale and of the assignation following thereon, including those to be incurred by the first party or his executors.—In witness whereof.

AGREEMENT OF THE NATURE OF BACK-LETTER QUALIFYING EX FACIE ABSOLUTE ASSIGNATION

With reference to the ex facie absolute assignation granted by the said B. in favour of the said A., of even date with his signature hereto, of the policy of assurance on his life with the X. Insurance Company, No., it is hereby agreed as follows:—

First. Notwithstanding the ex facie absolute terms of the said assignation, the said A. hereby admits and declares that the said policy is and shall be held by him and his executors in security of payment of all sums advanced and to be advanced by the said A. or his foresaids to the said B. or on his account, and all accounts incurred and to be incurred by the said B. to the said A., and of payment of and relief from all obligations undertaken or that may be undertaken by the said A. on behalf of the said B., and of and from all premiums and additional premiums on the said policy, and all expenses which may be incurred by the said A. in or about the premises, with interest per cent. per annum from the respective dates of disbursement till repaid; and further and generally, in security of all claims, present and future, of whatever nature, at the instance of the said A. or his foresaids against the said B. The said security shall be a continuing and covering security, but only to the amount of £ of principal, with penalty and interest as aforesaid.1

Second. The said A. and his foresaids shall be entitled to surrender the said policy and all bonus additions, if any, together or separately, and to apply the bonuses to reduction of premiums, and to sell the policy and bonuses, if any, either by public roup or private bargain, without any notice to the said B. and without any demand of payment, and with or without advertisement, and at such price as the said A. or his foresaids shall in their uncontrolled discretion think fit.

Third. The said B. binds himself to pay all premiums and additional premiums necessary for the upkeep of the said policy, and to produce receipts therefor to the said A. or his foresaids fourteen days at least before the last day of grace; and, on the other hand, there shall be no duty on the said A. or

his foresaids (though they shall be entitled) to pay any premium.—In witness whereof.

¹ The object of this is to permit of adjudication of the assignation, and also, it may be, to save stamp duty.

NOTICES TO THE INSURANCE COMPANY

1. SALE

Unto the X. Insurance Company, at their head office in Edinburgh. Notice is hereby given that by assignation dated A. assigned to B. the policy of assurance granted by the X. Insurance Company in favour of the said A. on his own life for the sum of £, numbered and dated , with all bonus additions which had accrued and which might accrue thereon, and the whole benefits thereof, and that absolutely. Dated at 30 Hill Street, Edinburgh, the day of .

Y. & Z., W.S., Solicitors of the said B.

Note.—It is requested that future premium notices, etc., may be sent to [state name and address].

2. LOAN

Unto the X. Insurance Company, at their head office in Edinburgh. Notice is hereby given that by bond and assignation in security dated A. assigned to B. the policy of assurance granted by the X. Insurance Co. in favour of the said A. on his own life for the sum of £, numbered and dated , with all bonus additions which had accrued and which might accrue thereon, and the whole benefits thereof, and that in security.

Dated at 30 Hill Street, Edinburgh, the day of Y. & Z., W.S.,

Solicitors of the said B.

SECTION XL

SUCCESSION AND SERVICES

TABLE OF SUCCESSION

Assuming there is no destination in the title, the following shews the descent of heritable property ab intestato:—

- 1. Sons in their order of seniority and their issue respectively in the same order as is now explained with reference to the ancestor, i.e.
 (a) males excluding females, (b) the elder male excluding the younger, (c) females taking pro indiviso.
- 2. Daughters pro indiviso as heirs-portioners, each daughter's issue, if any, representing their mother in the same order as is now explained with reference to the ancestor. (See above.)
- 3. Brothers of the full blood, beginning with the immediate younger brother and proceeding to the youngest, then returning to the immediate elder brother and proceeding to the eldest, each brother's issue, if any, representing their father in the same order as above explained under Nos. 1 and 2.
- 4. Sisters of the full blood pro indiviso, each sister's issue, if any, representing their mother in the order above explained under Nos. 1 and 2.
- 5. Brothers of the half blood consanguinean (same father), and their issue in the same manner as under No. 3.
- 6. Sisters of the half blood consanguinean pro indiviso, and their issue as under No. 4.
 - 7. Father.
- 8. Brothers and sisters of the father, and their issue, as under Nos. 3 to 6 inclusive.
 - 9. Paternal grandfather.
- 10. Brothers and sisters of the grandfather, and their issue as under Nos. 3 to 6 inclusive.

The ordinary modes of transferring property, in feudal title, from the dead to the living are three in number:—

1. Writ of clare constat by the superior, recorded.

- 2. Extract decree of special service, recorded.
- 3. Extract decree of general service, followed by notarial instrument recorded.

As to the first of these, see p. 729. It is enough here to say (1) that they are limited to cases where the deceased was infeft, and (2) that if they are not feudalised during the lifetime of the heir in whose favour they are granted, they fall altogether, as if they had never existed, and cannot be referred to in the title in any way whatever.

Dealing with special and general services with relation to these two points, namely (1) their availability according as the deceased was infeft or not, and (2) their transmissibility, we find that now there is no distinction between them regarding either of those matters, both being available indifferently whether the deceased was infeft or not, and both being fully transmissible. The historical development has been as follows:—

SPECIAL SERVICE

Deceased Infeft or Uninfeft.—Originally a special service implied a universal general service in the same character. This was altered in 1847, the alteration being re-enacted in sec. 47 of the 1868 Act, which provides that

no decree of special service . . . shall operate or be held as equivalent to or as implying a general service to the deceased in the same character except as to the particular lands therein embraced.

The effect of this exception is to leave a special service still equivalent to a general service in the same lands. So that it is strictly accurate to say that a special service is available though the deceased was not infeft. The practical bearing of this is, that if a special service has been expede on the understanding that the deceased was infeft, and it turns out subsequently that his infeftment was invalid, leaving him with a good enough title but uninfeft, then the special service in favour of his heir will still be all the title in the way of service which the heir requires. But of course he will require a notarial instrument proceeding on the deceased's title and the special (implying general) service.

Transmissibility.—Until 1868 a decree of special service was not transmissible to either heirs or assignees of the heir who had obtained it. That is to say, if the heir who expede the service did not take infeftment, the service was of no use to his heir or assignee. It dropped out of the title altogether. The next heir would pass him over and serve to the remoter ancestor; and an assignee would have no title at all unless either he took care to complete the heir's title in the latter's lifetime, when accretion would operate, or unless the heir had been three years in possession. But by sec. 46 of the 1868 Act all this was altered, and it was provided that

every decree of special service . . . shall to all intents and purposes, unless

and until reduced, be held equivalent to, and have the full legal operation and effect of, a disposition in ordinary form of the lands contained in such service, granted by the person deceased, being last feudally vest and seised in the said lands, to and in favour of the heir so served, and to his other heirs and successors entitled to succeed under the destination of the lands contained in the deceased's investiture thereof.

If the heir who expedes the service does not take infeftment, his heir or assignee may, under the same section, use the extract service as an unrecorded conveyance. That is to say, the second heir will expede a general service to the first heir, and then expede a notarial instrument on the two services; while if it is the case of an assignee of the first heir, he may expede a notarial instrument on the special service and his own assignation.

GENERAL SERVICE

Deceased Infeft or Uninfeft.—Until 1874 general service was limited to cases where the deceased was not infeft. But by sec. 31 of the 1874 Act this was altered, and a general service, followed by notarial instrument proceeding on the deceased's infeftment and the general service, was declared to be a competent mode of making up title. But to this end it is necessary that the heir shall have survived 1st October 1874.

Transmissibility.—When the deceased was not infeft a general service of itself alone always was a title, even though it should not be followed out to infeftment. It vested the right, and the next heir could not obtain a title by serving again to the same ancestor.

IN WHAT CHARACTER?

The following enactments are in point:-

1868 Act, s. 29 1: In every case in which the petitioner claims to be served heir of provision, or of tailzie and provision, whether in general or special, the deed or deeds under which he so claims shall be distinctly specified.

1874 Act, s. 11: It shall be no objection to any . . . decree of service, whether general or special . . . whether obtained before or after the commencement of this Act, or to any other decree, or to any petition, that the character in which an heir is or may have been entitled to succeed is erroneously stated therein, provided such heir was in truth entitled to succeed as heir to the lands specified in the precept, writ, decree, or petition.

Several questions may be raised as to the operation of this latter section and the relation of the two enactments.

General Service.—It is obvious that sec. 11 of the 1874 Act is ill-drawn, for it expressly refers to decrees of general service coupled with the condition that the heir is truly entitled to the lands specified in the decree, the fact being that no lands are specified in a decree of

¹ Substantially re-enacting s. 4 of the Service of Heirs Act, 1847.

general service only, so that in that case the condition can never be fulfilled. Notwithstanding this, it is thought that the enactment must extend to general services in virtue of its express terms. The question will arise thus: A. dies infeft (or uninfeft) under a destination to himself and his heirs male. B., his eldest son, ought of course to serve as heir of provision. But what he does is, to serve as heir of line in general to A., and then he expedes and records a notarial instrument. The objection is taken that the title is bad, and that sec. 11 of the 1874 Act is no protection, seeing that its condition is not fulfilled. there being no lands specified in the decree. It is submitted that the title is valid. If it is not, then the section can never apply to a decree of general service only, and it expressly bears that it shall so apply. Further, the heir is "in truth entitled to succeed," and the lands with reference to which that may be predicated, and with reference to which the service has in fact been expede, are "specified" in the notarial instrument.

Heirs of Provision.—The chief mischief which the 11th section of the 1874 Act was designed to remedy was, defects in titles owing to the expeding of services as heir of line when they ought to have been as heir of provision, and there can be no doubt that that error is corrected by the enactment. This involves, in that sense, the excusing of a failure to comply with sec. 29 of the 1868 Act above quoted.

But it does not follow that this last mentioned section is altogether superseded. If a petition is presented for service as heir of provision, "the deed or deeds under which he so claims" must be specified. Without the specification he is not entitled to obtain a decree.

But even suppose that in some way he did obtain decree as heir of provision without the specification, then assuming that the heir is truly an heir of provision, it is thought to be clear that sec. 11 of the 1874 Act would be no protection; for in that case the character in which the heir is entitled to succeed has not been erroneously stated. Further, the specification must be correct: any error therein which would have been fatal before 1874 will have the same effect still.

But take the reverse case, namely, a service as heir of provision when correctly it ought to have been as heir of line. This is an improbable, but still a possible, case. It is expressly within sec. 11 of the 1874 Act as being a case where the character is erroneously stated, and no failure to comply, or defective compliance, with sec. 29 of the 1868 Act would be any objection.

Service to Wrong Ancestor.—An error in this respect is, it is thought, clearly not corrected by the 1874 Act.

Special Service instead of General, or vice versa.—It is unnecessary to consider whether this would have been covered by sec. 11

of the 1874 Act, for the mistake cannot now be made, general and special services being now practically interchangeable.

MANDATE

Every petition for service, whether special or general, must be signed by the petitioner or a mandatory holding his special authority.¹ The mandate need not be a special deed for that purpose only; a special clause in a general power of attorney will be sufficient.

CONTENTS OF PETITION

1. SPECIAL SERVICE

Every petition for special service must set forth 1:

- 1. The ancestor's death and its date. The place at which it occurred ought also to be mentioned, as it regulates the periods of intimation, as detailed on p. 716.
- 2. The description of the property, which may be by reference, and, if necessary, a reference to burdens.
 - 3. The ancestor's infeftment.
- 4. The petitioner's propinquity, and if he is an heir of provision, the deed or deeds under which he claims.

2. GENERAL SERVICE 1

- 1. The ancestor's death and its date. The place ought also to be stated.
- 2. His domicile, or, if he died more than ten years before the date of the petition and the petitioner cannot ascertain his domicile, a statement that the domicile is unknown.
- 3. The petitioner's propinquity, and if he is an heir of provision, the deed or deeds under which he claims.

With reference to these averments:

Date of Death.—Sched. Q (special service) enjoins that the month and year shall be stated "at full length," which no doubt means in words and not in figures. The same will be done as regards the day of the month. And the same rule will be observed in petitions for general service, though Sched. P. does not say so. The date of death may not be accurately known, but the statutory expression is "on or about." If it is a case of presumed death, a decree under the Presumption of Life Limitation (Scotland) Act will have been obtained, and the averment will be that the ancestor "is presumed to have died on or about the day of conform to," specifying the decree finding the presumed date of death.

Description.—This of course applies to special services only.

1 1868 Act., s. 29.

Sched. Q expressly authorises description by reference. This applies not only to cases where the ancestor's infeftment itself contains a description by reference, but also to cases where it does not. same time, the ancestor's infeftment is the warrant and foundation of the petition, and nothing new or extraneous should be introduced. That is to say, if the description in the ancestor's infeftment is to be cut down in the service, it should be only by reference to that infeftment itself, and not to some outside writ. In like manner a service is not an occasion for bringing the description up to date, and a petition which sought to do so would probably and properly be refused in that The old description is the limit of the ancestor's title, and the Court will not go beyond it. The heir, after he obtains his service, can grant a new disposition in his own favour, setting out the new description if it is considered a matter of importance to get that upon the record. Or he may resort to a general (instead of a special) service, and then expede a notarial instrument, into which the new description might be introduced by way of representation to the notary after the insertion of the old description. One exception to this rule of not introducing new matter in the service is when the ancestor has sold part of the property after acquiring it. If that part is articulately described in the infeftment, then the service will simply be limited to the other part. But if there are not articulate descriptions of the parts in the infeftment, then the partial alienation should be averred, and the prayer correspondingly limited. The excepted part should be fully described.

The Ancestor's Infeftment.—The scheme of Sched. Q evidently is that there shall be specified all the writs subsequent to the infeftment previous to the ancestor's infeftment. If the ancestor was infeft by recording a disposition granted by an infeft proprietor, then of course that disposition is the only writ which need, or can, be specified. But if in that case, instead of recording his disposition, he had for any reason expede and recorded a notarial instrument thereon, the disposition and instrument are both to be specified. In like manner, if the ancestor's infeftment was by notarial instrument proceeding on a decree of general service, both will be referred to. writs may be much more numerous, but all will be specified. Further, in specifying the recorded writ constituting or completing the infeftment, the schedule prescribes that the warrant of registration shall be referred to, at least if it is a direct recorded deed. This is very superfluous, but the schedule will of course be followed, and whatever the writ may be.

The Heir's Propinquity.—This will be stated in detail. The rule of practice in framing the petition is to make separate and distinct averments, disposing of all those parties who, if existing, would succeed before the petitioner according to the rules of intestate succes-

sion in heritage, having regard of course to the special destination, if any. When this is done, the result is to show (1) who the petitioner is, and (2) that there is no one nearer, which is what is to be proved. In disposing of prior claimants it will of course be kept in view that it must be averred that they left no issue, if (as will be the common case) their issue would also have been prior to the petitioner. A difficulty comes in here in the case of presumed deaths under the Presumption of Life Limitation Act. Under that Act the Court will give no finding as to failure of issue of the absent person who is held to be presumably dead. It may be remarked here that the Act gives no machinery within itself for making up a title. A decree under it does not render a service unnecessary, which appears to be a defect in the Act.

Domicile.—This applies only to petitions for general service only.¹ What is wanted is an averment as to the *county* within which the deceased had his ordinary or principal domicile at the time of his death, or that the domicile was furth of Scotland. If "it is doubtful in what county the deceased" was domiciled, the petition proceeds as if the domicile had been furth of Scotland.² It may well be that it is doubtful whether the deceased was or was not domiciled in Scotland at all. In that case he was either domiciled furth of Scotland or it is doubtful in what county of Scotland he was domiciled, and the same rule will hold.

JURISDICTION 8

Special Service.—A petition for special service may be presented to the Sheriff of Chancery, or, in the petitioner's option, to the sheriff of the county in which the property is situated. If, therefore, the property is situated in two counties, or if the petition embraces properties in different counties, it must be presented to the Sheriff of Chancery. Separate extracts may be obtained applicable to the different properties if a special prayer to that effect is contained in the petition.

General Service.—A petition for general service may be presented to the sheriff of the deceased's domicile at the date of his death, or, in the petitioner's option, to the Sheriff of Chancery. If the domicile was furth of Scotland, or is unknown, the petition must be to the Sheriff of Chancery. But see Combined Services, *infra*.

COMBINED SERVICES

There are several senses in which this term may be understood:

1. Special Service in two or more Properties under different titles.— This is quite competent. If the properties are in different counties, the petition must be to the Sheriff of Chancery.³

^{1 1868} Act, s. 29.

² Ibid., s. 34.

³ Ibid., s. 28.

- 2. Service, General or Special, in Different Characters.—Assuming that the petition is for special service in different properties, it does not appear to be any objection that the heir takes one as heir of line and the other as heir of provision. The prayer would, however, require to be stated articulately, and the proof would be a little awkward. On the whole, in this case, separate petitions will be better. There is no objection to a petition for general service in different characters.
- 3. Special Service in one Character and General Service in another.—
 In this case one petition is apparently incompetent.
- 4. Special Service and General Service in same Character.—On the other hand, it is specially provided that

in any petition for special service, in whatever character, it shall be competent to the petitioner to pray for general service in the same character as that in which special service is sought, and decree may be pronounced in terms of such prayer as well as for special service; and no further notice or publication of the petition of service shall in such case be necessary than is hereby required for such petition of special service.¹

It will be observed that this applies "in whatever character" the special service is sought, and this is fully followed out in the statutory schedule. But it is not easy to see the benefit of the section, except only in the case of service as heir of line. In that case, if the deceased was infeft in one property and not infeft in another (and without any special destination in either case), a petition may be presented for special service in the first property, with a crave for general service in the same character, i.e. heir of line; and on decree being obtained, the extract may be recorded de plane in order to complete the title to the first property, and the same extract, in respect of the service as heir in general, will be a warrant for a notarial instrument as regards the other property. But if the special service is as heir of provision under a special destination to, e.g., heirs-male, it is difficult to see what use can be made of a general service in the same character, i.e. as heir of provision. As regards the particular property included in the petition, the special service itself implies a general service; and as regards any other properties falling to the same successor as heir of provision, whether as heir-male, heir-female, express substitute. or otherwise, it is thought to be clear that the extract would not be available as a warrant for a notarial instrument, for (1) it might not at all show that the heir possessed the character entitling him to succeed under the destination of other properties; (2) even if it did. the deed or deeds under which he claims the same are not referred to: and (3) assume that the special service is as heir of tailzie and provision under a particular entail, a general service as heir of tailzie and provision, without reference to any particular entail (which is a case ¹ 1868 Act, s. 48.

specially referred to in Sched. Q), would be useless as regards other entailed estates for want of reference to the fetters.

When a petition is presented for special service and for general service in the same character, the following relaxations from the rules applicable to general services only come into play, namely, (1) the petition may be presented to the sheriff of the county where the special property lies, though that is not the county of the domicile; (2) no averment or proof as to domicile is necessary; (3) no publication is made in the county of the domicile.¹

5. Service to Different Ancestors.—In this case it is hardly necessary to say that the petitions cannot be combined.

OBJECTIONS TO PETITION

See s. 40 of the 1868 Act: opinion per Lord M'Laren that the merits of a competition between one claiming as heir and one claiming as disponee may be disposed of in the petition for service, and the same as regards a petition under s. 10 of the 1874 Act.²

PROCEDURE

- 1. The petition (with mandate if the petition is signed by a mandatory) is lodged with the sheriff clerk of the county or the sheriff clerk of Chancery.
 - 2. Publication, which is attended to by the sheriff clerk.
- 3. Nothing further can be done until the expiry of the following periods from the date of the latest publication,³ namely:
 - (1) When deceased died in Scotland—fifteen days;
 - (2) Unless the publication requires to be made in Orkney or Shetland, or the petition is presented to the sheriff of Orkney and Shetland, when the period is twenty days.
 - (3) When the petition is presented to the Sheriff of Chancery, the deceased having died abroad—thirty days.
 - (4) No provision is made for the case of a petition to the sheriff of a county when the deceased died abroad. The period should then be thirty days. The explanation of the omission probably is, that when the section speaks of dying in Scotland or dying abroad, it really means dying domiciled in Scotland or abroad.

Nothing should be done until the agent receives notice from the sheriff clerk that proof may be led.

4. Proof.—The form is affidavit on oath made before any of the following: (1) the sheriff; (2) provost or bailie of any city or royal or parliamentary burgh; (3) any justice of peace for any part of the United Kingdom wherever he may be though out of the Kingdom; (4)

³ 1868 Act, s. 33.



¹ 1868 Act, s. 48 and Sched. Q.

² Sim v. Duncan, 1900, 2 F. 484.

notary public; (5) commissioner appointed by sheriff.¹ There must be two witnesses.

- 5. The proof and all documents per inventory are lodged. The documents include the deceased's infeftment in cases of special service; and in all services as heir of provision, whether general or special, the deed or deeds under which the heir claims.
- 6. Decree: whereupon the agent will borrow up all productions, and the process will be transmitted to the Director of Chancery. The extract decree is the only evidence that is of any use; a certified copy interlocutor cannot be used in making up title.² Extracts may be issued to any one who chooses to pay for them.²
- 7. The Director of Chancery records the decree in the Chancery records, and prepares an extract of it, which is delivered to the agent.

PETITION FOR GENERAL SERVICE AS HEIR OF LINE

[1868 Act, Sched. P]

1. By Eldest Son

Unto the Honourable the Sheriff of The Petition of A.

Humbly sheweth,-

That the late B. died at on or about the day of, and had at the time of his death his ordinary or principal domicile in the county of .

That the petitioner is the eldest son and nearest lawful heir in general of the said B.

May it therefore please your Lordship to serve the petitioner nearest and lawful heir in general to the said B.

According to justice, &c.

(Signed by the Petitioner or his Mandatory.)

2. By Eldest Son of Eldest Son

[First paragraph as above.]

That the eldest son of the said B. was C., who died on or about the day of . [It is immaterial for this purpose whether C. survived or predeceased B.]

That the petitioner is the eldest son of the said C., and as such is the nearest lawful heir in general of the said B.

[Prayer, etc.]

3. By Second Son, the Elder Son having Died

[First paragraph as above.]

That the said B. had two sons only, namely, C. and the petitioner. The said C. was the elder son, and died on or about without issue [never having been married].

¹ 1868 Act, s. 83.

² Lord Napier's Tr. v. Lord de Saumarez, 1900, 2 F. 882,

That the petitioner is accordingly the nearest lawful heir in general of the said B.

[Prayer, etc.]

4. By DAUGHTER (ONLY CHILD)

[First paragraph as on p. 717.]

That the said B. had no son, and the petitioner is his only daughter, and is accordingly his nearest lawful heir in general.

[Prayer, etc.]

5. By Two Daughters, Heirs-Portioners

[First paragraph as on p. 717.]

That the said B. had no son, and the petitioners are his only daughters, and are accordingly his nearest lawful heirs-portioners in general.

May it therefore please your Lordship to serve the petitioners nearest and lawful heirs-portioners in general to the said B.

According to justice, &c.

6. By Daughter and Grandson by another Daughter, Heirs-Portioners

[First paragraph as on p. 717.]

That the said B. had no son.

That he had two daughters only, namely, the petitioner A. and X.

That the said X. died on . The petitioner C. is her eldest son.

That the petitioners, A. and C. are accordingly the nearest lawful heirsportioners in general of the said B.

[Prayer as in last form.]

7. By Daughter, all the other Members of the Family and their Descendants being dead

[First paragraph as on p. 717.]

That the said B. had three sons, namely, C., D., and E., and three daughters, namely, F., G., and the petitioner.

That they all, other than the petitioner, predeceased the said B., having died on or about the following dates:—

That the said C., D., F., and G. left no issue [none of them having been married].

That the said E. had one child only, namely, H., who died in infancy on or about

That the petitioner is accordingly the nearest lawful heir in general of the said B.

[Prayer, etc.]

Note.—It will be observed that it is immaterial whether the issue, if any, of the petitioner's brothers did or did not survive B., the ancestor, so long as

they are all now dead. But it is otherwise regarding issue of the petitioner's sisters. If a sister had issue who survived B., the issue would (after 1874) take a vested right, which will pass to their paternal connections.

8. By Immediate Younger Brother

[First paragraph as on p. 717.]

That the said B. left no issue [never having been married];

Or,

That the said B. had two children only, namely, C. and D., both of whom predeceased him, having died on and respectively. Neither of them left issue.

That the petitioner is the immediate younger brother and nearest lawful heir in general of the said B.

[Prayer, etc.]

9. By FATHER

[First paragraph as on p. 717.]

That the said B. left no issue [never having been married].

That the said B. had no brother, and his only sister C. predeceased him without issue [never having been married].

That the petitioner is the father and nearest lawful heir in general of the said B.

[Prayer, etc.]

PETITIONS FOR GENERAL SERVICE AS HEIR OF PROVISION

BY ELDEST SON AS HEIR-MALE

[First paragraph as on p. 717.]

That the petitioner is the eldest son and nearest lawful heir of provision in general of the said B. under and by virtue of a disposition executed by C. in favour of the said B. and his heirs-male, dated the day of .

May it therefore please your Lordship to serve the petitioner nearest and lawful heir of provision in general to the said B. under and by virtue of the said disposition.

According to justice, &c.

BY GRANDSON THROUGH A DAUGHTER, AS HEIR-FEMALE

[First paragraph as on p. 717.]

That the said B. had two children, a son C. and a daughter D.

That the said C. is alive and unmarried.

That the said D. died on or about leaving an only child, the petitioner.

That the petitioner is accordingly the nearest lawful heir of provision in general of the said B. under and by virtue of a disposition executed by E. in favour of the said B. and his heirs-female, dated the day .

[Prayer as in preceding form.]

BY ELDEST DAUGHTER UNDER EXCLUSION OF HEIRS-PORTIONERS

[First paragraph as on p. 717.]

That the said B. had three children, all daughters, namely, the petitioner and C. and D.

That the petitioner is the eldest daughter, and as such is the nearest lawful heir of provision in general of the said B. under and by virtue of a disposition executed by E. in favour of the said B. and his heirs, excluding heirs-portioners, the eldest daughter always succeeding without division, dated

[Prayer as on p. 719.]

BY SON AND DAUGHTER AS "CHILDREN"

[First paragraph as on p. 717.]

That the petitioners are the only children of the said B., and as such his nearest lawful heirs of provision in general under and by virtue of a disposition executed by X. in favour of the said B. in liferent, and his children in fee, [or the said B. and his children, or the said B. and his wife X., also now deceased, in conjunct fee and liferent for her liferent use allenarly, and the children of the said B. in fee], dated .

Or

That the said B. had five children only, viz., the petitioners and C., D., and E. The said C., D., and E. all predeceased the said B. without leaving issue, none of them having been married. They died on the following dates respectively, viz., the said C. on , the said D. on , and the said E. on

The petitioners are accordingly the nearest lawful [as before].

May it therefore please your Lordship to serve the petitioners nearest and lawful heirs of provision in general to the said B. under and by virtue of the said disposition.

According to justice, &c.

SPECIAL SERVICE

BY ELDEST SON

Unto the Honourable the Sheriff of The Petition of A.

Humbly sheweth,—

That the late B. died at , on or about the day of last vest and seised in All and Whole [description by reference or otherwise], conform to disposition granted by C. in favour of the said B., dated the day of , and, along with warrant of registration thereon on behalf of the said B., recorded in the division of the general

¹ But it is not necessarily to be assumed that issue would take the parent's share under these circumstances.

register of sasines for the county of on the day of: But always with and under the real burdens [etc.] specified in the feu-contract entered into between D. and E., dated , and recorded in the said division of the general register of sasines on .

That the petitioner is the eldest son and nearest lawful heir in special of the said B. in the subjects and others foresaid.

May it therefore please your Lordship to serve the petitioner nearest and lawful heir in special of the said deceased B. in the subjects and others above described, but always with and under the real burdens and others foresaid.

According to justice, &c.

[To be signed by the Petitioner or his Mandatory.]

TWO PROPERTIES—DECEASED INFEFT UNDER NOTARIAL INSTRUMENTS—SEPARATE EXTRACTS

That the late B. died at on or about the day of last vest and seised in (first) All and Whole the shop 1 George Street in the city and county of Edinburgh, and others, being the subjects particularly described in the notarial instrument in favour of the said B., recorded, along with warrant of registration thereon on behalf of the said B., in the division of the general register of sasines for the county of Edinburgh on , conform to (1) extract general disposition and settlement of the late C., dated and registered in the Books of Council and Session on , and (2) the said notarial instrument: But always with and under the real burdens [etc.] specified in the feu-charter granted by D. in favour of E., dated , and recorded in the said division of the general register of sasines on and (second) All and Whole that tenement forming Nos. 1, 2, and 3 Wardlaw Place in the city and county of Edinburgh, and others, being the subjects particularly described in the notarial instrument in favour of the said B. recorded, along with warrant of registration thereon on behalf of the said B. in the said division of the general register of sasines on to (1) extract decree of general service in favour of the said B. as nearest lawful heir in general of the late F., granted by the Sheriff of the Lothians and Peebles, and dated at Edinburgh on , and (2) the said last mentioned notarial instrument: But always with and under the real burdens [etc.] so far as subsisting and applicable, specified in (1) the feu-contract entered into between G. and H., dated , and recorded in the said division of the general register of sasines on , and (2) the contract of ground-annual between the said H. and I., dated , and recorded in the said division of the general register of sasines on

That the petitioner is the eldest son and nearest lawful heir in special of the said B. in the several subjects and others foresaid.

May it therefore please your Lordship to serve the petitioner nearest and lawful heir in special of the said deceased B. in the several subjects above described or referred to, but always with and under the

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respective real burdens [etc.] above referred to. And to grant warrant to the Director of Chancery to issue separate extract decrees applicable to said subjects respectively.

According to justice, &c.

BY HEIR OF PROVISION

[First paragraph as on p. 720.]

That the petitioner is the eldest son and nearest lawful heir of provision in special of the said B. in the subjects and others foresaid, under and by virtue of a disposition [or the said disposition] executed by X. in favour of the said B. and his heirs-male, dated

May it therefore please your Lordship to serve the petitioner nearest and lawful heir of provision in special of the said deceased B. in the subjects and others above described or referred to, but always with and under the real burdens [etc.] above referred to.

According to justice, &c.

WHERE PART OF PROPERTY HAS BEEN SOLD

That the late B. died at on or about the day of last vest and seised in All and Whole the lands of X. in the county of being the subjects particularly described in and conform to the disposition granted by C. in his favour, dated , and, along with warrant of registration thereon on behalf of the said B., recorded in the division of the , but general register of sasines for the county of excepting always that part of the said lands which was disponed by the said B. to D. by disposition, dated , and recorded in the said division of the general register of sasines on , and therein described as follows, namely, All and Whole [insert description of the part sold]: But always with and under, so far as subsisting and applicable, the real burdens [etc.] specified in [as the case may be].

That the petitioner is the eldest son and nearest lawful heir in special of the said B. in the lands and others foresaid, under exception as aforesaid.

May it therefore please your Lordship to serve the petitioner nearest and lawful heir in special of the said deceased B. in the lands and others above described or referred to, but under exception as aforesaid, and always with and under the real burdens [etc.] above referred to, so far as subsisting and applicable.

According to justice, &c.

It will clearly be advantageous to have the description of the excepted part given here in full, and not by reference, seeing that the disposition of the part is not amongst the titles.

WHERE UNDER EXCAMBION PART HAS BEEN SOLD AND A NEW PART ACQUIRED

That the late B. died at on or about the day of last vest and seised in (first) All and Whole the lands of X. in the county of , being the subjects particularly described in and conform to the disposition granted by C. in his favour, dated , and, along with warrant of registration thereon on his behalf, recorded in the division of the general register of sasines for the county of always that part of the said lands which was disponed by the said B. to D. under the contract of excambion between them hereinafter specified, which part is therein described as follows, namely, All and Whole [describe at length the part excepted]: But always with and under, so far as subsisting and applicable [real burdens, etc., as in previous forms]; and (second) All and Whole the subjects previously parts of the lands of Y. in the county of , being the subjects disponed by the said D. to the said B. under, and particularly described in and conform to, the said contract of excambion entered into between the said B. and D., dated , and, along with warrant of registration thereon on behalf of the said B., recorded in the said division of the general register of sasines on : But always [real burdens, etc., if necessary).

[Complete as on pp. 721-2, but separate extracts will not be required.]

WHERE THE LANDS HAVE A STATUTORY GENERAL NAME

(1) Where the Deceased was Infert under the Disposition prescribing the General Name

That the late B. died at on or about the day of last vest and seised in All and Whole the lands of X. [being the general name] in the county of , as particularly described in and conform to the disposition granted by C. in favour of the said B., and bearing date the , and, along with warrant of registration thereon on behalf of the said B., recorded in the division of the general register of sasines for the county of on in the year , and in which the said lands are declared to be designed and known by the said name of X.: But always with and under the real burdens [etc., if necessary, and complete according to the other forms].

(2) WHERE DECEASED WAS INFEFT UNDER A SUBSEQUENT WRIT

That the late B. died at on or about the day of last vest and seised in All and Whole the lands of X. in the county of Y., as particularly described in the disposition granted by C. in favour of Z., and bearing date the and recorded in the division of the general register of sasines for the county of on in the year, and in which the said lands are declared to be designed and known by the said name of X., conform to disposition by the said Z. in favour of the said B.,

dated , and, along with warrant of registration thereon on behalf of the said B., recorded in the said division of the general register of sasines on : But always with and under the real burdens [etc., and complete].

UNDER AN ENTAIL

That the late B. died at on or about the day of last vest and seised in All and Whole the lands and estate of X. in the county of , being the subjects particularly described in and conform to the extract decree of special service in favour of the said B. as nearest and lawful heir of tailzie and provision in special of C., expede before the sheriff of , and dated at the day of , and, along with warrant of registration thereon on behalf of the said B., recorded in the division of the general register of sasines for the county of : But always with and under the conditions, provisions, and prohibitory, irritant, and resolutive clauses [or clause authorising registration in the register of tailzies] contained in a deed of entail granted by D., dated , in favour of E. and the heirs therein specified, and which destination, conditions, provisions, and prohibitory, irritant, and resolutive clauses [or destination and clause authorising registration in the register of tailzies] are herein referred to as at length set forth in the said deed of entail, which is recorded in the register of tailzies on , and in the [specify register of for and in the instrument of sasine following thereon in sasines on favour of the said E., recorded in the [register of sasines] on also with and under the real burdens [etc., if any necessary to be referred to] specified in [refer to recorded writ].

That the petitioner is the eldest son and nearest lawful heir of tailzie and provision in special of the said B. in the lands and others foresaid, under and by virtue of the said deed of entail.

May it therefore please your Lordship to serve the petitioner nearest and lawful heir of tailzie and provision in special of the said deceased B. in the lands and others above described or referred to, but always with and under the conditions, provisions, and prohibitory, irritant, and resolutive clauses [or clause authorising registration in the register of tailzies] above referred to, and also with and under the real burdens [etc., if any] above referred to.

According to justice, &c.

COMBINED SPECIAL SERVICE AND GENERAL SERVICE IN SAME CHARACTER

BY HEIR OF LINE

[As on pp. 720-1, to prayer.]

That the petitioner is likewise heir in general of the said B.

May it therefore please your Lordship to serve the petitioner nearest and lawful heir in special of the said deceased B. in the lands [or subjects]

and others above described or referred to, but always with and under the real burdens [etc.] above referred to, and likewise nearest and lawful heir in general of the said B.

According to justice, &c.

BY HEIR OF PROVISION

[As on p. 722, to prayer.]

That the petitioner is likewise heir of provision in general of the said B. under and by virtue of the said [deed containing the special destination].

May it therefore please your Lordship to serve the petitioner nearest and lawful heir of provision in special of the said deceased B. in the lands [or subjects] and others above described or referred to, but always with and under the real burdens [etc.] above referred to, and likewise nearest and lawful heir of provision in general of the said B.

BY HEIR OF ENTAIL

[As on p. 724, to prayer.]

That the petitioner is likewise heir of tailzie and provision in general of the said B. under and by virtue of the said deed of entail.

May it therefore please your lordship [prayer as on p. 724, and add] and likewise nearest and lawful heir of tailzie and provision in general of the said B., but always with and under the said conditions, provisions, and prohibitory, irritant, and resolutive clauses [or clause authorising registration in the register of tailzies].

PROOF

Two witnesses are necessary. What they prove is (1) the death, (2) the domicile in petitions for general services only, unless the death occurred over ten years ago, and (3) the propinquity. The affidavit of proof is really just a copy of the averments in the petition on these points, with this exception, that even though not averred, the place of death should be proved, in order to shew that the provisions of s. 33 of the 1868 Act regarding inducive have been complied with. Nothing should be averred in the petition which is not necessary; from which it follows that all that is averred must be proved, and there is no reason for changing the mode of statement of the case between the petition and the proof. It is accordingly unnecessary to give many forms of affidavit, for they will simply echo the petition, with slight verbal alterations, and with the addition of the place of death, if not averred. But it will be kept in view (1) that what the witnesses prove are the facts, not the law; therefore, properly, they should not proceed to swear that the petitioner is the nearest heir, etc.; and (2) that in special services they do not prove the infeftment; that is proved by the production of the title.

PROOFS IN PETITIONS FOR GENERAL SERVICES

[Petition on p. 717]

At the day , in presence of , one of His Majesty's Justices of the Peace for the county of , Appeared C., who, being solemnly sworn and interrogated, depones that the late B. died at on or about the day of , and had at the time of his death his ordinary or principal domicile in the county of . That A. is the eldest son of the said B.—All which is truth, as the deponent shall answer to God.

(C. and the justice will sign here, and they will both sign also each preceding page, if any.)

Appeared also D., who, being solemnly sworn and interrogated, concurs in omnibus with the preceding witness.

(D. and the justice will sign here, and D. will also sign each preceding page of C.'s deposition.)

Of course the deposition by the second witness may be a separate independent deposition, in which case he will not sign the other witness's deposition at all.

(PETITION ON p. 718)

At the day of , in presence of , one of His Majesty's Justices of the Peace for the county of , Appeared X., who, being solemnly sworn and interrogated, depones that the late B. died at on or about the day of , and had at the time of his death his ordinary or principal domicile in the county of .

That the said B. had three sons, namely, C., D., and E., and three daughters, F., G., and A.

That all the said children other than the said A. predeceased the said B., having died on or about the following dates:—

C.
D.
E. [Specify date opposite each.]
F.

That the said C., D., F., and G. left no issue [none of them having been married].

That the said E. had one child only, namely, H., who died in infancy on or about

All which is truth, as the deponent shall answer to God.

See above for form of deposition by second witness, and attestation of both depositions.

TRUST SERVICES

There are several cases in which a service in trust may be necessary or convenient:—

1. A substitute trustee, as under a trust destination to A., whom

failing to B., as trustee, will complete his title by service. Thus if A. accepted office, then, whether he completed his title or not, B., if he should become trustee by A.'s death, is a substitute, and should serve to A. as heir of provision in trust. But see the cases 1 cited, which, however, should not be followed.

- 2. A substitute or new trustee is sometimes appointed by a third party, e.g. the spouses in the case of a marriage-contract trust, or any person to whom under a will power of appointment has been given, which is very common under English wills. In these cases the new trustee is well enough appointed to the office, but he lacks a title to the property. So far as it is heritable (including heritable securities 2) he may obtain a title by service as heir of provision in trust, but apparently only if the last trust infeftment contains a destination to the then trustees and their successors in office.3 If not, the next method is competent and ought to be adopted.3
- 3. Under sec. 43 of the 1874 Act, when any sole or last surviving trustee dies, his heir-at-law may complete a title by service in the manner prescribed by the 1868 Act "with respect to the title of any other heir," provided there is nothing against this in the trust deed and no contrary order by the Court. But unless with the sanction of the Court or of all the beneficiaries (being all major and capable of acting), the heir is not a trustee, but merely a hand for passing on the estate to anyone duly appointed to administer the trust.

PETITION FOR SPECIAL SERVICE AS HEIR OF PROVISION IN TRUST

BY SUBSTITUTE TRUSTEE

That the late B. died at on or about the day of last vest and seised in All and Whole [description, which may be by reference], conform to (1) trust disposition for behoof of creditors granted by C. in favour of the said B., whom failing in favour of the petitioner, dated , and (2) notarial instrument following thereon in favour of the said B., and, along with warrant of registration thereon on behalf of the said B., recorded in the division of the general register of sasines for the county of . on , but in trust always for the purposes specified in the said trust disposition, and always with and under [refer to burdens if necessary].

That the petitioner, as substitute under the destination contained in the said trust disposition, is the nearest lawful heir of provision in trust in special of the said B. in the said subjects under and by virtue of the said trust disposition, and for the purposes therein specified.

May it therefore please your Lordship to serve the petitioner nearest and lawful heir of provision in trust in special of the said deceased B. in

Kerr's Tr. v. Yeaman's Tr., 1888, 15
 Hare, Petr., 1889, 17 R. 105.
 520; Inglis, L.-P., in Smith v. Wallace, 3 M'Lean, Petr., 1892, 19 R 1043.
 1869, 8 M. 204.



the subjects and others above described or referred to under and by virtue of the said trust disposition, and for the purposes therein specified, but always with and under the [burdens, etc.] above referred to.

According to justice, &c.

BY TRUSTEES APPOINTED BY THIRD PARTY

That the late B. died at on or about the day of last vest and seised in All and Whole [description, which may be by reference], conform to [specify the last trustee's infeftment], but in trust always for the purposes specified in the last will and testament of C., dated and proved in the principal registry of His Majesty's High Court of Justice in England on , and always with and under [refer to burdens if necessary].

That by the said will the power of appointing new trustees is declared to be vested in D.

That by deed dated , the said D. has appointed the petitioners to be trustees of the said will, and accordingly the petitioners are the nearest lawful heirs of provision in trust in special of the said B. in the subjects and others foresaid under and by virtue of the said last will and testament and deed of appointment, and for the purposes specified in the said last will and testament.

May it therefore please your Lordship to serve the petitioners and the survivors and survivor of them nearest and lawful heirs of provision in trust in special of the said deceased B. in the subjects and others above described or referred to under and by virtue of the said last will and testament and deed of appointment, and for the purposes specified in the said last will and testament, but always with and under the [burdens, etc.] above referred to.

According to justice, &c.

UNDER SEC. 43 OF THE 1874 ACT—HERITABLE SECURITY

That the late B. died at on or about the day of last vest and seised in All and Whole [description, which may be by reference], conform to bond and disposition in security granted by C. in favour of the said B., dated , and, along with warrant of registration thereon on his behalf, recorded in the division of the general register of sasines for the county of on , and that in real security of the sum of £1000 contained in the said bond and disposition in security, interest thereon at the rate of per centum per annum, and penalties, all as therein contained: But always in trust as trustee under and for the purposes specified in the trust disposition and settlement of the late D., dated and registered , and always with and under the [refer to burdens if necessary].

That the petitioner is the eldest son and nearest lawful heir of the said B., and as such he is in virtue of sec. 43 of the Conveyancing (Scotland) Act, 1874, entitled to be served nearest lawful heir in special of the said B. in the subjects and others foresaid, in real security and in trust as aforesaid.

May it therefore please your Lordship to serve the petitioner nearest and lawful heir in special of the said deceased B. in the subjects and others above described [or referred to], and that in real security and in trust as aforesaid, and with and under the [real burdens, etc.] above referred to.

According to justice, &c.

PRECEPTS AND WRITS FROM SUPERIORS

These are still competent. The 1874 Act, s. 4, abolishing writs by progress, expressly excepts precepts or writs from Chancery or of clare constat.

As to the expediency of this procedure. In the first place, the superior cannot be compelled to grant the writ except on production of a service; and of course if a service be expede, no writ from the superior is required at all. It is necessary that the superior's title should be complete when he grants the writ. There might be mistakes as to this, or for that matter as to who is superior. Nor is it probable that there will be much advantage in expense, as fees to two agents will be involved. But there is one case in which the superior's intervention, if it is offered without production of a service, may be advantageous, namely, when time is important, as will sometimes happen, and the superior is on the spot, so that the heir's feudal title may be completed in a very few days. Except in that case recourse should rather be had to the procedure by service.

As to the ancestor's and the heir's infeftment, see p. 709. Further, Crown writs must be recorded *before* the first term of Whitsunday or Martinmas after their date.¹

WRIT OF CLARE CONSTAT BY SUBJECT-SUPERIOR [1868 Act, Sched. W]

- I, A., whereas by authentic instruments and documents it clearly appears that B. died last vest and seised as of fee in All and Whole [description, which may be by reference], and that in virtue of disposition granted by C. in his favour, dated , and recorded in the division of the general register of sasines for the county of on , but always with and under [refer to burdens if necessary]: and that D. is eldest son and nearest lawful heir of the said B.: Therefore I do hereby declare the said D. to be the heir entitled to succeed to the said B. in the said lands: To be holden of me and my successors in manner and for payment of the duties specified in the [specify a charter containing the tenendas and reddendo*]:—In witness whereof.
- ^a The statutory schedule expressly refers to the tenendas and reddendo being inserted here at length (1) if different from the previous clauses, or (2) if desired by the vassal. It will often be advantageous to have these clauses ad longum.

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SECTION XLI

PERSONAL RIGHT UNDER SEC. 9 OF THE 1874 ACT, AND COMPLETION OF TITLE UNDER SEC. 10

THE common law of Scotland was that no estate, whether heritable or moveable, vested in the successor merely by survivance of the ancestor: it was necessary that some procedure should be taken to vest the right, namely, (1) confirmation in the case of moveable property, (2) special service and infeftment in the case of heritable estate in which the ancestor was infeft, and (3) general service in the case of heritable estate in which the ancestor was not infeft.

The effect of this state of matters was that, unless the requisite procedure for vesting the right was carried through, the debts and deeds of the successor could not affect the estate, it would not be carried by his will, nor descend as his succession in case of his death intestate.

This must have been productive of much hardship, and it was modified by degrees, and has now been wholly abolished. The progress has been as follows:—

- 1695. Heritable Estate.—If an apparent heir was three years in possession, the estate was liable for his debts.¹
- 1824. Moveable Estate declared to vest in the next of kin though dying unconfirmed.²
- 1868. Heritable Estate.—Special service vested estate in which the ancestor had died infeft, though the heir after obtaining the service should die uninfeft.⁸
- 1874. "A personal right to every estate in land descendible to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto by his survivance of the person to whom he is entitled to succeed," provided the heir survives the Act, and no matter when the ancestor died.

So that now the common law is entirely abrogated, and all estate, heritable and moveable, vests by survivance. It is to be understood,

^{4 1874} Act, s. 9.



¹ 1695, c. 24.

² 4 Geo. IV. c. 98, s. 1.

³ Consolidation Act, s. 46.

of course, that this has reference to the right only: the title is another matter; that still requires infeftment or confirmation, as the case may be. So that it is not even now correct to say that we have adopted the rule mortuus sasit vivum.

COMPLETION OF TITLE UNDER SEC. 10

In regard to the completion of title it is necessary to distinguish the following cases:—

- 1. The heir himself who takes a personal right by survivance under sec. 9. Thus A. dies infeft 1 and intestate, and is succeeded by B., his heir.
- 2. A subsequent heir in succession. Thus A. dies infeft 1 and intestate; is succeeded by B., his heir, who dies uninfeft, unserved, and intestate, and is succeeded by C., his heir.
- 3. A disponee of an heir who (i.e. the heir) takes a personal right by survivance under sec. 9. Thus A. dies infeft 1 and intestate; is succeeded by B., his heir, who, without being infeft or served, dispones to C. Further, in this case it is necessary to distinguish according as B. is (1) alive or (2) dead.
- 1. First Heir.—In the first of these cases the procedure under sec. 10 is *incompetent*. B. takes a personal right under sec. 9, and if he should die without being served, that section (9) will in that case be his only ground or claim of right. But while he lives and retains the property he is just in the same position as any heir under the old law. The ordinary methods of completing a title are open to him, namely, service or *clare constat*: he does not require the machinery of sec. 10, and in terms it is inapplicable.
- 2. Second or Subsequent Heir.—In the second of the cases above stated it is commonly laid down that the procedure under sec. 10 is optional, the subsequent heir having the alternative of proceeding by way of service to A. That the procedure under sec. 10 is competent in this case is express under the terms of the section. The only possible question is whether there is the alternative of service to A. It is thought to be clear enough that there is, but at the same time it is recommended that the special procedure under sec. 10 should be followed; and, of course, it must be followed when the second heir is not the heir of the first deceased. E.g. a mother dies intestate, is succeeded by her daughter B., who dies intestate and is succeeded by her father C. C. cannot serve to A.; procedure under sec. 10 is imperative.
- 3. Disponee.—In the third and last of the cases stated it is commonly laid down that the procedure under sec. 10 is competent

recorded conveyance, or a service whether special or general. But here, as always, a clare constat unrecorded would count for nothing.

¹ It is assumed here that A. was infeft, but of course that is not an essential, so long as he had something more than a personal right under the Act, e.g. an un-

and imperative. But this must be taken with a little qualification. Thus:—

- (1) Intervening Heir alive.—If the intervening heir who has neither been infeft nor served is still alive, it is certainly not true that the procedure in question is imperative, for the heir may still be served, and then either (1) his title may be feudalised, whereupon his disposition will be a warrant for direct infeftment in favour of C., the disponee, or (2) C. may expede a notarial instrument proceeding on A.'s infeftment, B.'s service, and the disposition. Further, one might even find an objection stated as to whether under these circumstances the procedure under sec. 10 is even competent, for the rubric of that section is applicable to "completion of title when deceased heir not served," and here ex hypothesi B. is in life. But this limitation does not occur in the section itself, and, on the contrary, the schedule (E) expressly contemplates the intervening heir being alive.
- (2) Intervening Heir dead.—This may for ordinary purposes be described as another case in which the procedure under sec. 10 is imperative. But it may be noted (as a matter of practical importance in cases to which the statute does not apply by reason of the heir having predeceased 1st October 1874) that even here, if the deceased heir was three years in possession of the property, a title may be vindicated by adjudication against the next heir in succession, founding on the intervening heir's obligation of warrandice or otherwise, his three years' possession, and the statute 1695, c. 24.

Security Rights.—It has been decided that s. 10 does not apply to anything but a right of fee, and in property, not security. This was on the ground that while s. 9 applies to every estate in land, s. 10 is limited to 'lands.' The right there in question was an original grant of a liferent annuity.¹

Procedure.—This is approximated to procedure in a special service. A petition is presented to the Sheriff of Chancery or to the sheriff of the county. It may apply to more than one property. If these are in different counties, of course the petition must be presented to the Sheriff of Chancery. Whether presented in the one Court or in the other, it will be in the form of Sched. E to the 1874 Act, and not, even in the Sheriff Court, in the form of Sched. A to the Sheriff Courts Act, 1876. The petition is signed by the petitioner or his mandatory.

Contents of Petition.—The petition must set forth:—

- 1. The name of the proprietor last infeft.
- 2. The description of the lands, or a reference thereto.
- 3. The names and, so far as known, the designations of every proprietor having only a personal right therein intervening between the proprietor last infeft and the petitioner. "Personal right" here is not

¹ De Walden, Petr., 1900, 2 F. 1101.

limited to a personal right under sec. 9: it includes all uninfeft proprietors, i.e. in this case all proprietors.

4. The petitioner's own right.

Prayer and Findings.—These are: (1) that the facts set forth are proved, and (2) that the petitioner is entitled to procure himself infeft in the property in terms of the 1874 Act.

Proof.—In the main lines the affidavits will follow those with reference to special services. But there is this difference: In petitions for special service the rule is not only to state that A. succeeds B., but to show in detail how that was so, e.g., if the petitioner is an elder brother, it is stated that the deceased never had issue, that he never had a younger brother, or that his children and younger brothers all predeceased him without leaving issue. But in the petition under the 1874 Act the net result only is stated, namely, that B. was succeeded by A., his immediate elder brother: at least Sched. E suggests no further details of averment. There is no reason why, if wished, full details should not be given. But even if they are not given in the petition, it appears necessary that they should be given in the proof, in which case the proof will not be able to rest content with echoing the petition as closely as is possible in the case of special services. Subject to this remark, it appears unnecessary to occupy space with separate forms of proofs.

Infeftment.—The petitioner is infeft by recording the extract with a warrant. Separate extracts may be obtained if prayed for. "The extract decree or decrees on such petition, as the case may be, shall be equivalent to a decree of special service" (s. 10). From which it would appear to follow that if the petitioner should die after obtaining decree, but before recording it in the register of sasines, his heir or testamentary disponees will complete title by notarial instrument, proceeding in the one case (heir) on the extract decree in the petition and a general service, and in the other case (testamentary disponees) on the extract decree in the petition and the petitioner's will. Of course, if the petitioner should die before obtaining extract, the procedure will fall, and his heir or testamentary disponees will bring a new petition.

Consequences of the Vested Right.—Looking at the matter from the point of view of examination of titles, there are several points to be noted:—

- 1. Ancestor's Debts.—Assuming that the intervening heir is dead, and died without disponing, his personal creditors will have the ordinary preference (see p. 195).
- 2. Government Duties.—Again, if the intervening heir is dead, and died without disponing, these duties will attach (see p. 192).
- 3. Terce and Courtesy.—These can never exist, for ex hypothesi there is no infeltment.



4. Searches.—All the intervening heirs must be searched against.

In regard to all these matters, if the decree and other writs produced do not shew in detail the whole chain of succession and transmission, it will be necessary to require production of the petition and proof, which are always available for examination at the Chancery office.

PETITION BY SECOND HEIR IN SUCCESSION

Unto the Honourable the Sheriff of Chancery,

The Petition of A.

Humbly sheweth,-

That the late B. died at last vest and seised in All and Whole [description or reference 1], conform to disposition granted by C. in his favour, dated , and recorded in the division of the general register of sasines for the county of on , but always with and under [refer to conditions, etc., if necessary].

That upon the death of the said B. he was succeeded by D., his eldest son [or otherwise], as his heir in the said lands [or subjects].

That the said D. died at on ² unserved and uninfeft, and having only a personal right to the said lands [or subjects], and was succeeded by the petitioner the said A., his eldest son [or otherwise] and nearest and lawful heir in the said lands [or subjects].

May it therefore please your Lordship to find the facts above set forth proved, and that the petitioner is entitled to procure himself infeft in the foresaid lands [or subjects], but [if necessary] with and under the [burdens, etc.] before referred to,⁸ so far as subsisting and applicable, in terms of the Conveyancing (Scotland) Act, 1874, and to decern.

According to justice, &c.

- Facts.—(1) B. dies infeft, (2) is succeeded by D., who makes up no title, and dies intestate, and (3) is succeeded by A., the petitioner.
- ¹ Description.—It is submitted that, though B.'s infeftment contains a full description, it will be sufficient to state the county (or burgh and county) and refer to B.'s infeftment.
- ² Date of First Heir's (D.'s) Death.—It is suggested that this date should be averred and proved, in order to shew that he was in life on, or after, 1st October 1874, which is necessary. In that case there will be a finding in conformity, which will be an end of the matter. It cannot be said that this is necessary in point of form, for it is not given in Sched. E. But it is necessary in point of fact under sec. 9, and if not proved in this way, third parties will no doubt require to be satisfied of the fact in some other form.
- ³ Burdens, etc.—These are not referred to in the prayer in Sched. E. But in the face of irritant and resolutive clauses in the title directed against any failure to refer to the burdens, it is suggested that a reference should be inserted in the prayer, as is done in cases of special service (Consolidation Act, Sched. Q).

PETITION BY DISPONEE OF HEIR WHEN THE HEIR IS DEAD

Unto the Honourable the Sheriff of Chancery, The Petition of A.

Humbly sheweth,-

[First and second paragraphs as on p. 734.]

That the said D. died at on unserved and uninfeft, and having only a personal right to the said lands [or subjects]. That the said D. disponed the said lands [or subjects] to the petitioner, conform to disposition dated

[Prayer as on p. 734.]

Facts.—(1) B. dies infeft, (2) is succeeded by D., who makes up no title, and (3) is now dead, but (4) granted a disposition to A., the petitioner. See notes on p. 734.

PETITION BY DISPONEE OF HEIR WHEN THE HEIR IS STILL IN LIFE

Unto the Honourable the Sheriff of Chancery, The Petition of A.

Humbly sheweth,-

That the late B.¹ died at on last vest and seised in All and Whole [description or reference], conform to disposition granted by C. in his favour, dated , and recorded in the division of the general register of sasines for the county of on , but always with and under [refer to conditions if necessary].

That D., eldest son [or otherwise] of the said B., is his heir in the said lands, but has only a personal right thereto, being unserved and uninfeft.

That the said D., by disposition dated , conveyed the said lands [or subjects] to the petitioner.

[Prayer as on p. 734.]

Facts.—(1) B. dies infeft, (2) is succeeded by D., who makes up no title, (3) is still in life, and (4) has granted a disposition to A., the petitioner.

¹ Date of Death of B. (last Infeft).—As the date of death of D. cannot be given, seeing he is in life, it is suggested that that of B. be given, i.e. assuming that he was in life on, or after, 1st October 1874. But in any case the date of D.'s disposition will no doubt shew that he survived the Act. A more direct way would be to add at the end of paragraph 2, "The said D. is still in life."

See notes on p. 734.

PETITION BY DISPONEES (TESTAMENTARY TRUSTEES)
WHERE THE HEIR'S ANCESTOR WAS NOT INFEFT,
AND WHERE THERE HAVE BEEN SEVERAL DEVOLUTIONS AND TRANSMISSIONS

Unto the Honourable the Sheriff of Chancery,

The Petition of A. and B., the trustees of C., acting under his trust disposition and settlement, dated , and registered in the Books of Council and Session on .

Humbly sheweth, -

That D. was last vest and seised in All and Whole [description or reference], conform to disposition granted by X. in his favour, dated , and recorded in the division of the general register of sasines for the county of on , but always with and under [refer to conditions if necessary].

That the said D., by disposition dated , conveyed the said lands [or subjects] to E. The said E. died never having been infeft in the said lands [or subjects].

That upon the death of the said E. he was succeeded by F., his eldest son [or otherwise], as his heir in the said lands [or subjects]. The said F. expede a general service as heir of the said E., conform to decree of the Sheriff of Chancery in his favour as heir foresaid, dated , but made up no further title.

That the said F. disponed the said lands [or subjects] to G., conform to disposition dated

That the said G. also died having only a personal right to the said lands [or subjects], and was succeeded by his eldest son [or otherwise], the said C., his nearest and lawful heir in the said lands [or subjects].

That the said C. died at on unserved, and having only a personal right to the said lands [or subjects].

That the said C. by his trust disposition and settlement disponed his whole estate, heritable and moveable, to the petitioners, and to H., K., and L., and the survivors and survivor, but always in trust for the purposes mentioned in the said trust disposition and settlement.

That the said H. predeceased the said C.

That the said K. declined the office of trustee, conform to minute of declinature dated , annexed to the extract of the said trust disposition and settlement herewith produced.

That the said L. has resigned the office of trustee, conform to minute of resignation dated , and registered in the Books of Council and Session on .

May it therefore please your Lordship to find the facts above set forth proved, and that the petitioners and the survivor of them, as trustees and trustee foresaid, are entitled to procure themselves and the survivor of them as aforesaid infeft in the foresaid lands [or subjects], but [if necessary] with and under the [burdens, etc.] before referred to, so far as subsisting and applicable, in terms of the Conveyancing (Scotland) Act, 1874, and to decern.

According to justice, &c.

Facts.—(1) D. last infeft, (2) disponed to E., who was not infeft, died intestate, and (3) was succeeded by F., who expede general service but did not take infeftment, and (4) disponed to G., who died uninfeft and intestate, and (5) was succeeded by C., who made up no title, but left a will containing a general conveyence to the petitioners and certain others as trustees, the other trustees having either predeceased the testator or declined or resigned office. It will be observed that there are several "personal rights" in these

devolutions (namely, E.'s, F.'s, and G.'s), but the first personal right in the sense of sec. 9 is that taken by C., the testator. E. was a disponee, F. was served, and G. again was a disponee: C. alone had nothing but a personal right by survivance, *i.e.* survivance of his ancestor G.

See notes on p. 734.

PETITION BY DISPONEE OF DECEASED HEIR TO COMPLETE TITLE TO PART

Unto the Honourable the Sheriff of Chancery,

The Petition of A.

Humbly sheweth,-

That the late B. died at on last vest and seised in All and Whole [describe or refer to whole subjects], conform to disposition granted by C. in his favour dated and recorded in the division of the general register of sasines for the county of on , but always with and under [refer to conditions if necessary].

That upon the death of the said B. he was succeeded by D., his eldest son [or otherwise], as his heir in the said subjects.

That the said D., by disposition dated , disponed to the petitioner the following part 1 of the said subjects, namely, All and Whole [describe the part], but [if necessary] always with and under the said [burdens, etc.], so far as subsisting and applicable, and also with and under the following burdens and others, namely [insert, if any 2].

May it therefore please your lordship to find the facts above set forth proved, and that the petitioner is entitled to procure himself infeft in the foresaid subjects disponed to him by the said D., but always with and under the [burdens, etc.] before specified or referred to, so far as subsisting and applicable, in terms of the Conveyancing (Scotland) Act, 1874, and to decern.

According to justice, &c.

Facts.—(1) B., last infeft, (2) is succeeded by D., who is now dead, but (3) disponed part of the property to A., the petitioner. If D. is in life, see p. 732.

- ¹ Description of Whole and Part.—Here it is assumed that the part to which title is being made up was not articulately described in B.'s infeftment. If, on the other hand, it was, there will be no need of two descriptions in the petition—the one of the whole, and the other of the part. The first averment will in that case run that B. was "vest and seised in inter alia All and Whole," describing the articulate part, and the last averment will simply be that D. disponed "the said subjects" to the petitioner.
- ² Burdens, etc., Applicable to the Part.—Almost certainly the disposition by which the part is cut off from the whole will contain clauses adjusting the rights of the different part-owners, e.g. apportionment of feu-duty. It appears proper that these should be set out.

47
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PETITION BY HEIRS-PORTIONERS OF DECEASED HEIR

Unto the Honourable the Sheriff of Chancery,

·The Petition of X. and Y.

[First and second paragraphs as on p. 734.]

That the said D. died at on unserved and uninfeft, and having only a personal right to the said lands [or subjects], and was succeeded by the petitioners the said X. and Y., his two daughters, and nearest and lawful heirs in the said lands [or subjects].

May it therefore please your lordship to find the facts above set forth proved, and that the petitioners are entitled to procure themselves infeft, each to the extent of one-half pro indiviso, in the foresaid lands [or subjects], but [if necessary] with and under the [burdens, etc.] before referred to, so far as subsisting and applicable, in terms of the Conveyancing (Scotland) Act, 1874, and to decern.

According to justice, &c.

Facts.—(1) B., last infeft, (2) is succeeded by D., (3) who is succeeded by the petitioners (his daughters) as heirs-portioners.

Separate Petitions.—Of course each might have a separate petition, but there is nothing to prevent a common petition, which indeed is better.

PETITION BY ONE OF TWO HEIRS-PORTIONERS

Unto the Honourable the Sheriff of Chancery,

The Petition of A.

[First paragraph as on p. 734.]

That upon the death of the said B. he was succeeded by D. and E., his daughters, as his heirs in the said lands [or subjects].

That the said D. died at on unserved and uninfeft, and having only a personal right to one-half pro indiviso of the said lands [or subjects], and was succeeded by the petitioner, the said A., her eldest son [or otherwise] and nearest and lawful heir in the said one-half pro indiviso of the said lands [or subjects].

May it therefore please your lordship to find the facts above set forth proved, and that the petitioner is entitled to procure himself infeft in one-half pro indiviso of the foresaid lands [or subjects], but [if necessary] always with and under the [burdens, etc.] before referred to, so far as subsisting and applicable, in terms of the Conveyancing (Scotland) Act, 1874, and to decern.

According to justice, &c.

Facts.—(1) B., last infeft, (2) is succeeded by D. and E. (his daughters) as heirs-portioners, (3) D. dies without completing any title, and is succeeded by her son A., the petitioner, who now seeks warrant to complete title to one-

half pro indiviso. It will be observed that if the other heir-portioner E. is alive, she could not concur in the petition, for she is an immediate heir and will proceed in one or other of the ordinary methods.

PETITION BY DISPONEE OF A DECEASED HEIR UNDER REAL BURDEN

Unto the Honourable the Sheriff of Chancery,

The Petition of A.

Humbly sheweth,-

[First and second paragraphs as on p. 734.]

That the said D. died at on unserved and uninfeft, and having only a personal right to the said lands [or subjects].

That the said D. disponed the said lands [or subjects] to the petitioner under the real and preferable lien and burden 1 of the payment to E. of the sum of £1000 at the term of , with interest [set out interest and penalties as in the deed; also any irritant, etc., clauses], conform to disposition dated

May it therefore please your lordship to find the facts above set forth proved, and that the petitioner is entitled to procure himself infeft in the foresaid lands [or subjects], with and under the said [burdens, etc., if necessary] before referred to, so far as subsisting and applicable, and also with and under the said real burden in favour of the said E., in terms of the Conveyancing (Scotland) Act, 1874, and to decern.

According to justice, &c.

Facts.—(1) B., last infeft, (2) is succeeded by D., who makes up no title, but (3) dispones to A., the petitioner, under a real burden in favour of E. for £1000. The specialty is the real burden.

¹ Real Burden.—It will be observed that this is not a case of reference to a subsisting burden. It is really the first constitution of a new burden. The whole validity of the burden will rest upon its being properly set out in the infeftment. Interest and penalty should be specified, also the time of payment of principal, and all irritant and resolutive and other clauses with regard to future references and the effect of omissions in that respect.

SECTION XLII

COLLATION

AT common law if the heir of line, being one of the next of kin, claims a share in the personal succession, it can be allowed only on condition of his collating the heritable succession, i.e. sharing it with the other next of kin. The following matters require consideration: (1) the international relations; (2) which heirs are subjected to the necessity of collating? and with whom they must collate; and (3) mode of collation and effect on succession.

THE INTERNATIONAL RELATIONS

The point to be kept in view is that in principle collation is an obligation, not a privilege. The starting point is, that the heir, being one of the next of kin, is as much entitled as any of the other next of kin to a share in the executry and (if he and the other next of kin are children of the deceased) to a share in the legitim fund; but that if he seeks to enforce his right to either one or the other, he is under obligation to throw in the heritage. Therefore collation is an incident of the moveable succession only, and the application of the doctrine is dependent on the domicile of the deceased. If that was in Scotland, then the heir, if he claims a share in the moveables, must collate heritable or real estate wherever situated 1; and conversely, if the domicile is in a country where collation does not obtain, the heir may be entitled to a share in the moveables without collating Scottish heritage.2

WHICH HEIRS MUST COLLATE?

Subject to what has already been said on the subject of private international law, the answer is: the heir of line, whether he takes (a) ab intestate, (b) by destination, whether in fee-simple or under restraint,3 (c) preceptione hareditatis, (d) by bequest.4 Heirs of provision, not being alioqui successuri, do not require to collate.5

¹ Robertson v. Macvean, 18 Feb. 1817, F. C.

⁴ Fisher's Trs. v. F., 1844, 7 D. 129. ² Balfour v. Scotts, 1798, 3 Pat. 300.

³ Gilmour v. G., 13 Dec. 1809, F. C.

⁵ Rae Crawfurd v. Stewart, 1794, Mor. 2384.

CASES IN WHICH THE HEIR MUST COLLATE 1

- 1. A. dies leaving heritable estate with no destination beyond himself and his heirs.
- 2. A. dies leaving heritable estate held on special destination (whether made by A. or not), but which in fact results in sending the heritable estate to the heir of line, e.g. a destination to heirs-male, under which A.'s eldest son succeeds.
- 3. A. dies having been institute or heir of entail infeft in the fee of an entailed estate, which under the entail destination descends to A.'s heir of line, however called in the entail, and quite irrespective of the heir's relationship, if any, to the entailer.
- 4. A. dies after having in his lifetime, by inter vivos gratuitous deed, conveyed heritable estate to his heir of line.
- 5. A. dies leaving a testamentary bequest of, or out of, his heritable estate to his heir of line, e.g. a fee, liferent, or annuity.
- 6. X. makes a bequest of heritable and moveable estate to the heirs, or heirs and executors, of A. This carries the heritable part of the estate to A.'s heir, and the moveable part to A.'s personal representatives. It is, however, held that A.'s heir is entitled to share in the moveable part on condition of collating the heritable part.⁴ This judgment was not unanimous, it has been strongly attacked, and will no doubt come up for reconsideration. In Sinclair's case be Lord Moncreiff's view, apparently, was that in Blair's case A.'s heir was not entitled to claim a share of the moveables even on condition of collating. The view is submitted that Blair's judgment is sound.
- 7. Illegal Accumulations.—When accumulations of income are directed beyond the limit which the law allows, 6 if the result is that the income thus illegally ordered to be accumulated falls into intestacy, the heir in heritage cannot share in that part of the income which is derived from personalty without collecting the heritage. It would be unnecessary to mention this specially if it were not for the terms of the interlocutor in the previous case of Logan.

CASES IN WHICH THE HEIR IS NOT BOUND TO COLLATE

- 1. When he is not heir-at-law, though he may succeed under destination.9
- 2. When he claims the personal estate, or any part of it, under a deed or will, e.g.:
 - (1) A. dies intestate as to his heritable estate, but leaves a will
- 1 I.e. as a condition of his claiming, if he elects to claim, a share in the moveable estate. Of course he can never be compelled to collate if he chooses to leave the moveables alone, otherwise there would be no primogeniture.
 - ² Gilmour, supra.

- ³ M. of Breadalbane v. M. of Chandos, 1836, 2 S. and M.L. 377.
 - 4 Blair v. B., 1849, 12 D. 97.
 - ⁵ Sinclair's Trs. v. S., 1881, 8 R. 749.
 - ⁶ See p. 806.
 - ⁷ Moon's Trs. v. M., 1899, 2 F. 201.
 - 8 Logan's Trs. v. L., 1896, 23 R. 848.
 - 9 Rae Crawfurd, supra.

under which he bequeaths £1000 to his heir-at-law. The heir takes both heritage and the £1000 without collation.

- (2) A development of the last instance is found in Sinclair's case.¹ A., heir of entail in possession, left a legacy of a share of his moveable estate to B., his heir-apparent under the entail, "and to his heirs, executors, and successors." B. predeceased A., leaving three children, C., D., and E., of whom C. took the entailed estate. Held, Lord Young dissenting, that C. was, without collating, entitled to an equal share of the legacy along with D. and E. Blair's case was here much canvassed, but it is submitted that both cases are well decided. In this case the question was the construction of A.'s will, and A.'s intention was plain that B. should have taken the estate plus the whole legacy.
- (3) In a marriage contract a landed estate was destined to the heir of the marriage, and the conquest to the bairns: the heir, being a son of the marriage, took the land and his equal share of conquest without collation.² But quere. If in one destination the estate and conquest had been provided to the heirs and bairns of the marriage, the heir would have taken the estate preferably, but if he had claimed any part of the conquest he must have collated. And is not the substance the same when the two assets are destined in the same deed though in different clauses?
- 3. When he is the only next of kin and there are no representatives of other next of kin entitled under the Moveable Succession Act, for the heir is not bound to collate with the widow.
- 4. When he is the only child, or the only child whose claim to legitim is not barred, and even though there are representatives of other next of kin entitled under the Act, the heir (if his claim has not been discharged or barred) is entitled to the whole legitim fund without collating the heritage.
- 5. One of two or more heirs-portioners, succeeding to the whole heritage under deed or will, is not bound to collate if all the next of kin are within the class of heirs-portioners. When heirs-portioners must collate, *quare* whether they must be unanimous or whether one of two heirs-portioners may collate to the extent of one-half?

In connection with these matters it is necessary to have regard to the question; whose succession is it? and the following cases may be distinguished:—

1. A destination by A. to B. in liferent and his heirs in fee: the

⁵ Riccart v. R., 1720, Mor. 2378. Contrast Balfour's Trs. v. Scott, 1787, Mor. 2379.



¹ Sinclair, supra.

² Brown v. his tutors, 1680, Mor. 2375.

³ Trotter v. Kochead, 1681, Mor. 2375.

⁴ L. Panmure v. Crokat, 1856, 18 D. 708.

fee is in B.: therefore (1) the heir must collate the heritage if he elects to claim a share in B.'s moveable estate, but (2) if he is entitled to share in A.'s moveables, he may do so without collation.

- 2. A destination by A. to B. in liferent allenarly and his heir in fee: B. has no fee: therefore (1) the heir may share in B.'s moveable estate without collation, but (2) if he is entitled and claims to share in A.'s moveables, he must, if he is heir aliequi successurus in the heritage, collate it.
 - 3. A. leaves his heritage to "the heir-at-law of B.": the same.
- 4. A. leaves personal estate to "the heirs and executors of B.": the heir-at-law of B., being also one of B.'s next of kin, may share in A.'s personal estate so destined without collating heritage acquired from B.

When the Heir takes by Representation.—This is the case provided for with anxious care in sec. 2 of the Intestate Moveable Succession Act, 1855. The case is: A. dies leaving heritable and moveable estate: he has a number of children: his eldest son and heir, B., predeceases him, leaving a son, C. C. is A.'s heir-at-law. If he is B.'s only child, there is really no specialty in the case. He may claim a share of A.'s moveable estate by right of representation, as introduced by the 1st section of the Act, but only upon condition of collating the heritage. But if C. is not B.'s only child, complication is introduced. Under the 1st section of the Act, B.'s children are entitled to claim a share of the moveables, but then they must collate the heritage, and, except C., they are unable to do so, for it is not theirs. To meet this state of matters the scheme of the 2nd section is:—

- 1. C. may collate the heritage, to the effect of claiming for himself and B.'s "other issue" the share of the moveable estate of the intestate (A.) which might have been claimed by B. upon collation if he had survived the intestate (A.). Thus C. keeps the whole heritage (or its value), and takes also an equal share with B.'s other issue (per stirpes) of the part of the moveable estate which B. would have received if he had survived and had collated.
- 2. "Daughters of the predeceaser, being heirs-portioners of the intestate, shall be entitled to collate to the like effect."
- 3. If the heir does not collate, "his brothers and sisters, and their descendants in their place, shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation."

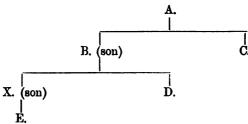
This section has in part been described as "singularly involved," and, so far as is known, it has not received much elucidation from decided cases. It will be observed (1) that it is only "the child" and "the daughters" of the predeceasing heir who are entitled to collate,

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and (2) that when the succeeding heir does not collate, the equivalent claim is given only to "his brothers and sisters and their descendants."

With reference to the first of these questions, it is thought that the language of this section is not sufficient to overrule the general provision in sec. 1, and that the heir taking by representation, however remote (so long, at least, as within the limits of sec. 1; but see p. 745), would be entitled to share in the moveables on condition of collating.

As regards the other question, the case is, e.g., this: A. dies intestate, leaving heritable and moveable estate. His elder son, B., predeceases him, but leaves issue. His (A.'s) younger son and only other child, C., survives. B.'s issue are a daughter, D., and a grandson, E., by a son, X.



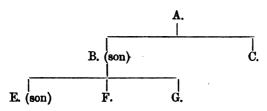
Is D. to take any part of the additional share which is, or would be, obtained by collation, according as E. does, or does not, collate? he does collate, the Act says he claims a share of the moveables for himself "and the other issue of the predeceaser," who is B., words which clearly include D. But if E. does not collate, the equivalent claim is given to "his brothers and sisters and their descendants," words which do not include his aunt D.; and in that case a clear opinion against D. is given by Lord M'Laren. With great deference the view is suggested whether the inherent right given by sec. 1 is not strong enough to bear out D.'s claim. No doubt, seeing that the stirps takes the heritage, collation is a condition, and clearly D. cannot convey the heritage. But it is at least not clear that conveyance is a condition of collation. Even E., if he collates, may be bound only to allow its value as a deduction, which D. may equally well do. view avoids the conclusion that D.'s right to share or not to share is dependent on E.'s caprice.

Again, E. might have "brothers and sisters" of his own, in which case they would be within the words of sec. 2, and D.'s position might accordingly be thought to be even worse; but still the opinion is suggested that she is entitled to a share of the moveables per stirpes. If so, then, as regards the moveables, D. alone would take as much as E. and his brothers and sisters put together.

Effect.—In no case is the heir's position to be made worse by collation. Thus, in the case supposed, if E. collates, he keeps the

¹ Wills and Succession, p. 121.

heritage wholly to himself, and what is shared between him and D. is the share of the moveable estate which collation attracts. That his share of the moveables must be so divided is plain in the case of E. collating; but if he "shall not collate," and D. makes an independent claim for a share of the moveables, what then? To make the matter simpler, however, assume that the family stands thus:—



E., the heir-at-law by representation, takes the heritage. He does not collate. His "brothers and sisters," F. and G., make an independent claim. The estate is:

Heritage .	•	•	,	•	£1000
Moveables					1200
					£2200

Legitim is discharged. If E. did collate, the share of moveables which would come to E, F., and G. would be £100, thus:

Half of whole blended estate		•	£1100
Deduct heritage .	•	•	1000
			£100

and accordingly, if E. did collate, he would keep the heritage, and E., F., and G. would each receive £33, 6s. 8d. But E. does not collate. In that case it appears clear that, as against C., B.'s *stirps* will still draw the full £100, and, further, that it will fall to be divided between F. and G. only, giving £50 to each.

But as to all these questions, there is the antecedent question: when is it ascertained that the heir does not collate?

RELATION OF SEC. 1 TO SEC. 2 OF THE 1855 ACT

It will be observed that the first section contains an express declaration "that no representation shall be admitted among collaterals after brothers' and sisters' descendants." Now, until the Act was passed, no heir-at-law who was not one of the next of kin was entitled to collate; but of course this latter limitation is removed by sec. 2 of the Act. The question arises: May the second section operate to remove the restriction of representation in moveables imposed by sec. 1? That is to say, suppose (1) that the heir-at-law takes by representation, and is not one of the next of kin, and (2) that he is

more remote from the intestate than a descendant of a brother or sister—then (1) is he entitled to collate? and (2) if he does not collate, may "his brothers and sisters and their descendants in their place" claim under the concluding clause of sec. 2? The Second Division have answered the first of these questions in the affirmative, from which it would follow that the second must be answered in the same manner. In Jamieson's case the facts were that the intestate was survived by an aunt and a daughter of an uncle. The latter was held entitled to collate. With deference it is submitted that the matter is worthy of reconsideration.

MODE OF COLLATION AND EFFECT ON HERITAGE

It is laid down that the heir is not bound to allow the heritage to be sold; and that it is sufficient if he communicates its value. But after the observations in the case of Napier, it is difficult to consider this as finally settled, and he may disqualify himself from collating if he sell the property or part of it. The fact that he holds under an entail, and is not entitled to disentail without consent, is no reason why he should not bring into accounting (hotch-pot) the value of his interest; but here, in addition to fixing the value of the lands, it would be necessary to have also an actuarial calculation of the value of the heir's interest therein. Nor is the heir freed from the obligation to collate because the heritage is, or includes, a lease which excludes assignees.

It is common to have a "contract of collation," as a bilateral deed, executed between the heir and the personal representatives. But an intimated election by the heir in writing is sufficient. The personal representatives having no option, their consent is immaterial, and therefore the term "contract" is strictly inappropriate. There may be a question whether the heir could withdraw his election while matters were entire, that is to say, while the personal representatives had done nothing on the faith of it, and on that question it would no doubt be better for the personal representatives to have a bilateral formal contract. Usually, however, it would be all the better for the personal representatives if the heir did withdraw his election.

If (as is the common case) the heir is benefiting himself by collation, it is his interest to see that proper steps are taken at once to protect his interest in the moveable estate. The simplest way will be that he should be confirmed as one of the executors. If that cannot be done, he can obtain an assignation of his proper proportion of the personal estate, which he can complete by intimation or otherwise.

From the point of view of the personal representatives the matter

⁶ Gilmour v. G., 13 Dec. 1809, F. C.; Fisher's Trs. v. F., 1850, 13 D. 245. ⁶ Fisher, supra.



¹ Jamisson v. Walker, 1896, 23 R. 547.

² M'Laren, p. 156.

³ Napier v. Orr, 1868, 6 M. 264.

⁴ M'Call's Tr. v. M'C.'s c.b., 1901, 3 F.

is not of so much importance, so long as they on their part have not given the heir a title to any part of the moveables, for of course the heir cannot insist on drawing any part of the moveables unless and until he communicates a share of the heritage, or its value, free from any debts contracted by himself.

It is often laid down that the share of collated heritage remains heritable in the person of the personal representative. But obviously that is a matter which depends upon how the collation is carried out; and in Napier's case it was expressly recognised that the effect of collation on succession is a matter of circumstances. In this connection the terms of any deed which it may be proposed to execute require careful consideration:—

- 1. If there is a bare intimation by the heir of an election to collate, or even a bilateral contract without any clauses as to the manner in which the matter is to be carried out, and assuming in either case that nothing has followed, the position of parties as regards their own successions will be the same as if the heritage had been conveyed pro indiviso to the heir and the personal representatives in their respective proper proportions, and as if the heir had actually received his equivalent share of moveables.
- 2. But this will not be so if the heritage is of a nature which cannot be conveyed, e.g. an entailed estate or leases excluding assignees. There a money contribution by the heir is implied, and the succession of the personal representatives will be moveable.
- 3. If there are in a bilateral contract of collation or otherwise mutual conveyances, though in general terms, of heritage and moveables respectively, the result will be as in No. 1. But of course this result will depend on the terms of the conveyance, and it is obvious that a peculiar question may be raised if the shares of heritage falling to the personal representatives are destined to them and their heirs and executors.
- 4. On the other hand if the deed of collation expresses that the arrangements are to proceed on the footing of the heir retaining the heritage and bringing its value into account, it appears to follow that the succession of the personal representatives will be wholly moveable, and that as regards the heir the heritage will be wholly his heritable succession, and only the balance of his share will be moveable succession.

A number of interesting questions as to the working out of collation, especially where the legitim claim comes in, will be found dealt with in Fraser on Husband and Wife, p. 1056. For instance, if the heir, being the only child (or the only one whose right to legitim is not discharged), claims the whole legitim fund, and also claims a share of the executry along with the other heirs ab intestato, is the value of the heritage brought in before or after the legitim is ascertained?

MINUTE OF COLLATION, HERITAGE BEING SHARED IN FORMA SPECIFICA

This Minute of Collation, entered into between A. [heir-at-law] and B. and C. [the personal representatives], Witnesseth that whereas D. [the intestate] died at on , domiciled in Scotland, intestate, and leaving heritable and moveable estate: And whereas the said A., B., and C. are his children and entitled to his whole estates, the said A. being heir-at-law, and the said B. and C. his other next of kin: And whereas the said A. has elected to participate along with the said B. and C. in the moveable estate of the said D., and to collate the heritable estate of the said D. accordingly: Therefore the parties agree as follows:—

First. The title to the moveable and personal estate of the said D., whereever situated, shall be completed in the names of the said A., B., and C., by confirmation, letters of administration, or otherwise.

Second. The said A. agrees to collate, and hereby collates, the heritable and real estate of the said D. with the said B. and C. He has, of even date with his signature hereto, granted a disposition in favour of the said B. and a separate disposition in favour of the said C., each to the extent of one-third pro indiviso of the subjects in X. Street, Edinburgh, being the only known heritable estate which belonged to the said D. He shall forthwith complete a title in his name to the said subjects as heir to the said D., and record the same. The expenses of and connected with the service and dispositions, and completing the same, and these presents, shall be shared by the three parties equally.—In witness whereof.

This will have the effect of giving the heir a title to a share in the personal estate while he may be in a position to encumber the whole heritage. If thought necessary, therefore, the following words may be added after article first:—

But the said B. and C. shall not be bound to allow such title to be made up until the said A. has completed a title to the heritage as after mentioned, and the same has accresced to the dispositions after mentioned, without any diligence, encumbrance, or other impediment used against or created by the said A.

MINUTE OF COLLATION, THE HEIR RETAINING THE HERITAGE BUT CONTRIBUTING ITS VALUE: DISTINCTION BETWEEN LEGITIM AND EXECUTRY

This Minute of Collation, entered into between the parties following, namely, (first) A. [heir-at-law], (second) B. [other surviving child of intestate], and (third) C. [grandson by predeceasing child of intestate], Witnesseth that whereas D. [the intestate] died at on , domiciled in Scotland, intestate, and leaving heritable and moveable estate: And whereas the said A. and B. are the only children of the said D. who survived him, and the said C. is the only child of the late E., another son of the said D., but who pre-

deceased his father: And whereas the said A., being the eldest son, is the heir-at-law and entitled to the heritable estate, the said B., as the only other surviving child, is entitled to the legitim fund, subject to the right of the said A. to share therein on condition of his collating the heritable with the moveable estate, and the said B. and C., as the heirs in moveables ab intestate, are entitled to the executry, subject to the right of the said A. to share therein on the same condition: And whereas the said A. has elected to participate in the legitim and executry, and to collate the heritable estate accordingly: Therefore the parties agree as follows:—

First. The title to the moveable and personal estate of the said D., whereever situated, shall be completed in the names of the said A., B., and C.,² by confirmation, letters of administration, or otherwise.

Second. The said A. agrees to collate, and hereby collates, the heritable and real estate of the said D. with the said B., as entitled to share in the legitim and executry, and with the said C., as entitled to share in the executry, according to their interests. The only heritable estate of the said D., so far as known, is the farm of X. in the county of Y. In carrying the collation into effect the said A. shall not convey the said subjects, but shall bring their value into account. Such value, after making all proper allowances and deductions, is hereby fixed at £.

Third. The expenses of these presents shall be borne by the three parties equally.—In witness whereof.

- ¹ Legitim.—This will not be referred to as one-half or one-third of the personal estate, seeing that heritable securities do not contribute to legitim.
- ² Confirmation.—C. is not entitled to the office of executor (sec. 1, Intestate Succession Act). But here it is reasonable that C. should be conjoined, and it appears quite competent.
- **Substitute of the widow is entitled to terce, this must be specially referred to here. Thus: "after making all proper allowances and deductions (including an agreed-on deduction in respect of the widow's right of terce in said subjects) is hereby fixed at £." The terce will be valued by an actuary.

SIMPLE INTIMATION OF ELECTION TO COLLATE

To A. , [Place and date.]

C.A.

I hereby intimate to you, as judicial factor on the heritable and moveable estates of the late B., that I elect to participate in the [legitim and] executry, and to collate the heritage so far as necessary to that end.

[Holograph or tested.]

SECTION XLIII

MARRIAGE CONTRACTS

Capacity of Parties.—The capacity of the parties is regulated by their respective domiciles at the date of the contract. The chief practical application of the rule is that a minor cannot by the law of England or Ireland make a valid contract, and this is not cured either by the marriage or by the residence of the spouses in Scotland,¹ or (it would seem clear in principle) by any clause in the contract as to the law which shall rule. There are, however, means by which under certain circumstances this difficulty can be got over, but of course, in these cases advice will be obtained in England or Ireland.

Insolvency of Husband.—It appears that the insolvency of the husband is no ground for attacking provisions by him in an antenuptial contract of marriage so long as these are not exorbitant, and if the wife is not a conscious party to a fraud upon the creditors.² But even in that case opinions were reserved as to what the decision might have been if the creditors had claimed only a partial reduction.

Unilateral Deed.—The ordinary contract of marriage is a bilateral deed signed by both contracting parties, and this course should always be followed if possible. Sometimes it is desired to have, say, the lady's settlement in a separate instrument in English form, and to that there is no real objection. Even then, however, the two deeds ought to contain mutual references, and indeed it is recommended that they should both be expressed as bilateral instruments, each containing a contract to marry and bearing that the provisions therein contained are in consideration of the marriage, and of the provisions in the other deed. For in the case of a true unilateral deed by the intended wife, the husband not signing it, the result may be that it is held to be revocable with the husband's consent, although it bears to be executed with reference to the marriage and contains ordinary matrimonial trusts, including a destination of the fee to the children of the marriage.3 In Watt's case children had not come into existence when the question was raised,

¹ Cooper v. C., 1888, 15 R. (H. L.) 2!. (revocation allowed); Lyon v. L.'s Trs., ² M'Lay v. M'Queen, 1899, 1 F. 804. 1901, 3 F. 653 (contra).

³ Watt v. Watson, 1897, 24 R. 330

and some weight was given to that fact, though it is difficult to see why it should make any difference so long as it cannot even be averred that the wife is past child-bearing.

The matters requiring attention in connection with marriage contracts naturally fall under the following heads:—

- 1. Provisions by the husband for his widow.
- 2. Provisions by the husband for children and issue of the marriage.
- 3. Provisions by wife for husband, children, and issue.
- 4. Provisions by third parties.
- 5. The powers and immunities of the trustees if the marriage contract includes the constitution of a trust or trusts.
- 6. General clauses, e.g. (a) exclusion of legal rights, and (b) declaration as to the local law which is to regulate the construction of the deed and the rights of parties.

Provisions by Husband for his Widow.—The provisions by the husband for his wife in the event of her surviving him very commonly embrace all the following, namely:—

- 1. Mournings.
- 2. Interim aliment.
- 3. Liferent of a house.
- 4. Furniture in liferent or in fee.
- 5. An annuity with or without security.

Mournings.—A certain sum will be specified, and it will bear to be for mournings for the widow and the children of the marriage living in family with her. Further, it is not clear that general creditors of the widow could not reach any sum so provided to her for her mournings. For these reasons it is recommended that the provision should be made through the intervention of trustees, with power to them to apply the money for the proper purposes. As to security, see p. 758.

Interim Aliment.—This is intended to cover the period between the date of the husband's death and the first term's payment of annuity. If the annuity were declared to run from the date of death, there would be no need of any separate provision of interim aliment, except, indeed, that it may be desired to provide a larger temporary sum to cover extraordinary expenses at the time of the death. The amount of the provision may be fixed either at a lump sum, or at a certain rate per annum for the period between the death and the first term. As in the case of mournings, and for the same reason, it is recommended that the provision be made through the intervention of trustees. As to security, see p. 758.

Liferent of House.—This may take the form of a disposition in liferent after the husband's death, with infeftment thereon immediately upon the marriage, or it may be merely an obligation to provide a house. In the former case the husband will grant absolute warran-

dice even though there is existing debt, so that it may be clear that in a question with his heirs or other representatives the widow is entitled to be relieved of all debt, interest as well as principal. Other matters requiring attention are: (1) whether the house should be put into a complete state of order and repair at the beginning of the liferent; (2) the incidence of feu-duty, repairs, and landlord's taxes; and (3) fire insurance. As to these, see p. 664. The liferent will of course be declared alimentary, and in order to make this effectual the provision will be made through the medium of a trust. It is suggested that it should be in the option of the husband, or of his heir or other representatives (or at least of the husband), to provide an additional yearly annuity of stated amount in lieu of the specific liferent, on condition that the same be sufficiently secured to the satisfaction of the trustees. This will protect the wife or widow, and yet enable the husband (or his successors) to deal with the property free from the hampering encumbrance of the liferent. If the clause of option is to extend at all to the husband's successors, it may be preferred that it should take the form of a mere power to the trustees, with consent of the widow, to release the specific property on obtaining satisfactory security for a substituted alimentary annuity, which, in view of the alimentary clause, they might not otherwise be entitled to do. The whole provision will no doubt be declared to lapse in the event of re-marriage.

Furniture, etc.—It is very natural to give the widow a right of some sort in the matter of household furniture, etc. The specification of the subject of the provision will require some consideration. The provision may be a fee or liferent. In the case of a liferent the widow should be taken bound to insure at her expense in the names of herself and her husband's representatives for their respective rights and interests, and it will be provided that the liferent shall come to an end in the event of re-marriage. In either case it may be convenient to give an alternative, in the option of the husband or his representatives, to pay a certain lump sum at his death in lieu of the provision of furniture. As to security, see p. 758.

Annuity (see p. 808).—The following points require attention:—

- 1. Terms of Payment.—See interim aliment, supra. The annuity will probably be payable in advance, and it is for consideration whether it should be half-yearly or quarterly.
- 2. Income Tax.—An obligation to pay the annuity free of tax would be ineffectual as regards the tax. If the matter is considered of sufficient importance, the intention may be carried out approximately by giving an annuity of £105 or thereabouts if a free annuity of £100 is what is desired. Or, in any case, the husband may make his intention effectual in his will.
- 3. Alimentary.—The annuity will of course be made alimentary (pp. 22, 650).

- 4. Re-marriage.—Provision will naturally be made for restricting, if not terminating, the annuity in the event of the re-marriage of the widow. If the annuity is payable in advance, the alteration will take effect as at the next term of payment: if it is not payable in advance, the alteration will take effect as from the date of the second marriage.
- 5. Whether in Addition to Pension, etc.—If the widow as such will or may be entitled to a pension from any Widows' Fund, it will be made express whether it is to be imputed towards payment of the marriage-contract annuity, or whether the widow is to draw both; and the husband will bind himself to make any annual or other contributions, and generally to comply with the conditions, necessary to entitle the widow to the pension.
- 6. Security.—See infra. The special point is how the widow's annuity and the children's provisions are to rank upon the subject of the security. It is sometimes recommended that the widow's annuity and her other provisions should be declared the first charge upon both capital and income. But the requirements of each case must be judged of according to the special circumstances. There may be cases in which it would be fairer that, so long as it is possible that there may be children or remoter issue (or at least immediate children) of the marriage who may become entitled to the capital, the widow's claim against the special security should be restricted to the income, leaving her of course her claim for the balance against her husband's general estate, if any. In other cases the income would be altogether too small; but this arrangement might be more feasible, and all the fairer, if there were a pension fund as above referred to from which the widow was certain of so much more towards her annuity.

7. Incidence.—See p. 809.

Security for Widow's Provisions.—Security, if any, constituted by the husband may take various forms, of which the following may be mentioned:—(1) Life insurance, (2) transfer of funds, (3) entailed estate, (4) fee-simple estate.

Life Insurance.—As to general points requiring attention see p. 686. The title must be investigated and the age admitted. The husband will bind himself to keep up the insurance, but it should be made clear that the trustees are not to be responsible for failing to see that in point of fact he does so. In the ordinary case there should be no funds from the insurance in the hands of the trustees until after the husband's death, but that will not be so (a) if the policy be surrendered for cash, or (b) if it is an endowment policy payable on the husband attaining a certain age, and if he should attain it. In the latter case it is necessary, and in all cases it may be proper, therefore, to include clauses dealing with the income of the policy moneys during the husband's life. In the endowment case the husband will naturally

be the person to whom the income will be made payable during the remainder of his life. The case of funds arising from surrender is, however, different. There is then default on the part of the husband, from which it is out of the question that he should derive any benefit. The natural procedure would be to convert the policy into a fully paid-up policy for the largest amount which the company will give (see p. 689), in which case there will be no trust fund and no income until the husband's death. Assuming, however, that the policy is surrendered for cash, provision should be made for applying the income for behoof of wife and children and, so far as not so applied, for accumulating it.

Special power will be conferred on the trustees to apply the bonuses towards reduction of premiums. If the husband should at the same time be settling any funds under the trust, there will be an express clause entitling the trustees to apply the income towards the premiums. But it is not clear that it is judicious to extend this to the income of any funds settled by the wife, so as to entitle the trustees to apply her income for that purpose without her consent; with her consent this could of course be done without any clause.

If the policy be not taken out in name of the trustees, the assignation in their favour will be intimated to the insurance company immediately upon the marriage; and to enable this to be done, the trustees should give an express acceptance of office, even though there may be no funds under the trust requiring present administration.

Transfer of Funds.—In this case there must be provision for the disposal of the income during the hushand's life, and it will naturally be payable to him, subject to his fulfilling any obligations to pay life premiums or other obligations undertaken by him in favour of the trustees, so far as past due. The liferent cannot, however, be made alimentary, and it may therefore be desired to introduce clauses forfeiting or suspending it in the event of the husband doing or suffering anything which would otherwise have resulted in the income passing to his creditors, and for passing it over to the wife or the children of the marriage, or both. See pp. 793-6.

An Entailed Estate.—General and Special Powers.—In all cases there is the power under the Aberdeen Act (5 Geo. IV. c. 87), and there may be special power under the deed of entail. If so, the conditions attaching to it must be carefully attended to. The danger of failing to do so, and of putting the provision on the entail power specially, is seen in Callander's case, where a provision granted "in virtue of the said power," i.e. the power in the deed of entail, failed altogether because the terms of that power had not been complied

¹ Callander v. C., 1869, 7 M. 777, from prior case of Lockhart v. L., 1853, 15 D. which, and the appeal case of Dickson v. D., 1854, 1 Macq. 729, it appears that the

with, and the words quoted were held to exclude the benefit of the statutory power. The better method is to set out expressly that the provision is granted

in virtue and in exercise of the powers under the Entail Acts and under the deed of entail, and of all other powers anywise enabling me in this behalf, each without prejudice to the others.

Who may grant Annuities?—The husband may be (1) institute in possession, (2) heir in possession, (3) heir-apparent. The powers of the Aberdeen Act are available in the first and second of these cases. And the third case is provided for under sec. 6 of the Entail Amendment Act, 1868, by which the heir-apparent, with consent of the heir in possession, may create a corresponding annuity, to come into effect at his own death, and postponed to provisions granted by the heir in possession, and calculated after deducting (in addition to other deductions)

the burdens and provisions granted by the heir in possession to his or her wife or husband and child or children, so far as chargeable on such entailed estate, or on the rents thereof.

Subsequent Divestiture.—Though the heir should after granting the provision, but before his death, be obliged to denude, the provisions granted by him will be effectual on his death.² The cases cited were instances of the operation of clauses of devolution, but the grounds of judgment would extend the rule to cases of denuding in favour of a nearer heir subsequently born; and the case of propulsion is a fortiori.

Insanity.—Though obviously it cannot arise on the preparation of a marriage contract, it is necessary in order to complete the subject to refer to the question whether provisions may be granted by the curator bonis of an heir who is of unsound mind. This was allowed in Gordon's case, where, however, the facts were favourable. The provisions were for the wife and children of the heir in possession; he had been incapax at the time of his succession; his wife and children were unprovided for; there was a large rental; no personal estate; the provisions did not exceed the statutory limits; and the next heirs consented. There are indications that there might be difficulties in cases where the facts were materially different, e.g. if it were sought to exercise entail powers much in excess of the statutory limit, or to apportion children's provisions.

Amount of Annuity, Entail Rental.—The limit under the Aberdeen Act is one-third of the rent or yearly value as at the husband's death. The year of his death is taken even though he may have ceased to be heir in possession many years before, as by the operation of a clause

Hamilton, Petr., 1857, 19 D. 723.
 M. 576; Hunter Blair v. H. B., 1899, 1
 Kinnoull's Trs. v. Drummond, 1869,
 F. 437.



of devolution.¹ Again, if, say, a feu-duty be legally exigible in that year, it must be computed though it is unsecured and the vassal insolvent.² Casualties would no doubt follow the rules applicable in trusts as between capital and income.³ The rental includes mining royalties,⁴ salmon fishings and shootings, though unlet.⁵

The mansion-house and garden and policies are excluded,⁵ though there has been a disentail, and the policies though let as grass parks.⁶

Deductions.—The Aberdeen Act directs deduction of

the public burdens, liferent provisions, the yearly interest of debts and provisions, including the interest of provisions to children, and the yearly amount of other burdens of what nature soever affecting and burdening the estate or the yearly proceeds thereof, and diminishing the yearly value thereof to the heir of entail in possession.

This does not authorise deduction of repairs or management charges.⁷ The full annual payment of rent-charges is deducted and not merely the part representing interest.⁸ Under clauses in deeds of entail the result may be the same,⁹ or no part of rent-charges may be allowed.¹⁰

Deduction of other Provisions.—It will of course be understood that in fixing the amount of any statutory annuity deduction is made of any prior annuity under the statute, and also of any prior annuity or annuities under the deed of entail, all as at the death of the granter of the annuity in question. This is clear under the list of deductions above quoted from sec. 1. Further, the deductions include the yearly interest of the children's provisions, if any, granted by the granter of the annuity; and vice versa, in fixing the rent for calculating the children's provisions, the widow's annuity granted by the granter of the provisions is deducted. In M'Donald 11 a formula is given for working out the necessary cross calculations. In the case of annuities under the deed of entail there may be much doubt on these and many other points, according to the terms of the particular deed, e.g. whether the annuity is, as in the case of the statutory annuity, to be fixed once for all at the death of the granter, or is to fluctuate with rental and deductions while it remains in force.

Res judicata.—It is not clear whether a decision upon rental and deductions in a previous petition, possibly by the Lord Ordinary, on a

- ¹ Hunter Blair, supra. But increase of rent resulting from permanent improvements effected after a disentail is deducted; Dalrymple v. Blair, 1900, 7 S. L. T. 350.
- ² Lamont Campbell v. Carter Campbell, 1895, 22 R. 260.
 - ³ See p. 652.
- 4 Ld. Belhaven and Stenton, Petr., 1896,
- ⁵ Lei'h v. L., 1862, 24 D. 1059.
- ⁶ M. of Northampton, Petr., 1898, 35 S. L. R. 941.

- 7 E. of Galloway, Petr., 1902, 10 S. L. T. No. 312.
- ⁸ Ld. Salloum, Petr., 1887, 24 S. L. R. 352.
- ⁹ Ld. Queensberry, Petr., reported in note to Saltoun.
- 10 Balfour Melville v. Mylne, 1901, 3 F. 421 ("feu-duties and all other legal and annual burdens"); Paterson v. P., 1849, 11 D. 14:0 ("feu-duties and all other legal annual burdens").
 - 11 M'Donald v. Lockhart, 1836, 14 S. 785.



report and without argument or a contradictor, is res judicata in a subsequent case with reference to the same estate and under the same entail.¹

Effect of Restriction of Security.—If the wife be infeft, she may release part of the lands without diminishing the amount of her annuity, i.e. the rent of the released part will still be reckoned in applying the statutory limit.² But of course if this is to be done there ought in prudence to be words in the deed of restriction making the meaning very clear.

Relation of Statutory and Entail Powers.—The statute does not curtail wider powers if given under the deed of entail, but the same heir may not grant cumulative provisions under the entail and under the Act so as to exceed the statutory limits (s. 12).

Limit of Total Annuities under Act.—The third section of the Act provides that—

where two liferents to wives or husbands, granted under the powers hereinbefore contained, shall be subsisting at any one time . . . it shall not be competent to grant a third liferent to take effect till one of the former subsisting liferents shall cease or expire.

It is the coming into effect and not the power that is affected, so that though there are two annuities a third may be granted, but it cannot begin to run till one of the others drops.³ The remainder of the section is in the following terms:—

But the power of granting a liferent may be exercised so as to increase a former liferent or grant a new liferent to the extent hereinbefore authorised to be granted upon the ceasing or expiration of any former or subsisting liferent, although the same may not take place in the lifetime of the persons granting such prospective or increased liferent.

This is a material qualification of the rule of s. 1 to the effect that everything is to be determined as at the date of the granter's death. Thus A. grants an annuity to his wife B. of, say, £500 subject to the statutory restrictions. When he dies there is a subsisting annuity of £300 to C. The free rental after deducting C.'s annuity is £900. On A.'s death B. draws £300 per annum (one-third of £900). But on C.'s death, B.'s annuity expands to £400 by the addition of £100, being one-third of C.'s annuity, and this without any special provision to that effect in the deed creating the annuity.³ Further, it will be observed that the section does not apply if the former provisions are not under the statutory power, but under power in the deed of entail.⁴ Here, however, questions may arise under the clauses in the entail; and quære whether an annuity granted under both powers could be held to be an entail, and not a statutory, provision?

¹ Balfour Melville, supra.

Bunter Blair, supra.

³ Morison v. M., 1894, 21 R. 538.

⁴ Lockhart v. L., 1853, 15 D. 914.

The words of the section are, "where two liferents to wives or husbands...shall be subsisting...it shall not be competent to grant a third liferent." Assuming that there is one annuity to a wife and one to a husband, quære whether a third could take effect? It is thought not.

The annuity may be made payable in advance.1

Infeftment.—1. Granter.—The 1874 Act, s. 9, applies, and the result is that without infeftment or any title at all the husband may grant effectual provisions.²

2. Grantee.—As to the form of provision,

So far as I can see an heir of entail in possession might under the statute competently bind and oblige himself and the heirs succeeding to him in the entailed estate in payment of an annuity to the full amount permitted by the Act,³ without securing it by infeftment at all, or he might grant security for the annuity over a part only of the estates.⁴

Back-hand Rents.—No part of the annuity is chargeable against any rents falling to the executry estate of the granter of the annuity.⁵ The same holds as regards any annuity current at the death of an heir in possession, except that his estate must pay the proportion to the date of his death.⁵

A Fee-simple Estate.—If the husband possesses a fee-simple estate, it will be a natural arrangement that the widow's annuity should be secured over it. A power of restricting security, and accepting a substituted security, should be given. See p. 752.

EXTENT AND RANKING OF SECURITY

In connection with questions of security special reference has been made to the wife's annuity, but when the circumstances admit, the security should cover all other provisions, e.g. (1) mournings, (2) interim aliment, (3) sum in lieu of furniture, and (4) an indefinite provision of the liferent of a house, and any additional annuity in lieu thereof. Of course, in the case of an entailed estate that is impossible. As to ranking between widow and children, see p. 753.

PROVISIONS BY HUSBAND FOR CHILDREN AND ISSUE OF THE MARRIAGE

The Heir.—If there is a landed estate, special provisions will or may be required with reference to it, and to the right and interest of the heir of the marriage in it, and his consequent exclusion from the benefit of the other provisions in favour of children.

¹ Lamont Campbell v. Carter Campbell, 1895, 22 R. 260.

² M'Adam v. M'A., 1879, 6 R. 1256.

³ As to powers under the deed of entail,

something might turn on the special terms of the power.

⁴ Per Lord Adam in Hunter Blair, supra. See also Lord Rutherfurd Clark in M'Adam. ⁵ Maitland v. M., 1877, 4 R. 422.

Entailed Estate.—The Entail Amendment Act, 1848 (s. 8), made provision for securing the descent of an entailed estate upon the issue of a marriage. An obligation to that effect might be given by an heir in possession or an heir-apparent, "together or separately . . . in any marriage contract." The result was that it was not competent for the heir who gave the obligation to apply for or consent to disentail until a child was born of the marriage capable of taking the estate, and who, by himself or his guardians, should consent to the disentail, or until the marriage was dissolved without such child being born, or unless the trustees under the marriage contract consented. The section was, however, limited to old entails. The Entail Act, 1882 (s. 17), has a similar provision applicable to all entails, but limited to "marriage contracts entered into prior to the passing of the present Act." In the case of a new entail, therefore, it is clear that there is no statutory authority for an obligation of this nature in any marriage contract entered into after the 1882 Act, and it would appear that the same is now the case with old entails also; at least the contrary could not be relied on.1 still, in any case, if the intending husband is heir in possession of an entailed estate which, if not disentailed, will pass to the heir of the marriage, there appears no reason why, if he is willing, he should not come under an obligation not to defeat the right of the heir. the obligation is undertaken, its nature and effect, and also its exact terms, should be very carefully considered. Assuming the obligation to be effectual, it is obvious that a mere obligation not to apply for disentail will not meet the case of an application to charge general debt. If the intending husband is only an heir-apparent, the obligation, even if otherwise binding, will be liable to be defeated by his consent being dispensed with under sec. 13 of the 1882 Act at the instance of the heir in possession, if the latter has not been a party to the marriage contract. Of course the husband's powers to make provisions out of the estate for his children and issue not succeeding to the estate, whether born of that or any subsequent marriage, will be reserved entire.

Fee-simple Estate.—If the husband is proprietor of a fee-simple landed estate, special consideration will be given to the question whether, and to what effect, it is to be dealt with in the marriage contract as regards its descent upon the heir (or the children or some one or more of them) of the marriage. In the books there are many references to simple destinations to the husband and the heir of the marriage, etc. Under a destination of this kind the right of the heir cannot be gratuitously defeated.² But the destination not only gives the heir no preference, it does not even enable him to compete with ordinary personal creditors. How bad his position may be is seen in

¹ Campbell, Petr., 1902, 10 S. L. T. No.
2 Livingstone v. Waddell's Trs., 1899, 1
175.

M'Leod's case,1 where he was found liable, up to the value of the estate, for a sum of £16,000 which the father had in the contract of marriage bound himself to provide to the younger children of the marriage. The whole consequences of these destinations will be found set forth in Bell's Conveyancing, p. 871 et seq. On the whole it appears preferable either to make a proper settlement of the estate or none at all. A real settlement involves a trust, though the father may be the sole trustee, and indeed the trust may take the form of a fiduciary fee. But, in any case, it is implied that he is reduced to the position of a liferenter, though his powers may be made pretty wide. If he be the sole trustee by express trust or fiduciary fee, he will be saved from the trammels of ordinary trust administration. Under such a real settlement—carried out in any of these ways—the beneficiaries may be all or any of the children of the marriage, and the father may have the fullest power of apportionment and selection, under which, as head of the house, he will be able to make what may afterwards, in the light of full knowledge, appear to him to be the most fitting provision for the descent of the estate and the maintenance of the family.

Completion of Title.—If what has been above described as a real settlement of a landed estate be made, care will be taken to secure the right of the fiar by immediate infeftment in the fee in appropriate terms. The point is, to divest the father of the absolute and beneficial fee vested in him on his prior title. If there be a conveyance to trustees for purposes declared, whether the father is the sole trustee or not, infeftment must be taken under the conveyance in favour of the trustee or trustees. If, again, there be a conveyance to the father himself in liferent for his liferent use only, and to the child or children of the marriage in fee, infeftment will be taken on a warrant "on behalf of A. B. [the father] for himself in liferent for his liferent use allenarly and for behoof of the heir (or children) of the marriage in fee"; and if powers of apportionment, etc., are reserved to the father, it will be proper to add, "but always with and under the powers of apportionment and otherwise reserved to the said A. B. as within mentioned."

PROVISIONS BY THE FATHER FOR THE YOUNGER (OR WHOLE) CHILDREN OF THE MARRIAGE

Entailed Estate.—General and Special Powers.—As to the relation between powers under the entail and under the Acts, see p. 754.

Who may grant Provisions.—See p. 755. The powers are available to (1) the institute in possession, (2) the heir in possession, and (3) the heir-apparent (but not an heiress-apparent) acting with consent of the heir in possession.

Beneficiaries.—"Younger children" means children not succeeding

1 Leslie v. M'Leod, 1870, 8 M. (H. L.) 99.

to the entailed estate unless the contrary appear.\footnote{1} As regards powers under the deed of entail, the terms of the deed will of course regulate the children for whom provision may be made, and the conditions of their taking. Under the Aberdeen Act (s. 4) the beneficiaries are the granter's child or children who shall not succeed to the estate, and who shall be alive or in utero at the time of the granter's death, but including (s. 5) any predeceasing child whose share may have been settled in his or her marriage contract with consent of the granter of the provisions. Further, under the Entail Acts of 1875 \(^2\) (old entails) and 1878 \(^3\) (new entails), the issue of a predeceasing child take their parent's share if they survive the granter, and the heir in possession may grant provisions to the issue of a deceased child, whether heir-apparent or not, always excluding the heir succeeding. In all cases the granter has a power of apportionment, but this should be expressly reserved.

Extent of Provisions.—The total amount of the provisions under the Entail Acts is according to the following scale, namely, one year's free rent for one child, two years' free rent for two children, and three years' free rent for three or more children. This does not mean that a granter having three children eligible to share may not grant the whole three years' rents to one of them.⁴ The rental is that of the year of the granter's death. To ascertain the free rent, deduction is made of

public burdens, liferent provisions, including those to wives or husbands authorised to be granted by this Act, the yearly interest of debts and provisions, and the yearly amount of other burdens of what nature soever.

If there are prior subsisting provisions not charged on the fee, these, so far as unpaid at the death of the granter of the new provisions, will fall to be taken off the principal of the new provisions (s. 6). Thus: A. grants three years' rents to his children, and dies; thereafter B. makes a similar provision, and dies; three years' rents are £1000; at B.'s death £500 of A.'s provision is still unpaid and has not been charged on the fee: B.'s provision is restricted to £500. But if the prior provision has been charged on the fee, it is then regarded as an ordinary debt, and the interest only is deducted in fixing the free rental.⁵

Interest.—(1) Statutory Provisions.—Under sec. 4 of the Aberdeen Act, where the power to grant the provision is given, the words are added, "bearing interest after the granter's death"; but by sec. 9 it is provided that "after the expiration of one year from the death of the granter" payment may be required "with the legal interest thereof from the term at which the right of such succeeding heir to the rents of the estate did commence." It may be suggested that no interest should run till the heir's right to the rents commences, which may be a

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1 Chancellor's Trs., 1896, 34 S. L. R. 4 Paterson
157. 5 Brodie v
2 38 & 39 Vict. c. 61, s. 10. 6 See Hun
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^{* 41 &}amp; 42 Vict. c. 28, s. 3.

⁴ Paterson v. P., 1888, 15 R. 1060. ⁵ Brodie v. B., 1867, 6 M. 92.

⁶ See Hunter Blair v. H, B., 1899, 1 F. 437.

considerable period after his predecessor's death, especially if the rents are back-handed, as to some extent they are almost sure to be. But it cannot be said that that view receives any support from *Hunter Blair's* case. As to the rate of interest, there is no obligation on the Court to allow five per cent.

(2) Provisions under the Deed of Entail.—The terms of the entail will be the rule, but so far as it is silent or indefinite, there will always be room for contending (a) that the statutory analogy should apply as regards date of payment and date of commencement of interest running, and (b) that the granter of the provision has no power to fix the rate beyond the control of the Court.

Fee-simple Estate.—If the husband be possessed of a fee-simple estate, (1) he may settle the estate on the children of the marriage by the intervention of a trust, as referred to on p. 760; or (2) he may bind himself to provide to the children a certain sum secured on the estate, reserving power of apportionment; or (3) he may settle the estate on the heir, under burden of provisions for the younger children of the marriage.

Other Forms of Provisions for Children.—If the husband assign a policy of life assurance or funds or securities, the capital thereof, subject to the widow's rights (as to the extent of which, see p. 753), will be provided to the children or the younger children, as the case may be, with ample reserved powers to the father. In this connection reference may be made to the case of Henderson, in which the husband bound himself to pay £3000 to the children after his death, and "for more effectually securing" the obligation, assigned to trustees his share of his father's estate "in order that" they might invest the money, pay him the income, after his death pay the £3000, residue if any "after these purposes are provided for," to be paid to him or his representatives. Held that the trustees were entitled and bound to recover the whole security money without limitation to the £3000. This suggests that, according to intention, either (1) the assignation should be "in security of the foregoing obligation and quoad ultra by way of additional provision," and that proper trust purposes should be declared of the whole assigned fund, or (2) that a reasonable limit of cover should be fixed, beyond which the trustees should not be entitled to retain the funds against the settler.

PROVISIONS BY WIFE

Entailed Estate.—What has been stated above with reference to provisions by the husband out of and regarding the entailed estate applies also to the case of the wife with two exceptions, viz :—

1. The annuity to the surviving husband may be one-half (instead of one-third) of the free rental, but so long as a prior annuity (whether

1 Henderson's Trs. v. H., 1900, 3 F. 17.

to wife or husband) is in force the new annuity to a husband is not to exceed one-third.¹ On the dropping of the prior annuity it appears to result from the combined operation of ss. 2 and 3 of the Act, and Morison's case ² that (1) the annuity will expand from one-third to one-half of the rental as at the granter's death, and (2) the prior annuity will not then be deducted. Thus, subsisting annuity, £100; rental deducting that annuity, £300; new annuity starts at £100, but when the prior £100 annuity drops it appears that the new annuity will expand to £200.

2. An heiress-apparent is not entitled to grant provisions even with consent of the heir in possession.

Fee Simple Estate.—The observations in the husband's case (p. 759) apply. But if it should happen that both spouses have estates, or if there be any other estate standing upon a destination which will or may bring it to some child of the marriage, it may be wished to introduce a clause to secure that the two properties shall not fall to the same heir. A perusal of the case of Livingstone 3 suggests that in connection with these clauses attention should be given to the exact effect in the event of the destination of the other estate being altered. Thus does a destination to the heirs-male of the marriage, other than the heir-male succeeding to a certain other estate, exclude the heir of the marriage who is contemplated under the destination of the other estate, or only any heir who does in fact actually succeed to the other estate? In Livingstone the former view prevailed.

General Conveyance.—The most usual form of settlement by the wife is a general conveyance of all her means and estate, including acquirenda, to trustees. As to the extent of the conveyance several points require to be noted.

1. Acquirenda ought to be expressly limited to estate vesting during the subsistence of the marriage; but that is implied.⁴ The test is vesting, not payment ⁵; and a policy on the husband's life payable on his death to the wife if surviving does not pass.⁶ Nor is the rule altered by the accident that owing to e.g. the debtor's bankruptcy a claim competent to the wife, but which according to its constitution was not to vest during the marriage, has to be valued as a contingency, with the result of the wife drawing a dividend during the marriage; the dividend does not pass to the trustees.

Of course there is nothing to prevent a spes succession is being included in the conveyance, and if that intention appear the fund will pass under the trust if it subsequently vest in the settler, even though that should

⁶ Coulson's Trs. v. C., 1901, 3 F. 1041.



¹ Aberdeen Act, s. 2. ² 1894, 21 R. 538.

³ Livingstone v. Waddell's Trs., 1899, 1 F.

⁴ Wardlaw v. Wardlaw's Trs., 1880, 7 R. 1066.

⁵ Wyllie's Trs. v. Boyd, 1891, 18 R. 1121; Grant's Trs. v. Ritchie's Ecor., 1886, 13 R.

be after the dissolution of the marriage.¹ A right vested subject to defeasance will pass though the certainty that defeasance is not to operate does not appear till after the dissolution of the marriage.²

- 2. The conveyance if in common terms is in legal effect limited to capital sums and does not include liferents or annuities.³ The rule is apparently the same when the general conveyance is to the husband.⁴ Though the wife should by realisation or otherwise come into possession of a capital sum as a surrogatum for the life interest (as a tercer on the sale of the property), that lump sum will still be hers unaffected by the trust; and if in fact for administrative purposes the life interest have been vested in trustees upon trust to let the wife have the full benefit of it, they will be bound to apply and exhaust the surrogated lump sum for her benefit instead of paying her only the interest of it.⁵
 - 3. The wife's paraphernalia should of course be excepted.
- 4. It is very common to except sums under (or not exceeding—which may be an important difference) a specified amount, say £100, which may come to the wife from one source and at one time. This is to enable her to receive for her personal use, free from the trust, small gifts or legacies which may fairly be supposed to have been so intended.
- 5. This last point leads up to the matter of larger legacies or successions falling to the wife which it is not intended should fall under the trust. The law is clear that no matter how express the testator's directions may be, still the wife's general conveyance must receive effect, and the marriage trustees will be bound to claim the money.6 In most cases, no doubt, this is much the better course for the wife; but if it be wished to leave it possible for successions and bequests to be taken and retained by the wife personally without regard to amount if the testator shall have expressed an intention to that effect, that purpose would be achieved by excepting from the wife's general conveyance all property to which she may acquire right under testamentary instruments provided the testator has expressly declared an intention that the same shall not fall under the marriage trust. That is the only general mode of achieving the purpose a priori. But there is an alternative method. Thus, A. under marriage contract assigned to trustees acquirenda which "shall at one time amount to or be equal in value to £100"; thereafter her sister made a will by which she directed her trustees to pay to A. one-half of her estate "in sums not exceeding £95 at any one time at intervals of one month," there was a declaration that the purpose was to prevent the money falling under the marriage trust, and the vesting of each monthly instalment was made dependent on A. surviving the respective terms of

¹ Wyllie, supra.

² Grant, supra.

³ Neilson's Trs. v. Henderson, 1897, 24

⁴ Ramsay's Trs. v. R., 1899, 1 F. 495. ⁵ Bonner's Trs. v. B., 1898, 6 S. L. T. No.

⁶ Simson's Trs. v. Brown, 1890, 17 R. 581.

payment. Held that the half (about £500) of the sister's estate did not go to the marriage trustees.¹ Apparently the determining element was the suspension of vesting.

- 6. It is not uncommon to except the provisions in favour of the wife made by the husband in the marriage contract. If, as is probably the case, these provisions do not arise until after the dissolution of the marriage, they could not in any case fall under the settlement by the wife, that being limited to acquirenda during the subsistence of the marriage. Besides, the main provision will probably be an annuity, and if it be expressly excepted, it at least gives support to an argument that other annuities and liferents, if any, are included, which is not the law, and is no doubt not intended.
- 7. As to the relation of a general conveyance of acquirenda to property acquired by the wife in the form of investment of savings from her income, see the cases noted,² in which it was quite recognised that these savings, and the investments representing them, would not fall under the settlement, but, on the other hand, that the onus of proving the origin of the property in question was on the wife, and in Young the proof failed. This emphasises the importance of preserving evidence of the source of the property if it is to be held as outside the settlement. Of course the same law will apply to all re-investments and increments of the property, and also to all profits in that or any other way which the wife may make by dealing with other excepted property, e.g. limited legacies or successions which by the terms of the settlement are not to pass to the trustees; and here again it will be necessary to record the history of the funds.

See the rule applied in a case where a wife, having by marriage contract conveyed acquirenda to her husband, insured her life to enable her husband to raise a loan; the premiums were paid out of separate means belonging to her; on her death survived by her husband, held that the policy was not conveyed to the husband, and further that he was bound to free it of the loan.³

8. A conveyance of acquirenda by the wife to the husband obviously does not prevent the husband making a present to his wife which will receive effect in favour of herself and her representatives notwithstanding the general conveyance, but subject to the husband's right to revoke during his lifetime.⁴

Different Kinds of General Conveyance.—For practical purposes it is important to distinguish three, viz.:—

1. Acquisita et acquirenda.—As already stated this is limited to what is vested at or vests during marriage, but with this limitation,

¹ Campbell's Trs., 1899, 1 F. 999.

² Young's Trs. v. Young's Trs., 1892, 20

³ Ramsay's Trs. v. R., 1899, 1 F. 495.

⁴ Thomson's Trs. v. T., 1879, 6 R.

R. 22; Dunbar's Trs. v. Dunbar, 1902, 5

F. 191.

and assuming that a trust is constituted, it entitles the trustees to enter upon the possession and control of all the estate which the settler possesses at the date of the marriage and of all subsequent acquisitions as successively acquired. This is common enough, and not objectionable, in the case of the wife. But it is wholly unsuited to the case of the husband.

- 2. Acquisita et acquirenda, but the latter only as at the dissolution of the marriage, e.g. "all means and estate at present belonging to the said B. or which shall belong to her at the dissolution of the marriage," or it may be at her death. This gives over control of the present estate but leaves future acquisitions under the control of the settler by intervivos act during the marriage or her life.
- 3. Acquisita et acquirenda, but both only as at the dissolution of the marriage, or more commonly as at the settler's death, e.g. "all means and estate present or future which shall belong to the said B. at her death." This leaves the estate at the absolute disposal of the settler by inter vivos deed, even gratuitous.\(^1\) But it is to be noted regarding the last two cases that if the settler be the wife, then so long as the husband lives, and subject to well-known exceptions, the wife cannot alienate without his consent if the right of administration be not renounced.

Trust Purposes.—The purposes of the wife's trust will probably be-

- 1. Liferent to herself. This may be made alimentary during marriage.² It ought to be declared alimentary for the whole period. But it appears, and it is consistent with principle to hold, that the effect of the protective clauses disappears on the dissolution of the marriage. Possibly they might be enforced if there were young children of the marriage left dependent on the widow.³ As to the protection enjoyed by the wife during marriage even without an alimentary clause, see p. 424.
- 2. An alimentary liferent to the husband if he should survive, and so long as he does not re-marry.
- 3. The fee to the children or remoter issue of the marriage. The suggestions made on p. 810 et seq. as to vesting, powers of apportionment and restriction, application of revenue, and advance of capital, all apply here, except that the powers of apportionment and restriction will in the first instance be vested in the wife, or in her and the husband jointly.

PROVISIONS BY THIRD PARTIES

These provisions, if any, are usually constituted by the wife's father. They may take the form of:—

³ M. P. Moncreif (Murray's Trust), per Lord Kincairney, 1900, 8 S. L. T. No. 228.



¹ Hagart's Trs. v. H., 1895, 22 R. 625. ² Reliance, etc., Ass. Coy. v. Halkett's Factor, 1891, 18 R. 615, at p. 622; Williamson v. Boothby, 1890, 17 R, 927.

- 1. A disposition of a landed estate to himself in liferent only, and thereafter to the wife (or to the spouses jointly and the survivor) in liferent only and to the heir (or children) of the marriage in fee, with or without (a) clauses burdening the fee with provisions to the younger children if the fee is destined to the heir, and (b) clauses enabling the wife or the spouses and the survivor to alter and regulate the descent of the estate, provided it be kept within the descendants of the marriage.
- 2. An obligation to pay an income of a stated amount to the wife during the joint lives of himself (the granter) and her. This should be through the medium of a trust, and declared alimentary.
- 3. An obligation to leave to the wife an equal share of his estate along with her brothers and sisters. These equality clauses are difficult in many ways. (a) Does it mean as much as the most favoured brother or sister, or simply a fractional share corresponding to the total number, i.e. one-sixth if there are six children? and if so, when is the number to be ascertained? and (b) in working it out is regard to be had to sums given to other members of the family during the obligant's life?
- 4. An obligation to pay to the marriage trustees at the granter's death a stated sum, to be held upon the trusts declared in the marriage contract regarding the trust estate conveyed by the wife. A detail of some importance is the matter of Government duty. As the law stands at present, the marriage trustees will take the fund free from estate duty, which the father's general estate will have to pay, but they (the trustees) will have to pay the settlement estate duty of 1 per cent. There may of course be changes in the law, and in any case it is suggested whether in the obligation it might not be well to provide expressly as to the incidence of the Government duty.

TRUSTEES' POWERS AND IMMUNITIES

On these important matters general reference is made to what is contained on pp. 816-818 when treating of Wills. But there is this great difference, that in the case of a marriage contract the settler is, for so long at least, in life after the constitution of the trust, and the other spouse perhaps for longer. It is therefore natural that many of the important powers should be exercisable only with consent of the settler, or of both spouses, or of the surviving spouse. Care will be taken to see that, by the introduction of general words at the commencement of the clauses dealing with the powers and immunities, these are applicable to both trusts, when there are separate trusts constituted by husband and wife respectively. As to appointment of new trustees, see p. 860.

GENERAL CLAUSES

Legal Rights.—All legal rights will be discharged. There is no difficulty as regards the spouses, but in the case of the children three points should be kept in view. These are—

- 1. Legitim will be discharged as regards the estates of both spouses.
- 2. The discharge of legitim should under no circumstances be limited to the younger children; it must apply to all the children. The result of a mistake on this point is that the heir is the only child entitled to legitim, and he accordingly draws the whole legitim fund. The mistake may be made not only by expressly referring to "younger children" only in the clause of discharge, but if the only provisions in the marriage contract are in favour of younger children (the heir being provided for separately, as by the destination of an entailed estate), and if the clause runs "which provisions herein contained are declared in full of legitim," etc. (even though it say, "in favour of the children of the marriage"), the discharge will be construed as only co-extensive with the provisions, and thus the heir's legitim is not discharged.
- 3. It appears not clear that a discharge of legitim in the parent's antenuptial contract is effectual if no provision be made for the child. This suggests for consideration whether it is enough to give (1) a provision with a clause of vesting so expressed that not only may any particular child never take anything, but that no child may ever take anything; or (2) a provision to the class with a power of apportionment under which any particular child may be wholly excluded.

Regulating Law.—It may sometimes be found useful to insert an express clause declaring that the contract shall be construed, and that the rights of the parties and of the children and issue of the marriage shall be regulated, by the law of Scotland, e.g. if the wife is not a Scotswoman. In the case noted a somewhat surprising latitude appears to have been given to the intention of the parties in this respect. But as to the capacity of the parties, see p. 750.

Date of Execution.—It goes without saying that the proper course is, that all parties should sign not later than the day before the marriage. If any of the signatures are adhibited on the day of, but before, the marriage, the testing clause may make this express. As to whether a contract intended to have been signed before, but in fact signed after, the ceremony, though on the same day, can be treated as antenuptial, see opinions both ways in the case cited.⁴

Conditio si testator.—The spouses ought to be informed that any

² See Bell v. B., 1897, 25 R. 310, L. O., ⁴ Cooper v. C., 1888, 15 R. (H. L.) to effect that there must be some provision. 21.

Lord M'Laren apparently contra.

wills they may have already made may be assumed to be revoked as the result of the marriage.

VERY SHORT FORM OF MARRIAGE CONTRACT ON BASIS OF SEC. 2 OF THE MARRIED WOMEN'S POLICIES OF ASSUR-ANCE (SCOTLAND) ACT, 1880

It is matrimonially contracted between A. and B. as follows: That is to say, the parties, having conceived a mutual attachment, hereby accept of each other as lawful spouses, and promise to solemnise their marriage with all convenient speed:—

OBLIGATION TO MAINTAIN POLICY

In contemplation of which marriage the said A. binds himself within one month after 1 the marriage to effect a policy of assurance on his life with the X. Insurance Company for the sum of £, which policy shall be expressed upon the face of it to be for the benefit of the said B. as his wife and the children and issue of the marriage, for such rights and interests and in such proportions and under such restrictions as he may appoint, and he binds himself to pay the premiums and extra premiums, if any, thereon during the whole period of his life:

DESTINATION OF POLICY MONEYS

And with reference to the destination of the proceeds of the said policy, it is declared and agreed as follows: (first) If the said B. shall survive the said A., and if there shall be no child or issue of the marriage then in life, the whole shall belong to the said B.; (second) if the said B. shall predecease the said A. the whole shall belong to the child, children, and issue of the marriage who survive him, and that in such shares and under such restrictions, including power to restrict any child to a liferent, carrying over the fee to his or her issue or not, all as the said A. shall think right, but which powers shall be exercisable only by will revocable at pleasure, and failing appointment in whole or in part, then equally per stirpes, the issue of predeceasers taking their parent's shares, original and accresced; (third) if the said A. shall be survived both by the said B. and by a child, children, or issue of the marriage. there shall belong to the said B. at least £ , and such further share. if any, as the said A. shall appoint to her by will revocable at pleasure, not exceeding in all £ , and the balance shall descend as in the immediately preceding purpose or direction; and (fourth) if the said A. shall be survived neither by the said B. nor by any child or issue of the marriage. the policy shall belong to him absolutely:

DISCHARGE OF WIDOW'S LEGAL RIGHTS

Which provisions in her favour the said B. accepts in lieu and full satisfaction of terce, jus relictæ, aliment, mournings, and any other right or claim com-

¹ The policy should not be actually signed until after the date of the marriage, for otherwise it may be held not to be within

the Act as not being effected by a "married man"; Coulson's Trs. v. Coulson 1901, 3 F. 1041.

petent to her on the death of the said A., all which rights and claims are hereby discharged:

DISCHARGE OF LEGITIM

And which provisions in favour of the children of the marriage are hereby declared to be in lieu and full satisfaction of legitim and any other right or claim competent to them on the death of the said A. (or on the death of either or both of the spouses), all which rights and claims are hereby discharged.—In witness whereof.

A SHORT FORM OF MARRIAGE CONTRACT WITHOUT A TRUST

It is matrimonially contracted between A. and B. as follows: That is to say:

ACCEPTANCE

The parties, having conceived a mutual attachment, hereby accept of each other as lawful spouses, and promise to solemnise their marriage with all convenient speed:

ANNUITY TO WIDOW

In contemplation of which marriage the said A., in the first place, binds himself, and his heirs, executors, and representatives, without the benefit of discussion, to pay to the said B., in the event of her surviving him, an annuity or yearly sum of \pounds for the remainder of her life after his death, so long as she remains unmarried, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the first of these terms after his death for the half-year succeeding, and so forth half-yearly thereafter in advance, with a fifth part more of liquidate penalty in case of failure, and with interest at the rate of five per cent. per annum on each term's payment during non-payment:

FORFEITURE ON RE-MARRIAGE

But declaring that in the event of the said B. entering into a second marriage, the said annuity shall absolutely cease with the payment at the term preceding such second marriage:

ALIMENTARY

And further declaring that the said annuity shall be purely alimentary, and shall not be capable of anticipation by the said B., nor subject to her debts or deeds, nor liable to the diligence of her creditors, and the said A. and his foresaids shall be entitled to implement this provision through the intervention of a trust:

INTERIM ALIMENT AND MOURNINGS

In the second place, the said A. binds himself and his foresaids to pay to the said B. forthwith after his death the sum of \pounds , for aliment of herself and the children of the marriage until the first term of Whitsunday or Martinmas after his death, and for mournings for herself and children:

FURNITURE, ETC., ABSOLUTELY

And in the third place, the said A. dispones to the said B. in the event of her surviving him, as her absolute property, the whole household furniture, furnishings, and plenishing, linen, plate, china, pictures, books, wines, liquors, and provisions that may be belonging to him and in his house at his death:

LIFERENT OF WIFE'S ESTATE TO SURVIVING HUSBAND

For which causes, and on the other part, the said B. binds herself, and her heirs, executors, and representatives whomsoever, without the benefit of discussion, to secure to the said A. in the event of his surviving her, but so long only as he does not re-marry, the liferent of the whole estate, heritable and moveable, real and personal, which may belong to her at her death, including all estate which may then be held by her under special destinations, and all estate of which she may then have power of disposal to the effect foresaid:

FORFEITURE ON RE-MARRIAGE

But declaring that in the event of the said A. entering into a second marriage, the said liferent shall absolutely cease as at the date of such second marriage:

ALIMENTARY

And further declaring that the said liferent shall be purely alimentary, and shall not be capable of anticipation by the said A., nor subject to his debts or deeds, nor liable to the diligence of his creditors, and the said B. and her foresaids shall be entitled to implement this provision of liferent through the intervention of a trust, with such powers of realisation, investment, and otherwise, and such immunities, as to her or them shall seem proper:

DISCHARGE OF LEGAL RIGHTS

Which provisions hereinbefore contained the said A. and B. accept in lieu and in full satisfaction of all terce, jus relictæ, courtesy, jus relicti, and any other right or claim competent to either of them on the death of the other, all which rights and claims are hereby discharged:

PROVISIONS FOR CHILDREN

Further, the said A. and B. do each hereby bind themselves and their foresaids to pay to such of the children (but not remoter issue) of the marriage as shall survive them respectively the sum of £50 each, that is to say, £50 from the estate of the said A. to each child who shall survive him, and the like sum from the estate of the said B. to each child who shall survive her, and that within one year after the death of the survivor of the spouses [insert discharge of legitim from both estates as on p. 770]:

REGISTRATION

And the parties consent to registration for preservation and execution.—In witness whereof.

ANOTHER FORM WITHOUT A TRUST, INCLUDING PROVISIONS FOR CHILDREN VESTING AT THE FATHER'S DEATH, SUBJECT TO POWERS

[As on p. 770, to end of acceptance clause.]

OBLIGATION TO SUBSCRIBE TO ANNUITY FUND

In contemplation of which marriage the said A., in the first place, binds himself regularly and punctually to pay the subscription to the widow's fund of the X. Society, and generally to observe all the requirements necessary to entitle the said B., in the event of her surviving him, to an annuity during her lifetime after his death, the present annual amount of such annuities being \mathcal{L} :

TO KEEP UP POLICY FOR WIFE

In the second place, Whereas the said A. has effected a policy of assurance on his life with the Y. Insurance Company for the sum of £ the said B. absolutely if she should survive him, but if not, then to himself as trustee for behoof of the children and issue of the said marriage, which policy and dated , the said A. herewith delivers is numbered the said policy to the said B. for her interest as aforesaid, and he binds himself to pay the premiums and extra premiums, if any, thereon during the whole period of his life, and to produce receipts therefor to her fourteen days before the expiry of the days of grace, with power to the said B. to advance the subscriptions to the said widows' fund, and the premiums or extra premiums on the said policy, and to pay any fines or other sums required for reinstatement in either case in the event of any failure on the part of the said A. in punctual implement of the foregoing obligations, all which advances the said A, binds himself to repay on demand, with interest at the rate of five per centum per annum from the respective dates of advance till repaid:

FURNITURE TO WIDOW

In the third place [as on p. 771]:

Provision for Children

And in the fourth place, the said A. binds himself, and his heirs, executors, and representatives whomsoever, without the benefit of discussion, to provide the following sums for behoof of the child, children, and issue of the marriage, subject as after mentioned, namely, if only one child survives him or leaves issue who survive him, the sum of £1000; if two children survive him or leave issue who survive him, £2000; and if three or more children survive him or leave issue who survive him, £3000, with interest at the rate of five per cent. per annum from the date of his death till paid to the children or issue, or received by trustees for them: And in order to secure these sums the said A. binds himself, during his lifetime and at latest within twenty years from the date of these presents, to vest in trustees for that purpose either cash or a life policy or life policies on his life with an insurance company of good standing for the largest sum which according to the circumstances

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then existing may become payable under the foregoing obligation, and in the event of circumstances subsequently changing so that a larger sum may become payable, then to increase the provision of cash or life assurance to such larger sum, and so from time to time, and this obligation to furnish security may be implemented partly in cash and partly by life assurance: And as regards all such policies, the said A. binds himself to keep them in force as before undertaken with reference to the policy hereinbefore referred to, with like powers of advance by the children or issue of the marriage as are hereinbefore contained with reference to the said B.: And all income accruing on such security during the life of the said A. shall be paid to him provided all his obligations hereunder have been duly fulfilled, failing which the same shall be applied towards implement thereof, with a preference to his obligations under this purpose: And with reference to the said existing policy in this connection, it is declared that the sum, if any, which may fall to the children thereunder shall be taken as pro tanto in implement of the foregoing obligations; but so long as the said B. lives, the existence of the said policy shall not be any ground for abatement in the sums for which the said A. is to provide security as aforesaid:

RESERVED POWERS TO FATHER 1

Reserving to the said A. power to apportion the said sum if there should be more than one child or issue entitled to participate therein, and in any case to postpone the period of vesting, and to impose such restrictions as he shall think fit, including power to restrict any child or issue to an alimentary liferent with or without a fee to his or her issue, and with or without a power of testamentary disposal by will revocable at pleasure, and for all or any of these purposes to interpose a trust, with such directions and discretions in any case as to expenditure of income and advance of capital as to him shall seem proper, all which powers shall, in the case of the said A., be exercisable only by will revocable at pleasure, but the powers shall be so exercised that some one or more of the children or issue of the marriage surviving him shall ultimately acquire a vested right in or testamentary power over the said respective sums of £1000, £2000, or £3000, according to the events foresaid, and the income thereof after the death of the said A.:

DESTINATION FAILING EXERCISE OF RESERVED POWERS

And failing the exercise of the said reserved powers, or so far as any exercise thereof may not extend, the said fund shall be payable in equal shares to the children who survive the said A. jointly with the issue surviving him of any child who may predecease him, such issue taking (equally between or among them per stirpes, if more than one) the share, original and accresced, which his, her, or their parent would have taken if he or she had survived:

HOTCHPOT CLAUSE

But if any beneficiary shall take any share under a partial appointment, neither such beneficiary nor his or her issue shall be entitled to participate in any unappointed balance, except on condition of bringing the appointed share

¹ Fuller clauses, p. 785.

into accounting and allowing for the same accordingly, unless it shall be otherwise directed.1

RESIDUARY PURPOSE

Declaring, with reference to any sum which may have been vested in trustees as aforesaid in excess of the sum required to meet the foregoing provisions of £1000, £2000, or £3000, or the whole thereof, should no part of such provision become payable, the same shall be applied as a security for and in implement of the several provisions hereinbefore contained in favour of the said B., and, subject thereto, shall be paid to the said A., his executors or assignees:

Wife's Estate to Surviving Husband in Liferent and Children in Fee For which causes, and on the other part, the said B. binds herself, and her heirs, executors, and representatives whomsoever, without the benefit of discussion, to secure to the said A., in the event of his surviving her, in liferent, but only so long as he does not re-marry, and to the child, children, or issue of the marriage surviving both spouses in fee, subject as after mentioned, the whole means and estate, heritable and moveable, real and personal, which may belong to her at her death, including all estate which may then be held by her under special destinations, and all estate of which she may then have power of disposal to the effect foresaid, declaring that in the event of the said A. entering into a second marriage the said liferent shall absolutely cease as at the date of such second marriage, and the said liferent shall be purely alimentary [as on p. 771, to "his creditors"]:

POWERS RESERVED TO WIFE

Reserving to the said B. the like powers as are hereinbefore reserved by the said A., to be exercised by her only by will revocable at pleasure; and further, the said liferent in favour of the said A. may also be provided through the medium of a trust, with such powers of realisation, investment, and otherwise, and with such immunities, as to the said B. shall seem proper:

AND, FAILING HER, CONFERRED ON HUSBAND

And failing the exercise of the said powers by the said B. or provision by her for the exercise thereof, or subject to any partial exercise thereof by her or under delegation from her, the said A., if he survive her, may exercise the like powers, including power of delegation, with reference to her estate, but only by will revocable at pleasure:

FAILING APPOINTMENT

And the other clauses above written with reference to the distribution among the children and issue of the marriage of the fund undertaken to be provided by the said A. shall apply also to the estate of the said B., with this exception, that the beneficiaries shall survive both spouses instead of surviving only the said A:

¹ See p. 853.

DISCHARGE OF SPOUSES' LEGAL RIGHTS

[As on p. 771.]

DISCHARGE OF LEGITIM

And which provisions in favour of the children of the marriage are hereby declared to be in lieu and full satisfaction of legitim and every other right or claim competent to them on the death of either and both of the spouses.

[Consent to registration and testing clause.]

FULL FORM WITH TWO TRUSTS

Short forms having been given, the following full form is inserted to shew various clauses; a selection can easily be made, e.g. if the only trust is constituted by the wife:—

It is matrimonially contracted between the parties following, namely, A. on the one part and B. on the other part, in manner following: That is to say:

ACCEPTANCE

The said A. and B., having conceived a mutual attachment, have accepted and do hereby accept of each other as lawful spouses, and promise to solemnise their marriage with all convenient speed:

ALIMENTARY ANNUITY TO WIDOW

In contemplation of which marriage the said A., in the event of the said B. surviving him, binds himself, and his heirs, executors, and representatives whomsoever, all jointly and severally, without the benefit of discussion, to pay during her life after his death, and for her behoof as after mentioned, to the trustees acting in the trust hereinafter created by him, a free life-rent annuity or yearly sum of £ (subject to restriction in the event after mentioned), payable half-yearly at Whitsunday and Martinmas by equal portions in advance, beginning the first term's payment at the first of these terms which shall happen after the death of the said A. for the half-year next to come, with interest at the rate of five per cent. per annum on each term's payment from and after the term of payment till paid, and with one-fifth part more of each term's payment in name of liquidate damages, expenses, and penalty in case of and for each failure in the punctual payment:

RESTRICTION ON RE-MARRIAGE

But declaring that in the event of the said B. entering into a second marriage the said annuity shall be reduced to a free liferent annuity or yearly sum of as at and from the first term of Whitsunday or Martinmas after such second marriage, and thereafter during the lifetime of the said B., payable in advance at the terms and with interest, damages, expenses, and penalty as aforesaid:

ALIMENTARY PROTECTION

Which annuity and restricted annuity shall be strictly for the alimentary support of the said B., not capable of being anticipated by her, nor subject to

her debts or deeds, nor liable to the diligence of her creditors; and the said annuity and restricted annuity may be paid by the said trustees to the said B. or applied by them for her behoof, or partly in the one way and partly in the other, as the said trustees may from time to time in their sole discretion think fit; and further, the said restricted annuity shall be exclusive of the jus mariti, right of administration, and all other right and power of any husband the said B. may marry:

MOURNINGS AND INTERIM ALIMENT

And further, the said A., in the event of the said B. surviving him, binds himself and his foresaids, all jointly and severally as aforesaid, to pay to the said trustees, and that immediately after his death (first) the sum of £ for mournings for the said B. and her family and household, and (second) a further sum corresponding to an annuity of £ for the period from his death until the first term of Whitsunday or Martinmas thereafter for aliment of the said B. and her family and household during that period, which sums of £ and £ may be paid by the said trustees to the said B., or applied by them for the purposes foresaid, or partly in the one way and partly in the other, as the said trustees may in their uncontrolled discretion think fit:

ABSOLUTE PROVISION OF FURNITURE, ETC.

And further, the said A., in the event of the said B. surviving him, hereby assigns and conveys to her as her absolute property the whole household furniture, furnishings and plenishing, linen, plate, china, pictures, books, wines, liquors, and provisions that may be belonging to him and in his house at his death:

MAINTENANCE OF CHILDREN

And further, the said A. binds himself and his foresaids, all jointly and severally as aforesaid, to maintain, upbring, educate, and support the child or children of the marriage in a manner suitable to their station in life until the sons attain majority and the daughters attain majority or be married:

RENUNCIATION OF JUS MARITI, ETC.

Moreover, the said A. renounces and discharges his jus mariti and right of administration in, of, and in relation to the whole estate and effects now owing and belonging, or which may hereafter be owing and belonging, to the said B., and agrees that the said estate and effects shall be and remain separate estate in her person, or in the person of such trustees or other persons as she may appoint to hold the same:

Assignation of Insurance Policy to Trustees

And further, the said A. hereby assigns to , [A] and the acceptors or acceptor, survivors and survivor of them, as trustees and trustee, and such other persons as may be assumed into the trust hereby created (Declaring that power of assumption is conferred on assumed as well as on the original trustees, that a majority of those trustees who may be resident in Great Britain for the time, or the only trustee resident in Great Britain, shall be a

quorum, and that the trustees acting for the time are hereinafter referred to as "the trustees") [B], the policy of assurance granted by the X. Insurance Company for the sum of \pounds in his favour on his own life, numbered and dated , on which there is a premium of \pounds

payable on the day of in each year, Together with the said sum contained in the said policy of assurance and all bonus additions [which have accrued and] which may accrue thereon, and his whole right, title, and interest, present and future, in and to the said policy of assurance, and in or to any claim, bonus, advantage, and benefit which may arise thereby in any manner of way:

OBLIGATIONS FOR MAINTENANCE OF POLICY

And the said A. binds himself and his foresaids, all jointly and severally as aforesaid, to fulfil all the conditions necessary for the upkeep of the said policy, and also any policy or policies (hereinafter referred to as "the substituted policies") which may be substituted in place thereof, and to keep the said policy and the substituted policies in force, and for that purpose to make timely payment of the said annual premium and of any premiums and extra premiums which may be required for keeping the said policy or the substituted policies in force, and to exhibit discharges thereof to the trustees or their agents regularly fourteen days at least before the last day of grace for payment thereof: And in case any policy shall become void or expire, then the said A. binds himself to renew the same, or to effect in the name of or convey, and in either case to deliver, to the trustees a new policy or policies on his life in place thereof for an amount equal to that which would have been payable under the policy so becoming void or expiring in the event of the death of the said A. on the day before it became void or expired, and that in such terms as the trustees may think fit, with an office or company approved of by the trustees, and to pay the whole original or additional premiums to become due on such renewed or new policy or policies: And should the trustees at any time, or from time to time, advance any sum or sums for any of the purposes foresaid in connection with the original or substituted policy or policies (all of which they are empowered but shall not be bound to do), the said A. binds himself and his foresaids, all jointly and severally as aforesaid, to repay the same, with a fifth part more of liquidate penalty in case of failure in the punctual repayment, and with interest at the rate of five per cent. per annum from the respective dates of disbursement till repaid: But it is hereby declared that the trustees, though entitled, shall not be bound to see or require that any of the obligations herein contained with reference to the said policies are fulfilled, or that the life assurance is otherwise kept up:

Powers of Sale, Surrender, etc.

With power, nevertheless, to the trustees, in the event of failure on the part of the said A. in punctual payment or repayment of any premium or extra premium, to sell or surrender or borrow money on the security of the said original and substituted policies, and bonuses, or any of them, and to make such arrangements with the assurance offices regarding the payment or application of bonus additions, or the acceptance in lieu of the policy then in

force of such other policy or policies as may be available for such smaller sum or sums, or payable in such other event or on such other conditions, as can be arranged and as they may in their uncontrolled discretion think proper:

TRUST PURPOSES

Which policy hereby assigned, and any substituted policies, sums therein contained, and proceeds thereof shall (subject to the exercise of the foresaid powers) be held by the trustees for the purposes following, namely:—

1. Expenses

 $\it First.$ For payment of the expenses of [constituting and] executing the trust hereby created.

2. Income, if any, during A.'s Life

Second. In the event of any funds coming into the trustees' hands during the life of the said A., the free income thereof, or such part thereof as the trustees in their uncontrolled discretion may think fit, may be paid to or applied for behoof of the said B., or of the children and issue of the marriage, or of the said B. and the children and issue of the marriage, or such of them, in such shares, and in such manner, as the trustees in their uncontrolled discretion may from time to time think fit, Declaring that all sums paid or applied under this purpose shall be for the alimentary behoof of the beneficiaries, and not capable of being anticipated by them, nor subject to their debts or deeds, nor liable to the diligence of their creditors: And so far as not so paid or applied, the said free income shall be accumulated with the capital until the death of the said A., unless and until he should become entitled to conveyance and payment in terms of the ultimate trust purpose, but with power to the trustees to resort to such accumulations in any subsequent year or years, and pay or apply the same in manner foresaid.

3. Income, during B.'s Survivance, towards Annuity

Third. In the event of the said B. surviving the said A., the trustees shall apply the free income of the trust fund on account of the said annuity or restricted annuity for the alimentary behoof of the said B, and subject to the protective clauses hereinbefore expressed in regard to the said annuity and restricted annuity; and the surplus income, if any, shall be paid to or applied for behoof of the children and issue of the marriage, or such of them, in such proportions, and in such way and manner, as the said A. shall direct, but only by will revocable at pleasure; and failing any such direction, or in so far as such direction shall not extend, then such surplus income, or such part thereof as the trustees in their uncontrolled discretion may think fit, may be paid to or applied for behoof of the child or children of the marriage or their issue, or such of them, in such proportions, and in such manner, as the trustees in their uncontrolled discretion may from time to time think fit, Declaring that all sums paid or applied under this purpose shall be for the alimentary behoof of the beneficiaries, and subject to the protective clauses expressed in the preceding purpose; and so far as not so paid or applied, such surplus income shall be accumulated with the capital until the same comes to be paid over, but with power to the trustees to resort to such accumulations in any subsequent year or years, and pay or apply the same in manner foresaid.

4. Capital to Children and Issue 1

Fourth. The trustees shall after the death of the survivor of the spouses hold and apply or pay the trust fund to or for behoof of the child or children of the marriage or their issue, or such of them, in such proportions and in such manner, as the said A. shall direct, but only by will revocable at pleasure, including power to him to fix the period or periods of vesting and payment, and to limit to a liferent, with or without a fee to remoter issue, and with or without a power of disposal by will revocable at pleasure but not otherwise; and failing any such direction, or in so far as such direction shall not extend, the trustees shall after the death of the survivor of the spouses hold and apply or pay the trust fund to or for behoof of the child or children of the marriage, or the survivors or survivor of them, or to or for behoof of the sole survivor, the surviving lawful issue of such of them as may die leaving issue being entitled to their parent's share, original and accresced, the division being per stirpes: But apart from such direction as aforesaid, such provisions shall not vest or be payable unless and until such child or children or issue shall respectively attain [twenty-four] years of age and survive both parents, until which period the trustees shall be entitled after the death of the survivor of the spouses, subject to the direction of the said A. as aforesaid, to make payment of the income, or such part thereof, in such proportions, and in such manner as they may in their uncontrolled discretion determine, and, if they think fit, the whole or any part for any part or parts not exceeding in all what they may consider to be one-half] of the capital of the presumptive share of any child or issue for his or her maintenance, education, outfit, or advancement in life.

5. Resulting Trust for Husband

And Lastly. Subject to the foregoing purposes, the trustees shall hold in security and for implement of all the obligations hereinbefore undertaken by the said A., and subject thereto they shall hold for him.

GENERAL CONVEYANCE TO TRUSTEES BY WIFE

For which causes, and on the other part, the said B. hereby assigns and dispones to 2 [repeat A to B, p. 776-7 3] and the assignees of the trustees the whole means and estate, heritable and moveable, real and personal, now belonging to her, or to which she may acquire right or succeed during the subsistence of the marriage, including all estate held or which may be held by her under special destinations, and all estate of which she has or may have power of disposal, with the whole titles and securities thereof, with power to

- ¹ See p. 781 for an alternative scheme. But, naturally, the same contract will, in both its parts, follow the same lines. Much fuller clauses are given on p. 785.
- ² It is better to name the trustees again, even though they are, as they naturally will be, the same as have been appointed by the husband. If the same, they will of course be named as "the said X., Y., Z."
- * In like manner, this is much better, though a little longer, than simply saying "and their foresaids."



uplift, receive, and discharge the said means and estate, and with all action and execution competent to her thereament:

EXCEPTIONS 1

1. Annuities, etc.

But excepting always (first) the liferent interest to which the said B. is entitled under the will of the late X., and the annuity to which she is entitled under the marriage contract between her late father and mother, and all other liferents, annuities, and similar payments to which the said B. is or may become entitled;

¹ For remarks and variations, see p. 763.

2. Small Legacies and Gifts

(second) all legacies, successions, and donations, not exceeding the sum of \pounds each from any one source at any one time, to which the said B. is or may become entitled or which she may receive;

3. Provisions in Terms excluding this Settlement

(third) all legacies, successions, donations, and other property, of whatever nature and of whatever amount or value, to which the said B. is or may become entitled or which she may receive, if the same are bequeathed, provided, or given to her on the express condition that the same are not to pass under the foregoing conveyance by her, or that the same are not to pass to the trustees of this settlement, or under any similar express condition whether special or general in terms;

4. Investments of Income and Non-settled Property, etc.

(fourth) all earnings and savings to be made and effected by the said B., of whatever amount and whether capitalised or not, and all increase and increment thereof, and of all other property of the said B. hereinbefore or by operation of law excepted from the foregoing conveyance by her, and all investments and applications thereof, and all sums and benefits resulting therefrom:

TRUST PURPOSES

Which means and estate hereby conveyed the trustees shall hold for the purposes following, namely:—

1. Expenses

First. For payment of the expenses of [constituting and] executing the trust hereby created.

2. For Wife's Liferent

Second. For the liferent alimentary use only of the said B. during the subsistence of the marriage, and also after its dissolution unless and until she shall become entitled after the dissolution of the marriage to have the trust estate made over to her in terms of the ultimate trust purpose. But this liferent right shall be exclusive always of the jus mariti and right of administration and all other right and power of the said A. and any future husband; and further, the same shall not be capable of being anticipated, nor subject to her debts or deeds, nor liable to the diligence of her creditors.

3. Surviving Husband's Liferent

Third. In the event of the said A. surviving the said B., the trustees shall pay to him during his lifetime thereafter [so long as he remains unmarried] the free income of the trust estate for his liferent alimentary use only, not capable of being anticipated, nor subject to his debts or deeds, nor liable to the diligence of his creditors:

FUTURE AND REVERSIONARY ESTATE

Declaring with reference to the liferents hereinbefore created that the trustees shall not be bound to realise future or reversionary estates or interests until they fall into possession in natural course, though entitled to do so if in their uncontrolled discretion they think it advisable for the protection of the capital, and that no benefit in any form shall accrue to the said liferent rights from such future or reversionary estates or interests before actual realisation or falling in, and then only for the then future period.

4. Capital to Children and Issue 1

Fourth. After the death of the survivor of the spouses, the trustees shall hold and apply or pay the trust estate to or for behoof of the surviving child or children of the marriage and the surviving issue of predeceasers, or such of them, and in such proportions, and in such way and manner, as the said B. shall direct, but only by will revocable at pleasure, including power to her to fix the period or periods of vesting and payment (but so that no vesting shall take place unless and until such child or children or issue shall respectively attain the age of [twenty-four] years and survive both spouses), and to limit to an alimentary liferent, with fee to remoter issue; and failing any such direction or in so far as such direction shall not extend, the trustees shall after the death of the survivor of the spouses hold and apply or pay the same to or for behoof of the children of the marriage, or the survivors or survivor of them, or to or for behoof of the sole survivor, the surviving issue of such of them as may die leaving issue being entitled to their parent's share, original and accresced, the division being per stirpes, and mutatis mutandis subject to the same provisions, vesting and payable at similar periods, and with like powers of application of capital and income, as are contained in the fourth purpose of the trust hereinbefore constituted by the said A.

5. Resulting Trust for Wife

And Lastly. Subject to the preceding purposes, the trustees shall hold for the said B.

GENERAL CLAUSES—HOTCHPOT 2

And with reference to both trusts hereinbefore constituted, it is hereby declared that in the event of any child or issue taking any part of the capital of

¹ See p. 779. If the two sets of clauses are to follow the same lines, that applicable to the wife's estate may be expressed thus:

Fourth. After the death of the survivor of the spouses [or the death of the said B. and the death or re-marriage of the said A.] the trust estate shall be held for the same purposes and with the same powers and discre-

tions and other clauses in all respects, including application of income and capital, as are hereinbefore declared in the purpose of the trust constituted by the said A., except that the powers and discretions shall be exercisable by the said B. instead of by the said A., but only by will revocable at pleasure.

² See p. 853.

the respective trust estates under any appointment to be made by the said A. or B. as aforesaid, neither the receiver thereof nor his or her issue shall have or be entitled to any further or other share of or in that part of the same estate of which no appointment shall have been made, without bringing into account the appointed share, the same being reckoned as on account of the share or shares respectively falling to the receiver of the appointed share or his or her issue from the estate from which the appointed share was taken:

EXCLUSION OF HUSBAND'S RIGHTS

As also declaring, with reference to all provisions herein made in favour of or descending to females, that the same shall be exclusive of the jus mariti and right of administration, and every other right and power, of any husband to whom they may be married, and shall not be affectable by the debts or deeds of such husbands, or by the diligence of their creditors:

EXCLUSION OF LEGAL RIGHTS OF SPOUSES

Which provisions hereinbefore contained in favour of the spouses shall be, and hereby are accepted by them respectively as, in lieu and full satisfaction of all terce [dower], jus relicte, courtesy, jus relicti, and every other right or claim which he or she could ask or demand by or through the decease of the other; and such terce [dower], jus relicte, courtesy, jus relicti, and other legal rights are hereby discharged:

AND OF CHILDREN

And which provisions hereinbefore contained in favour of the child and children and issue of the marriage shall be in full satisfaction to them of legitim, and any and every other right and claim that they could ask or demand by or through the death of the spouses or either of them:

TRUSTEES' POWERS AND IMMUNITIES

And with reference to both trusts hereinbefore constituted, it is hereby declared that, in addition to the powers and immunities conferred and which may be conferred on gratuitous trustees, the trustees shall have the fullest powers of and in regard to realisation, investment, administration, management, and division as if they were beneficial owners; and particularly, but without prejudice to the said generality, they shall have the following powers, namely [insert such powers and immunities as may be desired from pp. 829, 832 et seq., but referring to "the trustees" and "the trust estates"]:

EXECUTION

And the said A. and B. consent to registration hereof for preservation and execution.—In witness whereof.

CONTRACT OF MARRIAGE OR SETTLEMENT CONTAINING THE PROVISIONS ON ONE SIDE ONLY

It is matrimonially agreed between A. and B. as follows, that is to say:—

ACCEPTANCE

The parties, having conceived a mutual attachment, hereby accept of each other as lawful spouses, and promise to solemnize their marriage with all convenient speed.

Provisions by A.

In contemplation of which marriage and in consideration of the provisions [or settlement] by the said B. contained in another deed in English form executed or intended to be executed by the parties of even date herewith [then insert A.'s provisions with powers and other appropriate clauses].

B.'s SETTLEMENT

For which causes and on the other part the said B. has made the provisions [or settlement] contained in the said other deed, executed by both parties.—In witness whereof.

The other settlement, though in English form, may easily be so expressed as to contain essentially the same idea as above.

CONTRACT OF MARRIAGE CONTAINING CONCURRENCE OF THE TESTAMENTARY TRUSTEES OF THE WIFE'S FATHER TO EFFECT OF SETTLING HER SHARE OF HER FATHER'S ESTATE OR PART OF IT

The wife will be expressed to be a party

with consent of C., D., and E., the trustees of the late F. acting under his trust disposition and settlement dated , and registered , to the effect hereinafter stated.

Then after the general conveyance by the wife the following will be introduced:—

And whereas under the said trust disposition and settlement of the said F., the said C., D. and E. are empowered on the marriage of the said B. to settle the [whole or part of the] share of his estate falling to or to be held for her. and that upon such trusts, and with such powers to the said B., all if and as they may think proper, and either under her marriage contract or otherwise. and whereas they have resolved to settle the share under these presents [but]. Therefore the said C., D., and E., as trustees only to the extent of £ foresaid, with the consent of the said A. and B., hereby assign to [the trustees of the marriage contract] as trustees foresaid and their foresaids the investments and assets specified in the schedule hereto [and (but always without prejudice to the discharge granted by the said A. and B. [and the said C., D., and E.]), all other if any the sums, investments, and assets which may fall to the said share], with all interest and revenue accrued and to accrue on the said scheduled [and other sums, investments, and] assets, which means and estate hereby conveyed by the said B. and by the said C., D., and E. as trustees foresaid shall be held by the trustees acting under these presents for the purposes following, viz.:-

Notes

- 1. Intra vires?—Exact attention must be given by the power conferred by the wife's father upon his trustees. For instance, are they entitled to give a liferent to the husband? or to give the daughter and her husband or either of them power of apportionment, or to empower them or either of them, or the marriage trustees, to postpone vesting or reduce to a liferent with or without a fee to remoter issue? All these will no doubt be given regarding the wife's other estate, and if so, would in the above form be applicable to this part of the estate also, which might be ultra vires.
- 2. Partial.—In that case what is to become of the balance? If it be vested in the wife it might be held to pass under her own general conveyance, which would be absurd. The same might result if the testamentary trustees afterwards exercised a power to pay the capital to her. The balance ought in the marriage contract to be expressly excepted from its operation if that be the intention.
- 3. Liferent.—If the father's estate be subject to a liferent the clause may run:—

Therefore the said C., D., and E. as trustees foresaid hereby agree and declare that the share of the estate of the said F. falling to or to be held for the said B. shall be settled under these presents, and with consent of the said A. and B. they hereby settle the same accordingly to the effect of entitling the said [marriage trustees] and their foresaids to receive the said share when it comes to be paid over, but always without prejudice to the liferent of X. under the said trust disposition and settlement, and without prejudice to the right of the said C., D., and E. as trustees foresaid to retain the estate of the said F. uptil the expiry of that liferent, and their powers, privileges, and immunities under the said trust disposition and settlement, and further the liferent interests created under these presents shall take no benefit in any form from the said share so settled by the said C., D., and E. as trustees foresaid until the expiry of the liferent of the said X., and then only for the then future period, and the said A. and B. having already given a discharge to the said C., D., and E. to date, it is hereby declared and agreed that quoad ultra the receipt and discharge of the said [marriage trustees] and their foresaids shall be a complete exoneration to the said C., D., and E. as trustees foresaid and their successors in office and all others concerned.

- 4. Discharge.—When the estate is made over at once there will of course be a discharge by the intended wife, and her husband should concur. It can hardly be expected that the marriage trustees will sign it, nor does that appear necessary. If the estate is not to be immediately made over, then as above suggested there ought to be a discharge by the spouses up to date, and then for anything more the marriage trustees will have to give a discharge when they come to receive the estate afterwards.
 - 5. Pari passu ranking, see pp. 854, 767.

Without taking up space with further complete forms, it may be useful to give forms of various special clauses which can easily be introduced where desired:—

VERY FULL DISCRETIONARY POWERS

HUSBAND'S POWERS

The trustees shall after the death of the survivor of the spouses [or the death of the said A. and the death or re-marriage of the said B., subject [if it be so] to her annuity in the last mentioned case], hold and apply or pay the trust estate to or for behoof of the child or children of the marriage or their issue, or such of the children or issue, in such proportions and in such manner as the said A. shall direct, and he shall be entitled to fix the period or periods of vesting and payment, and to fix different periods of vesting or of payment or both for different beneficiaries or for different parts of the same beneficiary's share, and to impose such restrictions as he shall think fit, including power to restrict any child or issue to an alimentary right to the income of the share which would otherwise be paid to him or her or any part thereof, and that for life or for any shorter period or periods, and to deal with the capital of such share or part thereof by expressly leaving it at the disposal of the beneficiary subject to his or her own alimentary right as aforesaid, or by giving him or her a right of testamentary disposal only thereof subject as aforesaid, or by directing the purchase of an annuity on the life and for the alimentary behoof of the beneficiary, the purchase to be made and the annuity to be payable to and drawn and applied by the trustees, or by settling the said share or part thereof upon the issue of such beneficiary subject as aforesaid, and with such conditions as to vesting, and alimentary application of income during suspense of vesting, as he the said A. may think fit, or by directing payment, settlement, or application of it to or for the benefit of any other or others of the children or issue of the marriage, or he may leave the disposal of the capital or part thereof for the exercise of the powers and discretions of the said B. [and of the trustees] as after mentioned, and he shall be deemed to have done so if or so far as another method is not expressly declared, or partly in all or any of these ways, and also including power to allow application of or encroachments on capital for the alimentary behoof of any child or issue though not having a vested right or though otherwise restricted so as to be excluded from right to receive capital, all which powers and discretions shall be exercisable by the said A. only by will revocable at pleasure, but otherwise in his uncontrolled discretion, and he may if he think fit expressly give power to the said B. [whom failing to the trustees] to revoke any exercise by him of the said powers and discretions.

WIFE'S POWERS

And failing exercise by him of the said powers and discretions or so far as any exercise thereof by him shall not extend or take effect, the said powers and discretions shall after his death [and in so far as the contrary is not directed by him by will revocable as aforesaid] be exercisable by the said B. [if she does not re-marry], but only by will revocable at pleasure and mutatis mutandis.

TRUSTEES' POWERS

And failing exercise of the powers and discretions hereinbefore reserved or conferred, or so far as any exercise thereof shall not extend or take effect, the

said powers and discretions other than the power of apportionment, and it also if so expressly declared by the said A. by will as aforesaid, shall after the deaths of the spouses [or the death of the said A. and the death or marriage of the said B. subject as aforesaid], and in so far as the contrary is not directed by them by will as aforesaid, be exercisable by the trustees in their uncontrolled discretion, and in addition the trustees shall subject as aforesaid have the further alternative of restricting to an alimentary right as aforesaid and reserving the disposal of the capital or part thereof for the further exercise if afterwards thought fit of their own powers and discretions, and they shall be deemed to have done so if and so far as another method is not expressly declared, and all powers and discretions exercisable by the trustees may be exercised from time to time, and they may rescind in whole or in part any exercise by them of any of the said powers and discretions.

CASE OF SOLE BENEFICIARY

All which powers and discretions, whether reserved to the said A. or vested in the said B. [or the trustees], shall so far as applicable extend to the case of a sole beneficiary.

FAILING EXERCISE OF POWERS1

And failing exercise of the powers and discretions foresaid, or so far as any exercise thereof shall not extend or take effect, the trustees shall, after the death of the survivor of the spouses, 2 hold and apply or pay the trust estate to or for behoof of the child or children of the marriage, or the survivors or survivor of them, or to or for behoof of the sole survivor, the surviving lawful issue of such of them as may die leaving issue being entitled to their parent's share original and accresced, the division being per stirpes, but apart from a direction to the contrary under the powers foresaid, the provisions shall not vest or be payable unless and until such child, children, or issue shall respectively survive the period or respective periods of payment and attain [twenty-four] years of age, until which periods [powers to apply income and advance capital, p. 779]: And further declaring that when the whole or part of the share of any beneficiary has been made the subject of exercise of any of the powers and discretions foresaid, then any further or accrescing share or shares which may fall to such beneficiary, or the same proportion thereof as the case may be, shall be deemed to be dealt with in the same way unless otherwise declared in terms of these presents.

LIKE TRUSTS OF WIFE'S PROPERTY

After the death of the survivor of the spouses [or otherwise, supra], the trust estate shall be held for the same purposes and with the same powers and discretions and other clauses in all respects, including application of income and capital, as are hereinbefore declared in the purpose of the trust constituted by the said A., except that the powers and discretions shall in the first place be exercisable only by the said A. and B. by mutual testamentary

factor, who may not be entitled to exercise the powers.

² Or otherwise as above.



¹ Even when the powers are given to trustees, a failure may occur, for the trust may come to be administered by a judicial

writing revocable by them jointly or by the said B. if the survivor [or by the survivor] at pleasure, and failing or subject thereto then by the survivor, and failing or subject thereto then by the trustees.

LIFERENT OF HOUSE

1. By Immediate Infertment

The said A. dispones to [trustees] All and Whole [refer to conditions in title if necessary]: With entry as on the day of his death: And he assigns the writs: And he assigns the rents as from the day of his death: And he grants warrandice: But the said subjects shall be held by the said trustees, subject to the provisions and with the powers after mentioned, in trust for the purposes following, namely, (first) they shall allow the said B. the liferent use and enjoyment thereof during her lifetime after the death of the said A., in the event of her surviving him, but only so long as she does not re-marry; (second) subject to the said liferent, they shall hold the said subjects in security of all the obligations binding on the said A., or his heirs, executors, or representatives (or foresaids), with reference to the said subjects and liferent; and (third) upon the death of the said B. in the lifetime of the said A., or upon her death or re-marriage in the event of her surviving him, or upon the substitution of a secured annuity as after mentioned, and upon all the said obligations being fulfilled, or fulfilled to date as the case may be, the trustees shall denude of the said subjects in favour of the said A. or his heirs or successors: Reserving always to the said A. the power and option of substituting an annuity of £ in lieu of such liferent, with security therefor to the satisfaction of the trustees, whereupon the said subjects shall be reconveyed to the said A. as aforesaid: And further declaring that in the event of the heirs or successors of the said A., at any time after his death during the currency of the said liferent, being desirous of substituting an annuity of the said amount, and offering security therefor to the satisfaction of the trustees, it shall be in the power and option of the trustees, with consent of the said B., to accept such substituted secured annuity, and to denude of the said subjects accordingly: And the said A. binds himself and his foresaids, without the benefit of discussion, to put the said subjects into a proper condition of order and repair in all respects at the commencement of the said liferent at the sight and to the satisfaction of an architect to be named by the trustees, and to pay any casualties or duplicands which may be or become due at the commencement or may become payable during the subsistence of the liferent, but the said B. shall be bound to pay the feu-duty, rates, taxes, and assessments, both proprietor's and occupant's, all repairs after the subjects are put into repair as aforesaid, and the premiums on insurance against fire, to the extent of £ on building and £ rent, with an insurance company of standing, on a policy in the names of the trustees [or otherwise as may be desired]: Which liferent and annuity shall be strictly alimentary, and not capable of anticipation by the said B., nor subject to her debts or deeds, nor liable to the diligence of her creditors:

2. OBLIGATION ONLY

The said A. binds himself, and his heirs, executors and successors [or foresaids], without the benefit of discussion, to secure to the said B., in the event of her surviving him, the liferent use and enjoyment of the house, or principal house, which may be occupied by him at the time of his death, or if there should be no house in his occupation at his death, then to pay to her in lieu thereof, and in any case with the option to him an annuity of £ [or his foresaids] to pay her such annuity in lieu of the liferent, which liferent or annuity shall subsist only so long as the said B. remains unmarried, and the said A. binds himself and his foresaids to provide proper security for such liferent or annuity; [but such election of option, if not made by the said A., must be made by his foresaids within one year after his death, without prejudice to the right of the said B. to the one or the other from the day of his death] [clauses as to (1) putting into repair, (2) incidence of charges, and (3) alimentary]; and it shall be in the power of the said A. and his foresaids to implement the foregoing obligation, whether of liferent or annuity, by the medium of a trust [or, and the foregoing obligation, whether of liferent or annuity, shall be implemented through the medium of the trust hereby created, and the trustees thereunder shall be entitled to enforce the same].

DESTINATION OF FEE-SIMPLE ESTATE BY HUSBAND

The said A. dispones to himself in liferent for his liferent use allenarly, and to the said B. in the event of her surviving him, in liferent for her alimentary liferent use only, not capable of anticipation by her, nor subject to her debts or deeds, nor liable to the diligence of her creditors, and to the children of the marriage hereby contracted, alive at the death of the survivor of the said A. and B., jointly with the issue then alive of predeceasing children, such issue taking their parent's shares, original and accresced, in fee, but under the reserved powers to the said A. hereinafter contained, heritably and irredeemably, All and Whole : But reserving always to the said A. power to select any one or more of the issue of the marriage surviving as aforesaid to succeed to the said estate; and if more than one exist or be so selected, then to apportion the same between or among them, including power to pass over the immediate issue of the marriage in whole or in part, and to destine the subjects in whole or in part to remoter issue, or any of them, with or without a limited right, by way of liferent or annuity, in favour of any immediate issue, all which powers shall be exercisable only by will revocable at pleasure: As also reserving power to the said A., and after his death with power to the said B., to exercise all the powers of management competent to any absolute owner, including power to grant leases for any ordinary period according to the nature of the subject, and powers to feu and excamb [add formal clauses, having special regard to nature of warrandice].

ENTAIL PROVISION BY HEIR IN POSSESSION IN FAVOUR OF HIS WIFE

And whereas the said A. is heir of entail in possession of the said lands and estate of X., in the county of Y. [or other short sufficient description], and

it is agreed, as part of the settlement to be made by him in favour of the said B., that he should secure her in the annuity hereinafter mentioned out of the said estate and rents thereof: Therefore, in virtue and in exercise of the powers under the Entail Acts, and under the deed of entail under which the said estate is held, and of all other powers anywise enabling him in this behalf, each without prejudice to the others, the said A., in the event of the said B. surviving him, hereby provides and dispones to her, and grants warrant for infefting and hereby infefts her in, a liferent annuity or yearly sum of £ restrictable as after mentioned, for the remainder of her lifetime after his death out of the said lands and estate of X. and rents thereof, which annuity shall be payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the first of these terms after his death for the period between his death and that term, and the next term's payment thereof at the next of these terms for the half-year preceding, with a proportionate payment as at the date of her death for the period to that date from the last preceding term, with a fifth part of each term's payment of liquidate penalty in case of failure in punctual payment, and with interest at the rate of five per cent. per annum on each term's payment from the time the same becomes payable till paid; but declaring that the said annuity shall be strictly alimentary, and shall not be capable of anticipation by the said B., nor subject to her debts or deeds, nor liable to the diligence of her creditors: And further declaring that if it shall be found that the said annuity of \mathcal{L} is in excess of the provision which the said A. is or may be entitled to secure to his widow out of the said estate, then the same shall be and is hereby restricted to the amount of the largest provision from time to time, (not exceeding the said sum of £ per annum plus such further sum as may be required to make good any restrictions suffered in previous years, with interest at the rate of five per cent, per annum from the terms at which such restrictions took effect till so made good), which the said A. is or may be entitled to secure to her out of the same: As also declaring that the said annuity or restricted annuity is granted subject in all respects to the limitations and conditions under which the said A. has power to grant the same, and not otherwise:

ADJUSTMENTS WITH GENERAL ESTATE

And in the event of the said annuity being for its whole term or any part thereof restricted as aforesaid, then, and so long as such restriction shall last, the said A. binds himself, and his heirs, executors, and representatives whomsoever, without the benefit of discussion, to make up the same to the said annual sum of \pounds , with penalty and interest as aforesaid, subject always to the alimentary and other protective clauses above written: And on the other hand any sums which the said B. may draw from the said estate in excess of \pounds per annum in order to make good deficiencies as aforesaid and interest thereon shall be handed over by her to the representatives of the said A. if the same have then already been made good by them to her and with corresponding interest.

ENTAIL PROVISION BY HEIR-APPARENT (WITH CONSENT OF THE HEIR IN POSSESSION) IN FAVOUR OF HIS WIFE

And whereas the said A, is entitled to succeed to the entailed lands and estate of X., in the county of Y. [or other short sufficient description], on the death of C., the heir in possession thereof, and is heir apparent thereto, and it is agreed as part of the settlement to be made by him in favour of the said B. that he, with consent of the said C., should secure her in the annuity hereinafter mentioned out of the said estate and rents thereof: Therefore, in virtue and in exercise of the powers under the Entail Acts, and under the deed of entail under which the said estate is held, and of all other powers anywise enabling them in this behalf, each without prejudice to the others, the said A., with consent of the said C., and they both with joint consent and assent, in the event of the said B. surviving him the said A., hereby provide and dispone to her, and grant warrant for infefting and hereby infeft her in, a liferent annuity or , restrictable as after mentioned, for the remainder of her life after the death of the said A., out of the said lands and estate of X. and rents thereof, which annuity shall be payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the first of these terms after the death of the said A. [proceed as in the previous form, to end of alimentary clause]: Declaring always (first) that if it shall be found that the said annuity of £ is in excess of the provision which the said A., with consent of the said C., is or may be entitled to secure to his widow out of the said estate, then the same shall be and is hereby restricted to the amount of the largest provision (not exceeding the said sum of per annum) which the said A., with consent of the said C., is or may be entitled to secure to her out of the same; (second) that the said annuity or restricted annuity shall not interfere with or affect any annuity or other provisions which have been or may be granted by the said C., nor his power to grant annuities or other provisions, but shall be postponed to all such annuities and provisions; and (third) that the said annuity or restricted annuity hereby granted is granted subject in all respects to all other limitations and conditions under which the said A., with consent of the said C., has power to grant the same, and not otherwise.

Or this part of the deed may follow the preceding form, and, as in it, provision may be added for adjustment by and with the granter's general estate.

PROVISION BY HEIR OF ENTAIL IN POSSESSION FOR YOUNGER CHILDREN

And further, the said A., in virtue and in exercise of the powers under the Entail Acts, and under the deed of entail of the said entailed lands and estate of X., and of all other powers anywise enabling him in this behalf, each without prejudice to the others, binds the heirs of entail succeeding him in the said estate in payment, out of the rents or proceeds of the same, to the children of the marriage hereby contracted who shall not succeed to the said

estate of the sums following, namely, if there shall be one such child, \pounds , if two such children, \pounds , and if three or more such children, \pounds , payable after his death, and with interest at the rate of five per cent. per annum from his death till paid: Declaring always that if it shall be found that these provisions are in excess of the amounts which the said A is or may be entitled to provide for his children out of the rents of the said estate, then the same shall be and are hereby restricted to the amount of the largest provision (not exceeding the said specified sums according to the respective events) which the said A is or may be entitled to provide out of the same: As also declaring that the said provisions are granted subject in all respects to the limitations and conditions under which the said A has power to grant the same, and not otherwise:

DEFICIENCY TO BE MADE UP OUT OF GENERAL ESTATE

And in the event of the said provisions being restricted as aforesaid, the said A. binds himself, and his heirs, executors, and representatives whomsoever, without the benefit of discussion, to make up the same to the said respective sums, according to the events foresaid, with interest as aforesaid:

RESERVED POWERS

Reserving always to the said A. the fullest powers of settlement, apportionment, and otherwise which it is competent for him to reserve with reference to the said provisions, whether payable from the rents of the said estate or under the foregoing supplementary obligation.

SETTLEMENT OF A DAUGHTER'S SHARE OF AN ENTAIL PROVISION IN HER MARRIAGE CONTRACT

1. Where her Father has already constituted a Provision in General Terms

And whereas the said C. [the wife's father], in the contract of marriage between him and his wife D. dated , granted a provision to the children of his marriage who might not succeed to the entailed estate of X., in the county of Y., out of the rents of the said estate amounting to a sum of from £ to £ , according to circumstances, with interest, and subject as therein mentioned; and further he bound his general representatives to make up any deficiency if the sums therein stated should be in excess of his powers with reference to the said entailed estate: And whereas no apportionment or settlement of the said provision, or any part thereof, has ever been made: Therefore, in contemplation and consideration of the marriage hereby contracted, the said C. irrevocably apportions to the said B. (the wife) primo loco and preferentially out of the said provision, with interest as aforesaid (or one equal (sixth?) part of the sums which may be drawn from the said entailed estate and from his general estate in respect of the said provision): but declaring that in the event of any part of the said provision remaining unapportioned, neither the said B. nor anyone claiming through her shall be entitled to participate therein except on condition of bringing into account the share hereby apportioned and allowing for the same: And further, in contemplation and consideration of the marriage hereby contracted, the said B. declares that the conveyance and settlement by her hereinafter contained does and shall embrace her share or shares of the said provision, whether to be drawn from the said entailed estate or from the general estate of the said C., and whether hereinbefore appointed to her or hereafter to be appointed to her, or which may fall to her in default of appointment, or otherwise in any manner of way, even to the whole provision, and the said C. hereby consents to such conveyance and settlement, including as aforesaid.

2: Where there is no Prior Constitution

And whereas the said C. [the wife's father] is heir of entail in possession of the entailed lands and estate of X., in the county of Y., he hereby, in virtue and in exercise of the powers under the Entail Acts, and under the deed of entail of the said entailed estate, and of all other powers anywise enabling him in this behalf, each without prejudice to the others, binds the heirs of entail succeeding him in the said estate in payment out of the rents or proceeds of the same to the said B. [the wife], if she shall not succeed to the said estate, of payable after his death, and with interest at the rate of five per cent, per annum from his death till paid: Declaring that the said provision is granted under all the limitations and conditions under which the said C. has power to grant the same, and not otherwise: But nevertheless the said C. warrants the same absolutely, and binds himself, and his heirs, executors, and representatives whomsoever, without the benefit of discussion, to make up any deficiency in the amount which may be drawn from the said entailed estate, with interest as aforesaid: And further, in contemplation and consideration of the marriage hereby contracted, the said B. declares that the conveyance and settlement by her hereinafter contained does and shall embrace the said provision of £ , and the said C. hereby consents to such conveyance and settlement, including as aforesaid.

SUPPLEMENTARY POSTNUPTIAL SETTLEMENT INTER VIVOS BY HUSBAND

The chief points of general importance in connection with post-nuptial provisions are:—

1. Whether they can stand against creditors of the husband. The creditors will be entitled to the presumption of insolvency as at the date when the provision was constituted; but if those seeking to uphold the deed can prove that the granter was then solvent, the deed will stand at least if the provision be moderate. The question is, whether the granter was solvent after setting apart the property forming the provision. But while that is the modern tendency, it is not absolutely clear that a moderate provision made by an insolvent husband for his widow otherwise unprovided for will not stand.

¹ Gillon's Trs. v. Gillon, 1903, 10 S. L. T.
² Guthrie v. Cowan, 1846, 9 D. 124; No. 428.
Fraser, ii., 1502; Goudy, 33.



- 2. The granter cannot reserve an alimentary liferent to himself. Therefore clauses should be inserted to the effect of forfeiting or suspending any benefit taken by the granter in the event of his sequestration, etc., and giving the same to some other object of the settlement, who must not be his wife (see next paragraph).
- 3. In no case is the wife allowed to derive any benefit from the settlement during her husband's lifetime in a question with his creditors. If that question should arise, the income, if given absolutely to the wife, would pass to the creditors for the period of the joint lives of the spouses. Therefore clauses should be inserted similar to those in the case of the granter's liferent. This, of course, applies only to a liferent or other benefit given to the wife during the husband's lifetime, and the forfeiture or suspension will take effect on the sequestration, etc., of the husband's (not the wife's) estate.
- 4. What is stated above with reference to postnuptial provisions both for wife and children must be qualified by the Married Women's Policies of Assurance Act, 1880. The second section provides that any policy of assurance effected by a married man (which includes a widower²) on his own life, and declared upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, constitutes a trust in his person or in the person of any trustee he may appoint. The proceeds of the policy shall not be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency.

Provided always that if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof.

This is a very valuable Act. Even in the worst case, viz., when the policy is effected and kept up with intent to defraud creditors, still the creditors cannot reach the policy or its proceeds, but at most only a sum equal to the premiums. Even that apparently is only when the policy has been both effected and maintained with intent to defraud, so that if the husband be solvent when the policy is effected it seems to follow that creditors cannot reclaim even premiums paid during insolvency; and quære whether intent to defraud is to be inferred from the payments having been made during insolvency? But if bankruptcy supervene within two years of the effecting of the policy, the two years' premiums may be reclaimed, though there was no insolvency and no fraudulent intent. Quære whether bankruptcy means notour bankruptcy, or seques-

Dunlop v. Johnston, 1867, 5 M. (H. L.)
 Kennedy's Trs. v. Sharpe, 1895, 23 R.
 Robertson's Trs. v. R., 1901, 3 F. 359.

tration or cessio? When premiums are reclaimable there is no warrant for claiming interest on them. Observe the premiums are reclaimable only "out of the proceeds" of the policy; does this mean that, supposing the trustee of the policy to be able to keep it in force, the creditors must wait for repayment until death or other maturity of the policy and without interest? The husband may reserve to himself very wide powers, and these may be expressed in the policy. The policy must have its beneficial nature "declared upon the face of it." It is an advantage that the wife cannot deal with her interest stante matrimonio even with her husband's consent. As to the trustee's powers, see p. 689. It is a disadvantage that there is no obligation on the husband to pay the premiums. The policy needs no delivery. The trustee in the husband's bankruptcy is not entitled to retain the control of a policy of this kind.

5. Legitim cannot be discharged by a postnuptial deed.

The following deed assumes that there is a marriage contract under which the husband has made certain provisions for his wife and children, including the assignment of life policies to trustees. The scheme of the supplementary deed is the conveyance of additional property to trustees for the following purposes:—

- 1. Expenses.
- 2. Maintenance of policies assigned to marriage trustees.
- 3. Husband's liferent; but in the event of anything happening which would carry the liferent to husband's creditors or assignees, the income shall pass from him to the surviving children and issue *per stirpes* for their alimentary behoof.
- 4. For wife's alimentary liferent, if she survive her husband, in or towards payment of, and not in addition to, the annuity and restricted annuity under the contract of marriage.
- 5. After husband's death, any surplus income to be applied for alimentary behoof of surviving children and issue as husband may direct; or failing that, then in the discretion of the trustees; any unexpended income to be capitalised.
- 6. For children or issue in fee as the husband may direct; which failing, for surviving children and issue *per stirpes*; no vesting until majority, but with powers of application of income and advance of capital.
- 7. So far as fee may not vest under preceding purpose, the wife, if she survives her husband and remains his widow, may test thereon, "but only by will revocable at pleasure."
 - 8. Subject to the preceding purposes, a resulting trust for the granter.
- I, A., considering that the provisions already made by me for my wife and family under my contract of marriage dated are insufficiently secured and inadequate, and that my assets greatly exceed my liabilities, and that out of the surplus I am well able to constitute the present additional security and provision for my wife and family, and that I have resolved to do so:

³ Stewart v. Hodge, 1901, 8 S. L. T. No. 346.



¹ See p. 769.

² See p. 689.

CONVEYANCE

Therefore I hereby assign and dispone to [name and design the trustees 1], and the acceptors or acceptor, survivors and survivor of them [and me, if the granter is a trustee], as trustees and trustee, and such other person or persons as may be assumed into the trust hereby created (Declaring that a majority of the trustees resident in Great Britain for the time shall be always a quorum, that power of assumption is conferred on assumed as well as on the original trustees, and that the trustees acting for the time are hereinafter referred to as "the trustees"), and the assignees whomsoever of the trustees [insert appropriate conveyances of the particular property, with appropriate executory clauses 2]: And I bind myself, and my heirs, executors, and representatives, to grant at our expense such other deeds (if any) as may be desired for giving the trustees and their foresaids effectual titles to the said subjects [or otherwise, as the case may be] and others, or enabling them to deal with or dispose of the same:

TRUST PURPOSES

But declaring that these presents are granted and shall be accepted by the trustees in trust always for the purposes following, namely:—

1. Expenses

First. For payment of the expenses of constituting and executing the trust hereby created.

2. Maintenance of Life Policies

Second. The trustees shall hold the trust estate in security and satisfaction of the obligations undertaken by me for payment of the premiums, and extra premiums, and otherwise for the maintenance of the policies of assurance assigned by me under the said contract of marriage, and any policies of assurance which may be substituted therefor, with power to the trustees to apply the income of the trust estate primo loco in satisfying the said obligations, or in repaying to the trustees under the said contract of marriage any advances which they may make towards satisfaction of the said obligations, with interest and expenses: But it is expressly declared that the trustees, though entitled, shall not be bound to see or require that the said obligations are fulfilled, or that the policies are otherwise kept up.

3. Husband's Liferent

Third. Subject to the foregoing purposes, the trustees shall, subject as after mentioned, allow me during my lifetime the free income of the trust estate: Declaring that, subject as after mentioned, they shall be entitled to pay to me, or to allow me to receive, the income of the trust estate as the same comes in so long as there has then come to their knowledge no default by me in implement of the obligations referred to in the immediately preceding purpose, but without responsibility upon them for omitting to make inquiry regarding such default:

¹ The trustees will naturally be those then acting under the contract of marriage.

² If stocks, etc., are conveyed, there may require to be separate transfers. But in any

case, the stocks will be mentioned in the principal deed, with a reference to the transfers; if they are numerous, a schedule may be annexed to the deed.



DESTINATION-OVER IN EVENT OF SEQUESTRATION, ETC.

And further declaring that the benefit intended to be taken by me under this purpose shall be always under this provision and condition, that in the event of my having done or suffered anything, or upon my doing or suffering anything, whereby, or by any right flowing therefrom, the said benefit or any part thereof would but for this clause of forfeiture and destination-over pass to, or be enjoyable during my lifetime by, some person or persons other than myself, I shall ipso facto and as often as the same may happen forfeit any right I would otherwise have to the said benefit so long as the act, deed, or thing done or suffered, or any right flowing therefrom, shall remain in force: And upon and during the continuance of any such forfeiture occurring in my lifetime the said benefit shall pass over to, and be taken and enjoyed by, the surviving children born and to be born of the marriage between me and my wife B. and the surviving issue of predeceasing children, who shall take the share, original and accresced, which their, his, or her parent would have taken, and that equally per stirpes, but such benefit to children and issue shall be strictly for their alimentary support, and not capable of anticipation, nor subject to their debts or deeds, nor liable to the diligence of their creditors.

4. Wife's Liferent in or towards Payment of Annuity

Fourth. From and after my death, and in the event of my wife surviving me, the trustees shall pay the free income of the trust estate to her during her lifetime to or on account of (and not in addition to) the annuity of £300, or restricted annuity of £100, provided to her under the said contract of marriage, and strictly for her alimentary support, and not capable of anticipation, nor subject to her debts or deeds, nor liable to the diligence of her creditors: But in the event of her second marriage the said B. shall not, at or after the first term of Whitsunday or Martinmas thereafter, receive from the income of the trust estate under the said contract of marriage and from the income of the trust estate under these presents, taken together, more than the said restricted annuity of £100, which shall be exclusive of the jus mariti, right of administration, and all other right and power of any husband she may marry.

5. Surplus Income during Wife's Survivance

Fifth. In the event of my wife surviving me, and there arising during her lifetime any surplus income after satisfying the prior purposes, the same shall be applied for the benefit of the surviving children born and to be born of the marriage between her and me, or their issue, or such of them, and in such shares and in such way and manner as I shall direct by any writing under my hand; and failing such direction, the trustees shall have full power to apply such surplus income, or such part thereof, in such proportions and in such manner as they may in their uncontrolled discretion determine, for the maintenance, education, outfit, or advancement in life of such children or issue; and so far as not so applied during the year in which the same arises or thereafter, such surplus income shall be added to capital: [If necessary and competent, add], And further, I direct that this present purpose shall

also apply to any surplus income which may during my wife's survivance arise on the estate under the said contract of marriage, and I direct the trustees thereunder accordingly.

6. Fee to Children and Issue

Sixth. The trustees shall after the death of the survivor of me and my wife B. hold and apply or pay and divide the trust estate to or for behoof of the child or children born and to be born of the marriage between her and me, or their issue, in such proportions and in such way and manner as I shall direct by any writing under my hand, including power to me to fix the period or periods of vesting and payment, and to limit to a liferent with fee to remoter issue; and failing any such direction, or in so far as such direction shall not extend, the trustees shall after the death of the survivor of me and the said B. hold and apply, or pay and divide, the same to or for behoof of such of the children of the said marriage as may then be in life, and the issue then in life of such of them as may then have died leaving issue, such issue being entitled to the shares, original and accresced, to which their respective parents would have been entitled if they had respectively survived, the division being per stirpes:

TERM OF PAYMENT

But apart from such direction as aforesaid, said provisions shall not be payable until such child or children or issue shall respectively attain [twenty-four] years of age;

POWERS TO APPLY INCOME AND ADVANCE CAPITAL

until which period the trustees shall have full power after the death of the survivor of me and the said B., subject to my direction as aforesaid, to apply the income, or such part thereof, in such proportions and in such manner as they may in their uncontrolled discretion determine, and if they think fit, the whole or any part of the capital, of the presumptive share of any child or issue, for his or her maintenance, education, outfit, or advancement in life; and so far as not so applied during the year in which the same arise or afterwards, such surplus income shall be added to the share of capital on which it accrued:

ACCOUNTING (OR HOTCHPOT) CLAUSE (p. 773).

Period of Vesting

And it is hereby provided and declared that (except as may be otherwise provided by me under the power to that effect reserved to me as aforesaid) no child or issue shall take a vested interest unless and until they respectively attain the said age of [twenty-four] years and survive the actual period of payment:

EXCLUSION OF HUSBAND'S RIGHTS

As also declaring, with reference to all provisions herein made in favour of or descending to females, that the same shall be exclusive of the jus mariti and

¹ Or any part of the capital not exceeding what my trustees may estimate to be one-half [or other fraction].



right of administration, and every other right and power of any husband to whom they may be married, and shall not be affectable by the debts or deeds of such husbands or by the diligence of their creditors:

SATISFACTION OF LEGAL RIGHTS

And which provisions hereinbefore written in favour of the child or children and issue of the said marriage shall (along with the provisions contained in the said contract of marriage, without prejudice to the terms thereof) be in full satisfaction to them of legitim, and any and every other right or claim that they could ask or demand by or through the death of me and the said B.

7. Power to Widow to Test on any Part of Estate not vested under 6th Purpose

Seventh. In the event of the said B. surviving me, and if at her death there shall be any part of the trust estate which may not have vested, and may not vest, in any child, children, or issue of our marriage in terms of these presents or under the exercise of the power reserved to me as aforesaid, then the said B., but only if she shall not re-marry and shall die my widow, and subject always to the prior purposes of the trust, shall be entitled to test upon the trust estate, or such part thereof as may not have vested and may not vest as aforesaid, but that only by will revocable at pleasure: Declaring that what is hereby conferred in the events foresaid is merely a personal inalienable and unaffectable faculty:

RESULTING TRUST FOR GRANTER

And Lastly. Subject to the preceding purposes, the trustees shall hold for me the said A.:

POWERS AND IMMUNITIES

See pp. 777, 782, et seq.:

IRREVOCABLE

And I declare these presents to be irrevocable, and I have delivered the same accordingly.—In witness whereof.

CONTRACT OF SEPARATION

The general rule is that contracts of voluntary separation are revocable at the instance of either spouse. The following passage is in point:—

It may perhaps be true that when a contract of separation proceeds as often occurs upon an admission of cruelty, the effect . . . is the same as a decree of separation and aliment. It may also be true that although the instrument is silent on the subject, yet on proof of cruelty [or adultery] causing or justifying the separation the result is the same. But . . . it is not in my opinion maintainable that the aliment fixed by the contract is any less liable to revision upon change of circumstances than if . . . fixed by a decree. 1

¹ Lord Kyllachy in M'Keddie v. M'K., 1902, 9 S. L. T. No. 322.

The following form is purposely framed to meet somewhat complicated circumstances. The clauses desired in any particular case may be easily selected and adapted. The chief omission is any arrangement as to custody of and access to children of the marriage if any; that can be added if desired.

It is contracted between A. on the one part and B. on the other part in manner and to the effect following: That s to say, Whereas the parties were married on , and on the occasion of their marriage a contract of marriage was entered into between them, dated and registered in the Books of Council and Session on , which is here specially referred to and held as repeated brevitatis causa: And whereas the said B. maintains that she is entitled to have the said contract of marriage reduced on the grounds that she was not separately advised regarding it, that she did not understand its effect and particularly did not know what her legal rights were, nor understand the effect thereon of the said contract of marriage, and that the provisions therein contained in her favour are grossly inadequate having regard to the amount of the said A.'s estate: And whereas the said B. further maintains and is advised that facts and circumstances exist which entitle her to obtain decree of judicial separation with an award of aliment, or even to other remedies the result of which would be to make the annuity contracted to be paid in the said contract of marriage instantly payable: And whereas the said B. is advised that the aliment should be at the rate of at least £500 per annum: And whereas in view of all these questions and in order to avoid actions of reduction and separation and aliment, or otherwise, it has been arranged to settle the same by way of mutual and onerous compromise and transaction on the terms hereinafter set forth. Therefore the parties agree as follows :-

- 1. The parties are to live separate unless and until they of free mutual consent agree to resume cohabitation.
- 2. The said A. binds himself and his heirs, executors, and representatives whomsoever, jointly and severally to pay to C., D., and E., as trustees for behoof of the said B., and to any trustees to be assumed by them, and to the survivors and survivor of them [or to C., D., and E., the present trustees under the said contract of marriage, and to the trustees or trustee for the time being acting thereunder], the sum of £300 per annum free of all deductions for the period beginning on [notwithstanding the date hereof]. and to continue for the whole period of the subsistence of the marriage, subject only to the article 8 of these presents, which sum shall be payable quarterly in advance, the first payment being made on the execution of these to the presents for the period from the said , and the next for the quarter succeeding, and so forth payment being made on the days of quarterly thereafter in advance on the in each year during the subsistence of the marriage, subject only as aforesaid, with a fifth part more of liquidate penalty in case of failure in punctual payment, and with interest at the rate of five per cent. per annum on each quarterly payment from the date on which the same becomes payable till paid. [The

trustees shall be bound to produce at each quarterly payment a certificate by a clergyman, justice of peace, or notary public, of the said B. being alive and giving her address.]

- 3. In the event of the death of the said A. survived by the said B., he binds himself and his foresaids to pay to the said trustees and their foresaids for her behoof the sum of £200 per annum free of all deductions for the period beginning with the first quarterly date foresaid after his death, and to continue so long as the said B. survives and does not enter into a second marriage, which sums shall be payable quarterly in advance, the first payment being made on the first of the said quarterly dates after his death for the quarter succeeding, and so forth quarterly thereafter in advance on the quarterly dates foresaid so long as the said B. survives and does not enter into a second marriage, with penalty and interest as aforesaid. This sum of £200 per annum is made up of the £100 provided in the same event under the said contract of marriage and an additional sum of £100 now provided, making together the said sum of £200 per annum.
- 4. In the event of the said B. surviving the said A. and entering into a second marriage the sum of £100 per annum which in that event is payable under the said contract of marriage shall be payable, and the said A. hereby in that event binds himself and his foresaids to pay the same, to the said trustees and their foresaids for behoof of the said B., and that at the terms and with interest and penalty as provided in the said contract of marriage [or as aforesaid].
- 5. The said respective provisions of £300, £200, and £100 per annum, all are and shall be strictly for the alimentary use only of the said B, and shall not be capable of being assigned, discharged, or anticipated by her, nor subject to her debts or deeds, nor liable to the diligence of her creditors.
- 6. It is admitted that the jewellery and other effects which the said B. took with her when she left the said A.'s house, or has since received, are her absolute property. She is also to retain the sum of \mathcal{L} or thereabouts which she had when she left, and that in addition to the foregoing provisions.
- 7. The said A. admits that all debts incurred up to the date of the said B. leaving his house are his proper obligations, and that he has no claim against her.
- 8. The said A agrees that these presents are and shall be irrevocable, and he binds himself and his foresaids to warrant the same absolutely. Particularly these presents are not to be revoked, terminated, or in any way affected though the parties should resume cohabitation, except only as regards the second article and the provision of £300 per annum therein contained, and even that shall in that event only be suspended, and only for the period or periods of cohabitation, and shall be and remain in full force and effect as regards the periods before and after such period or periods of resumed cohabitation.
- 9. On the footing and in consideration of the preceding articles and each of them, the said B., being now separately advised, confirms and homologates the said contract of marriage as modified by these presents.

- 10. The said B, binds herself as from the said [date] and for the future not to contract any debt or obligation which can in any event affect or burden the said A, or his estate or become the foundation of any legal demand against him.
- 11. The said A. pays the whole expenses of and relating to these presents, including the negotiations prior thereto.

Lastly. The parties consent to registration hereof for preservation and execution.—In witness whereof.

SECTION XLIV

WILLS

In connection with the preparation of testamentary instruments the general advice, of course, is to ascertain exactly what the testator's intentions are, and to express them clearly. It is impossible to touch on all the matters which will or may require attention according to the circumstances of particular cases, but the following may be specially referred to:—

Prior Instruments.—The conveyancer, in preparing a will, ought to know what other documents are in existence affecting the estate. Of these the probable are:—

- 1. Marriage Contract.—This, being a deed of obligation or contract, fetters the disposing power of the testator, and provision must be made for carrying out its purposes.
- 2. Inter vivos Trusts.—The testator may have settled, or come under obligation to settle, special parts of his estate by inter vivos trusts.
- 3. Children's Marriage Contracts.—The testator may have become a party to the marriage contracts of his children (more probably his daughters), to the effect of undertaking particular obligations in their favour, or in favour of trustees for them. In particular these deeds frequently contain clauses by which the father binds himself to leave his daughter an equal share of his estate with his other children, or some similar obligation. These are very awkward clauses,1 and must be carefully kept in view. Separately, in connection with the marriage contracts of daughters (and other beneficiaries, but usually daughters), under which they have conveyed all estate and acquirenda to trustees, the testator should be informed that their shares of his estate, if given absolutely, will fall under their marriage contracts, and must pass to the marriage trustees. There may often be no objection to this, but sometimes it may be otherwise, and the testator may prefer that some other arrangement should be made. A declaration that the shares shall not fall under the beneficiary's marriage trust will not meet the case, for it will not receive effect in law.2

As regards all the cases which have been referred to, it should ¹ See p. 767. ² See p. 764.

be made plain in the will what the testator's intention is as to the relation between the provisions thereby made and the provisions under the earlier deeds. Is the testamentary provision to be in satisfaction of, or in addition to, the *inter vivos* obligation?

Special Destinations.—Difficulties frequently arise owing to a doubt whether the testator has intended to include in his will property which he held under special destinations. This suggests that the conveyancer should, as far as possible, ascertain whether any special destinations exist, and should put the question clearly to the testator whether, in point of fact, he wishes them to receive effect, or whether, on the other hand, he desires the property in question to be massed with his general estate. In either case there should be express words in the will. Four cases may be specially mentioned:—

- 1. There is the ordinary case of heritable destinations under which the testator holds, with a substitution. The destination may have been made by the testator himself (which includes a destination dictated by the testator, e.g. in a disposition by the seller on the occasion of a purchase by the testator ') or by some third party. In the former case the general presumption is that he intends it to stand, whereas, in the latter case, the presumption is the other way.² But in neither case, as has been said, should the matter be left to presumption. The recent cases of Currie and Minto 's were both conflicts between special and general dispositions both made by the testator. In the latter the presumption against evacuation was held to be overcome; in the former contra.
- 2. Destinations to the testator in liferent and some named member of his family in fee, or in terms which have that effect, but with power to him to alter. The deed may, however, be so expressed that it is left doubtful whether the father has power to alter by mortis causa deed. If the deed has never been recorded or delivered (and assuming the destination was granted or dictated by the father), it would probably be entirely under his control whatever its terms might be. If, however, the deed has been delivered, and the power of testamentary disposal is doubtful, the father may be able to put conditions in his will which will effectually bar challenge, or, failing that, he may realise in his lifetime and deal as he chooses with the price.
- 3. Undelivered deeds in favour of third parties. If A. buys a house and takes the title in favour of B. without any reserved power, but never delivers the deed, and assuming that there was no obligation on A. to take the deed in these terms, the house will be A.'s property,4 though no doubt much trouble may be caused by the title having been so taken. This trouble will certainly be nothing the less if the

¹ Currie v. M'Lennan, 1899, 1 F. 684.

³ Minto's Trs. v. M., 1898, 1 F. 62,

² Campbell v. C., 1880, 7 R. (H. L.) 100, and cases cited; Currie, supra.

⁴ Kindness v. Bruce, 1902, 4 F. 415.

purchaser dies leaving the title in this form and saying nothing about it in his will. In that case it may be allowed testamentary effect, as was done in Walker's case.

4. Share certificates, deposit-receipts, etc., in joint names with survivorship, or in two names jointly and severally which implies survivorship.² These are just circumstances under which the real intention of parties is apt to be defeated and much trouble created. A share certificate is held to be a proper destination while an ordinary bank deposit-receipt is not.³

Entail Improvement Expenditure.—So far as uncharged by the testator in his lifetime, improvement expenditure, if it is to be kept up at all, must be "expressly bequeathed, conveyed, or assigned." It is thought to be clear that this does not require any identification of the particular expenditure, or any specification of amount, or that the expenditure shall be prior to the date of the will. The clause of conveyance in the will may proceed—

Including but without prejudice to the said generality all sums expended, now in course of expenditure, and that may hereinafter be expended by me on improvements of the nature contemplated by the Entail Acts on the estate of X. or any part thereof [and any other entailed estate, and all such expenditure by others of which I am now in right], and all my rights, powers, and remedies in respect thereof.

Legal Rights.—If the testator have wife, husband, or children it should be clearly explained to him or her what legal rights they may have and that these cannot be defeated by any testamentary act. But the rules as to moveable bonds in a question with the widow will be kept in view.⁵ The same bonds will be free from legitim if taken to the lender and his heirs excluding executors. Heritable securities are free from jus relictæ and legitim even without that exclusion, but are subject to terce if the lender is infeft. Before one can say whether the legal rights exist, the marriage contract if any must be seen.⁶ The testamentary provisions will (1) be expressly declared in lieu of the legal rights, and there ought to be (2) a clause as to the disposal of the forfeited testamentary provisions in the event of widow, husband, or child claiming legal rights.

Equitable Compensation.—If the first of these clauses be omitted then the rule is not forfeiture but equitable compensation, the result of which is that if the rejected provision be sufficient to leave a surplus after compensating the loss inflicted upon the other beneficiaries by the

¹ Hadden v. Bryden, 1899, 1 F. 710; Jarvie's Trs. v. J.'s Trs., 1887, 14 R. 411; Walker's Ex. v. W., 1878, 5 R. 965; Kindness v. Brucs, 1902, 4 F. 415.

² Muir v. Snodgrass' Ex., 1901, 9 S. L. T. No. 284.

³ Connell's Trs. v. C.'s Trs., 1886, 13 R.

⁴ 1875 Entail Act, s. 11; *Maxwell*, Petr., 1877, 4 R. 1112.

⁵ See p. 12.

⁶ See p. 768.

legal claims being put forward, that surplus will go to the beneficiary who has claimed his or her legal rights, a result which will probably not be intended. To illustrate: suppose the liferent of £1000 is left to a son; he claims legitim and draws, say, £350; the trustees must retain the £1000 during the son's life and pay the income of it to, or accumulate it for, those from whom the £350 has been taken, probably the residuary legatees; then when (allowing for compound interest) £350 has been made good in this way, the son begins to draw the income of the £1000 and continues to draw it during his life, and of course still keeps his legitim, £350.1

If a clause be inserted making total forfeiture the rule, but without a clause disposing of the forfeited provision, the same case shews that it may be a serious question whether it is to fall into residue or go as intestate succession.

Liferent to Child and Fee to Remoter Issue.—This is a very common form of trust provision; a fund to be set apart and held for the testator's child (usually a daughter) in liferent and her issue in fee. The testator's attention should be called to the right of the daughter to claim legitim (if not discharged) and that the result of that may be that the daughter draws a large sum as legitim and yet her issue get the whole capital fund intended to have been liferented by her.2 This will no doubt be found not to be what he would wish. remedy is to declare that if the daughter claims legitim not only shall she forfeit her liferent, but her issue shall forfeit the capital. again may not carry out the real intention. The testator may wish that the issue should in any event take some benefit, and when his wishes are thought out it will be easy enough to make this perfectly clear in expression. Note that if the child who repudiates and her issue are the only beneficiaries, she is not allowed to found upon her repudiation and produce intestacy, with the result of the fund falling to herself; her issue are preferred.3

Limit of Forfeiture.—The important case of Naismith 4 establishes that even a formal declaration that the provisions of the will are in full of legal rights is to be construed as excluding them in so far only as conflicting with the will, and that if there should be a resulting partial intestacy (as by failure of one of the residuary legatees), the widow and children, notwithstanding that they have accepted their provisions under the will, are entitled in addition to their legal rights out of the intestate part. No doubt it would be easy to frame a clause which should bar these claims also, but it is not clear that there is any reason for doing so. The better course is to go as far as possible in framing the will in the direction of preventing lapse.

Macfarlane's Trs. v. Oliver, 1882, 9 R.
 Paton v. P.'s Trs., 1903, 5 F. 528.
 Jack v. Marshall, 1879, 6 R. 543.

Gillies v. G.'s Trs., 1881, 8 R. 505.
 Naismith v. Boyes, 1898, 25 R. 899, affd. 1899, 1 F. (H. L.) 79.

Restriction of Liferents.—In creating liferents regard must be had to the limitations which the Entail Acts have imposed as regards both heritable and moveable estate.

Heritable estate.—As regards instruments dated on or after 1st August 1848, any person born after the date of the deed and of full age may, though by the terms of the deed he is restricted to a liferent, hold the estate in fee simple.¹

Personal estate.—This is extended to personal estate as regards deeds dated on or after 31st July 1868. The date of wills is deemed the date of testator's death, and the date of any marriage contract the date of the dissolution of the marriage.²

Restriction of Accumulations is of course entirely different from restriction of liferents; under a liferent the *corpus* is preserved, but the income is spent, whereas under accumulation both corpus and income are rolled up. The restrictions on accumulations are:—

1800. Thellusson Act.³—Personal Property.⁴—Accumulations allowed for only one of the following terms, viz. (1) life of settler; (2) twenty-one years after his death; (3) minorities of any persons living or in utero at his death; (4) minorities of any persons who, if of full age, would be entitled to the income directed to be accumulated. But those restrictions do not apply to (1) accumulations to pay debt; (2) accumulations for children's provisions,⁵ (3) producing timber.

1845.6 Heritable property brought within these enactments.

1892.7 Accumulations Act, 1892.—Accumulations of income of estate, heritable or moveable, "for the purchase of land only," limited to the minorities of persons who, if of full age, would be entitled to the income.

The effect is that, except as above stated, income cannot be accumulated beyond the period of twenty-one years after the birth of a child in utero at the testator's death, and this holds though the accumulations may not begin for some years after his death.⁸ The excess period only is illegal and annulled.⁹ The income which is set free goes to the person entitled to the capital, if under the will there be a present gift of the capital, and the result may be to anticipate the payment of the corpus; if not, then to the heirs ab intestato of the testator—to the heir, if heritable, otherwise to the executors.¹⁰ Heritage and moveables are distinguished as at the testator's death, ignoring any conversion ordered under the will.¹¹

Powers of Disposal (see special destinations, supra). — This,

- ¹ Entail Act, 1848, s. 48.
- ² Entail Act, 1868, s. 17.
- 3 39 and 40 Geo. III. c. 98.
- 4 8 9
- ⁵ As to what these are, see *Moon's Trs.* v. *M.*, 1899, 2 F. 201.
- ⁶ Entail Act, 1848, s. 41.
- 7 55 & 56 Vict. c. 58.
- 8 Campbell's Trs. v. C., 1891, 18 R. 992.
- ⁹ Colquhoun v. C.'s Trs., 1892, 19 R. 946.
- ¹⁰ Edwards' Trs. v. E., 1891, 18 R. 535.
- 11 Moon, supra.

however, refers more particularly to the very common case of a fund being held in trust for the testator in liferent, the capital to be paid to such persons as he may appoint, and failing such appointment, then to X. The testator will probably desire to exercise this power, but on the other hand he may not, and there may be a bad miscarriage if the point is not specially put to him and his instructions taken. If the power is to be exercised, it will be done expressly (either specially or generally); but, on the other hand, it will not be assumed that silence will leave the fund to go to X. Whatever be the intention, the only rule for the conveyancer is—state it clearly.

Powers of Apportionment held by testator. These are materially different from powers of disposal. The latter are general powers of alienation; powers of apportionment are limited to division amongst a certain class already specified, e.g. the testator's own children. It is important to note that in the case of marriage-contract provisions by a father in favour of his children as a class, he has an implied power of apportionment, which he may even delegate. But of course that would not be so if in the marriage contract the provisions were in favour of the children equally. The exercise of the power should be express, and further, it should be special. That is to say, in the ordinary case it will not be found appropriate simply to state that the funds subject to the power are included in the estate dealt with by the will; for even if the residue be given wholly to persons who are objects of the power, there must be purposes in the will to which the funds in question cannot be applied, e.g. payment of the testator's debts. Accordingly, there should either be a special deed containing the exercise of the power, or at least a special clause in the will dealing with these funds only. The following further points may be noted:-

- 1. Any object of the power, or all but one, may be excluded unless the instrument creating the power is express to the contrary.²
- 2. A mere power of apportionment will not enable the party exercising the power (the donee of the power) to interfere with the vesting.
- 3. Care must be taken not to imperil the exercise of the power by (a) giving a share to anyone who is not an object of the power, or (b) attaching any unauthorised conditions. Further, see p. 849.

Powers of Apportionment conferred by testator. Whenever the testator intends to confer a power of apportionment, he should be asked to consider whether he intends that the power should be capable of exercise inter vivos, or only by revocable testamentary act. The difference in result may be very considerable. If the power be capable of irrevocable inter vivos exercise, the result may be that it is so exercised under undue pressure on the part of one of the family for his apparent immediate advantage, that the whole or a great part of ¹ Campbell v. C., 1739, Mor. 6849.

² Powers Act, 1874, 37 & 38 Vict, c., 37.

the fund is sacrificed, and most unjust consequences brought about. It is suggested that in all ordinary cases the testator ought to be advised to restrict the donee of the power to exercise "only by will revocable at pleasure."

Debts.—When particular properties are specially bequeathed, and these properties are burdened with debt, there is a risk that the testator's intention may not receive effect as to whether or not the legatee is to take the property burdened with the debt, or whether the debt is to be paid by the general estate so that the legatee shall take the property disburdened. A mere general direction to pay all debts will not have the effect of relieving the legatee.¹ If, therefore, that be intended, an express clause must be inserted.

Alimentary.—Whenever a liferent or an annuity is being bequeathed, the testator should be advised to make it alimentary. Indeed, it may be assumed that this is what he intends, for his bounty flows to the beneficiary, not to the latter's creditors. In carrying out this intention the conveyancer will bear in mind that in order to secure the alimentary nature there must be the intervention of a permanent trust. A direct conveyance by the testator to the beneficiary of a property in alimentary liferent is not effectual so far as the alimentary point is concerned. The same is the case with a direction to trustees to convey in these terms, or to purchase an alimentary annuity in name of the beneficiary, or to convey to a third party under the real burden of an alimentary annuity. In all these cases the alimentary protection will fail. There must be kept up a trust capacity and relation during the subsistence of the liferent or annuity giving the trustees a right and a duty to sustain the alimentary clause.2

It will, however, be kept in view that a capital sum cannot be made alimentary.³ In the case of a secured annuity it appears that to give protection the personal obligation as well as the security must be granted in favour of the trustees.⁴

Annuity (see p. 752).—The following points may be kept in view in framing bequests of annuities:—

- 1. Alimentary.—The annuity should be declared alimentary (q.v.).
- 2. Capital.—Is the annuity to be a charge on capital if the income should be insufficient? This will be the effect if the contrary be not declared.⁵ There is, however, reason to believe that very often the true meaning of the testator is, that the beneficiary is to receive the *income*, but not exceeding the annual sum stated as the amount of the annuity, and that he does not contemplate that the capital is to be encroached

Brand v. Scott's Trs., 1892, 19 R. 768.
 Murray v. Macfarlane's Trs., 1895, 22
 R. 927; Rothwell v. Stuart's Trs., 1898, 1

R. 927; Rothwell V. Studetts 178., 1898, 1 F. 81; Kennedy's Trs. v. Warren, 1901, 8 F. 1087.

³ Rothwell, supra.

⁴ Christie's Factor v. Hardie, 1899, 1 F. 703.

⁵ Graham's Trs. v. G.'s Trs., 1898, 1 F. 357.

upon. It is very easy to make this clear according to the true intention. If the right conferred is the income with a limit, the clause ought to go on to say whether a deficit in any one year may be made up from a surplus in a previous or subsequent year during the beneficiary's life.

- 3. Government Duty.—Is the annuity to be free of duty? If so, the exception should not be limited to legacy duty, but should extend to all Government duties.
 - 4. Income Tax.—The like question.
- 5. Ranking.—Looking to the circumstances under which bequests of annuities are often granted, it is probable that the testator would not infrequently desire that in the event of a deficiency of estate to meet all his testamentary provisions, the annuities should have a preference over ordinary general legacies. But unless this is made express, the annuities will abate pari passu with the general money legacies.
- 6. Incidence.—It will sometimes be important to remember that the rule is that, unless the contrary is provided, annuities, as having a tract of future time, are a burden on the heir to the relief of the executor.¹
- 7. Purchase of Annuity.—Without the consent of all parties interested it appears that trustees have no power to provide for an annuity by purchase.²

Liferent.

- 1. Alimentary (q.v.).
- 2. Government Duty.—See supra, under Annuity.
- 3. What is Income?—This is, of course, always a difficult question, and under certain circumstances it may be worth while to put special directions in the will to help to determine it. See p. 651.
- 4. Apportionment.—The effect of the rule of apportionment often is that the beneficiary receives little or no income for a considerable time after the death, which may result in much inconvenience. It is for the testator's consideration whether it should not be provided that all dividends and other income becoming payable after the death shall fall to the liferenter irrespective of the period for which they are due. If such a provision be added, the other question is, What is to be the rule at the end of the liferent as regards any income accrued before, but not payable till after, the death of the liferenter?
- 5. Liferent of House.—Where the right given is the occupancy of a dwelling-house, it has been held that the beneficiary is entitled to be relieved of certain items which in the ordinary case are undoubtedly income charges, namely, feu-duty, landlord's repairs, landlord's taxes, and interest on heritable debt. No doubt should be left on this point. It is for the testator's consideration whether, in any case, the beneficiary

326.

¹ Moon's Trs. v. M., 1899, 2 F. 201.

⁴ Cathcart's Trs. v. Allardice, 1899, 2 F.

² Graham, supra.

⁸ Bayne's Trs. v. B., 1894, 22 R. 26.

should not be entitled to have the house put into proper condition and repair at the beginning of the liferent at the expense of the estate and at the sight of some named person.

6. Fire Insurance.—The liferenter ought to be taken bound to pay or allow the premiums necessary to insure all buildings in the names of the trustees so as to protect both liferent and fee.

Interest.—The rule as to legacies is that if no term of payment be fixed they bear interest from the testator's death, and this is not displaced by a direction to pay "as soon after my death as funds can be realised" unless it can be proved that realisation was impossible at the death. The rate of interest depends on what rate the estate over all is yielding; unless there is delay 4 per cent. is a common rate.

Vesting.—On this question of vesting two things are certain. one is that more disputes are raised regarding it than on any other point, owing to the way in which too many wills are drawn. The other is that only a very little care is required to leave no possibility of doubt at all as to the testator's intention. The words "the testator's intention" are largely a fallacy. The fact, of course, is that in one sense the vast majority of testators have no intention at all as to "vesting," inasmuch as they do not even know that there is such a thing. The matter must be put before the testator in its effects, and his purpose will be immediately ascertained. The suggestion is made that the testator should be recommended to postpone vesting till the period of payment, carrying over the shares of predeceasers to their issue, though it may be proper that the parent should have the power of apportionment. Postponement of vesting will not save the succession from being forestalled by reversionary transactions: it will only render these dealings more expensive by requiring the protection of life assurance; if further security is to be sought against the anticipating of the date of payment, the best available means is by giving the liferenter a power of purely testamentary appointment, or by giving him or the trustees large discretionary powers to restrict to a liferent or otherwise. But postponement of vesting has certain advantages to recommend it:---

1. It is only in accordance with the ordinary man's common sense that if an intended beneficiary is not in life at the time of division he cannot be included in the division, and it will probably be found that that is what most testators really have in their minds. As regards the idea that the testator may have any purpose of enabling the beneficiary to make the fund available as a source of credit before it becomes payable—which has sometimes been made a ground of judgment 2—it is much more probable that he would look with the utmost disfavour on any such suggestion for disposing of his estate. It therefore appears

² Per Lord Blackburn in Taylor v. 221.

¹ May's Trs. v. Paul, 1900, 2 F. 657. Gilbert's Trs., 1878, 5 R. (H.L.) at 217, p.

that postponement of vesting has the fundamental advantage of carrying out the true testamentary intention.

- 2. Suppose the intended immediate beneficiary has his estate sequestrated during the subsistence of the liferent, his interest, if vested, will pass to the trustee and be lost. But if vesting has been postponed, he may obtain his discharge before the fund falls in, and then he will come into enjoyment of what the testator intended he should have. And whatever may be said as to this from certain points of view, there is no doubt that, as in the case of alimentary provisions, the testator wishes to benefit the persons whom he selects, and not their creditors. Or, again, the intended immediate beneficiary may after sequestration predecease the liferenter, and if the vesting has been postponed, his children, if any, will come into the succession, which will have the advantage of carrying out his, as well as the testator's, wishes.
- 3. Apart, however, from any question of bankruptcy, assume that the intended immediate beneficiary predeceases the liferenter; if vesting is not postponed, there will be estate duty to be paid on two devolutions: (1) from the testator to him, and (2) from him to his issue. This double duty is saved by postponing vesting. But on the other hand it may be found that a very simple will, if it involve postponement of vesting and conditional institution of issue or survivors, is held by the Inland Revenue authorities to subject the estate to settlement estate duty.

But while postponement of vesting is recommended, the recommendation does not go the length of suggesting postponement until actual payment. Thus if the fund is liferented by A., the vesting may be postponed until A.'s death, or until the first term of Whitsunday or Martinmas occurring six months thereafter, according as may be preferred, but it ought not to be postponed until the fund is in fact paid over. The reason is, that if this extreme postponement be directed, the direction is literally applied unless default and delay can be established against the trustees, and this is practically to invite litigation. When the direction is to divide after a stated period, e.g. the death of a liferentrix so soon thereafter as deemed proper, the shares vest at the death of the liferentrix.

Then as to the proper manner in which to carry out the testator's intention on this point of vesting, two rules may be given: (1) insert an express clause as to vesting, and (2) be careful that there is nothing repugnant to this clause in the trust purposes or otherwise in the instrument. That the former alone may not be sufficient is seen from the case cited.³ There the express clause declared earlier vesting, but

¹ Macdougall v. M'Farlane's Trs., 1890, ² Croom's Trs. v. Adams, 1859, 22 D. 17 R. 761. 45.

² M'Call's Trs. v. Murray, 1901, 3 F. 380.

the substantive clauses were so expressed as to shew, according to rules of legal construction, that that could not have been intended and that vesting was further postponed. As to the exact words to be used in the clause giving the gift, it is suggested for consideration whether, when postponed vesting is intended, instead of giving the fund to A., B., and C., and the survivors of them, it is not simpler and more direct to give it to such of A., B., and C. as may be in life at the period of payment. But in that case it is specially important not to leave the conditional institution of issue to stand upon the conditio si sine liberis, for in that case it appears to be a question whether the issue of any predeceasing member of the original class would take any share at all.¹

Special attention must be given to the period of vesting of the shares falling to issue of predeceasing intended beneficiaries under a destination (to take effect at the expiry of a liferent) to the testator's children and the survivors of them, with a declaration that the issue of predeceasers shall take their parent's share. There is, of course, no vesting in the testator's own children until the period of payment; but if one dies leaving issue, the issue take a vested right at their own parent's death.² If the fact be that the testator wishes to postpone vesting in the case of his children, it can hardly be supposed as a matter of fact that he has a contrary intention in the case of his grandchildren, and it is suggested, therefore, that words be inserted giving the share exclusively to the issue who survive the period of payment.

Failure of Vesting: Intestacy.—It not infrequently results that the testamentary purposes fail, wholly or in part, with the further consequence of total or partial intestacy. However it may be in the former case, it can hardly be supposed that partial intestacy does not frustrate the true intention of the testator. To take the case of a residuary destination in shares, it is a reasonable assumption that he would prefer any one of his residuary legatees to his heirs ab intestata. It is just here that the mistake is apt to be made. Suppose a scheme of testamentary disposition under which the residue is to be split into two shares, one to be liferented by each of A. and B., with the fee of the several shares to their issue respectively. The will may stop there on the assumption that both A, and B, will leave issue who will take a vested right. But that may not be, and under a will in these terms, if either have no issue, there is intestacy to the extent of one-half of the estate. Of course the point must be put to the testator himself for his own instructions, but it may be surmised that, failing issue of A. on his death, the real desire is that B., if surviving, shall have the liferent of the whole, and that B.'s issue, if surviving, shall have the whole capital.

¹ See Balfour, L.-P., in *Bowman* v. ² Martin v. Holgate, 1866, 1 L. R. (Eng.) Richter, 1900, 2 F. 624, at p. 628. (H. L.) 175.

Issue; Accrescing Shares.—We have already (p. 812) dealt with the nature of the right to be taken by issue of predeceasing intended beneficiaries: equally important is the extent of the right, assuming, that is, that they are intended to take at all. This last is the first question. The practical advice on it is, be express. If issue are to take, there will be a special express clause. If, on the other hand, they are not to take, it will often be neater to insert a general clause after the trust purposes, to the effect that "in the event of any of the persons intended to be favoured by these presents dying without taking a vested interest, their issue shall not take unless" (if it be the case) "when otherwise expressly provided."

Assuming that issue are to take, the next question is, to what extent? the vexed question being whether they are to take the "original" share only, or "accrescing" shares also. Reference is made to p. 656. If they are to be limited, the clause may run:—

to pay to such of my children as may then be in life, declaring, however, that the issue then in life of such of my children as may then have predeceased shall take as in room of their parents respectively, but to the extent only of such parent's original share, and not any accrescing share which such parent would have taken if in life.

In the contrary case the clause may run:-

to pay to such of my children as may then be in life, and the issue then in life of any of my children who may then have predeceased, such issue taking the shares, original and accrescing, which would have fallen to their respective parents if in life, the division being per stirpes.

Conditional Institution or Substitution is a matter which may require attention especially in directions to trustees to execute conveyances of heritable estate. Thus when a testator directed his trustees to convey heritage "to A., whom failing to his lawful children equally among them," it was held that as A. survived the period of vesting the destination to his children was of no effect, it being merely a conditional institution to come into effect if A. failed to take a vested right and having no power as a substitution.1 These questions ought not to arise and would not if the direction were to "convey to A. absolutely and in the event of his predeceasing me [or the said X.], then to convey to his children," etc. But when the ambiguity occurs the practical question arises—how should it be dealt with so as to prevent any miscarriage, to keep the trustees safe, and to save expense? In this connection it is important to observe what actually happened in Marshall's case. trustees conveyed exactly in the full terms of the trust direction. disposition was recorded on behalf of A. simply. A. died intestate. He left two sons. The elder claimed the whole. The younger claimed one-half on the ground (1) that the will imported a substitution prescribed by

¹ Marshall v. M., 1900, 2 F. 1023.

the testator, and (2) that even if not, A.'s acceptance of the disposition in these terms imported a substitution prescribed by him. Both pleas were rejected, and the elder brother took the whole. The point to be kept in view is that in any case the beneficiary in whom the right first vests is absolute dominus of the property and of the destination if any, i.e. assuming him to be major and capax. Accordingly the proper course for the trustees is to obtain his signature to the disposition for the express purpose of removing any doubt as to the destination. He will, according to his intention, either create the destination assuming it to be non-existent or revoke it assuming it to exist. If this cannot be arranged then the full destination may be repeated or judicial sanction may be required.

Conditional Institution of Heirs of Legatee.—But the question remains whether the testator intends that a legatee's children or heirs should take even if the legatee himself predeceases the testator or the period of vesting. In framing a legacy, the words "heirs," "executors," "children," "representatives," and such like ought never to be introduced without some special reason. A legacy to A. will lapse by his predecease unless there be room for the conditio si sine liberis, whereas a provision to A. and (or or or whom failing) his heirs (or executors or successors) will carry the legacy to the heir in heritage or in mobilibus, according to the nature of the property. But the rule is not absolute, and if there is anything to shew that the original legatee's survivance is a condition of the whole legacy, it will lapse, e.g. a bequest to A. in case she shall survive me, and to her heirs, executors and assignees whomsoever.1

Ademption may mean two different things. The first is what would appear to be more correctly described as satisfaction, i.e.

When a testator leaves a legacy to any one, and afterwards in his lifetime makes a payment to that person in such a manner and in such circumstances as to satisfy the Court judicially that the payment was intended as a discharge of the legacy—a prepayment of it for the convenience of the legatee —such a discharge will be given effect to.²

This is a matter which the conveyancer may have no opportunity of guarding against, but whenever he is consulted regarding payments to or for members of a client's family he should have in view the possibility of these payments raising questions regarding the client's testamentary arrangements.

Ademption in the stricter sense is when a testator makes a bequest of some specific subject and afterwards sells it in his lifetime. The legacy falls. This is apt to happen in the case of bequests of heritage. As to the effect of a sale made in the testator's lifetime, but not carried out to completion till after his death, see the case noted below.³ Quere

Baillie's Exor. v. B., 1899, 1 F. 974.
 Johanson v. J.'s Trs., 1898, 1 F. 244, at pp. 249.
 Pollok's Trs. v. Anderson, 1902, 4 F. 455.

whether the result would have been the same if the bequest had been of heritable estate generally and not of specific heritage. Even more dangerous are bequests of specific investments, e.g. stock or securities. A subsequent change of investment destroys the gift, which in the ordinary case is a good reason for avoiding this form of bequest.

Defeasible Conditions.—It is necessary to bear in mind that if the effect of carrying out the exact testamentary directions would be that the beneficiary could immediately undo what has been so done, the Court will free him from the expense of having to do so, and will direct the estate or funds to be made or paid over to him simply and absolutely. The principle is that, given a vested and absolute fee, any conditions attempted to be superadded are voidable at the will of the beneficiary as being repugnant to the gift. The following are examples:—

- 1. To purchase lands to be conveyed to the beneficiary in fee simple with or without a special destination. The beneficiary may claim the cash.¹
- 2. To pay off debt affecting property belonging to the legatee in fee simple, with or without a special destination. Even though the debt is paid off before the time for payment of the legacy, the legatee may claim the money.²
- 3. To purchase an annuity in favour of the beneficiary, even though it is called an alimentary annuity, unless provision has been made for protecting the annuity by a permanent trust, for without that protection the annuity would not be truly alimentary, and the Court will not erect the necessary machinery.³
 - 4. To qualify for a business or profession.4
- 5. Finally there is the established rule that if there is no other interest to be protected, and the fee is vested, and the beneficiary major, he will be relieved from trust management, though the will fixes a later date.⁵

Advances by Testator.—If the testator has made any advances to or on account of any of the beneficiaries, care should be taken to ascertain and state exactly what his intention is as regards these, both principal and interest. He may wish to discharge all claim, or he may wish the principal only to be charged, and to be paid at his death, or only accounted for at the period of division; or he may wish interest to be charged, and if so, both period and rate should be specified. In any case, however, it may be well to qualify any clause of discharge or abatement of claim to the effect that it is not to operate if the beneficiary (assuming that it is the case of a son or

² Sutherland's Trs v. S., 1870, 8 M. 716.

¹ Gordon v. G.'s Trs., 1866, 4 M. 501; Spens v. Monypenny's Trs., 1875, 3 R. 50; Ross v. Thomson and ors., 1896, 4 S. L. T. No. 235 (per Lord Stormonth Darling).

³ Murray v. Macfarlane's Trs., 1895, 22 R. 927.

⁴ Ross, supra.
⁵ Miller's Trs. v. Miller, 1890, 18 R.
301.

daughter) should repudiate the will and claim legitim, though no doubt in most cases that would be the result in any event.

Warrandice.—The correct rule probably is that a will ought never to contain a clause of warrandice. If property be bequeathed with absolute warrandice (which in the case of heritage will be implied in the words, "And I grant warrandice") or of warrandice from fact and deed, the result is that the testator's personal estate must pay off all debt created by the testator over the property so bequeathed, and further if the warrandice be absolute, the obligation will extend to all debt, This may often not be whether created by the testator or not. the real intention, and if it is, it would be better to insert an express clause. But the warrandice if absolute will go even further, for it will bind the personal estate to guarantee the title to the legatee and his successors, which can hardly be assumed to be intended. If, however, the legatee who takes a specific bequest, even with absolute warrandice, is also the residuary legatee of the personal estate, the warrandice in effect becomes pro non scripto, at least if the personal estate, which would otherwise fall under the residuary bequest, is not less than the claim under the warrandice.1

Discretionary Powers.—This refers not to discretionary powers of administration, but to such powers as control the beneficial interests to be taken under the will. The most common is a power to restrict to an alimentary liferent and to carry over the fee to the next generation. The power must authorise the carrying over of the fee to some one else. and the act in execution of the power must go that length, otherwise it will not be effectual against the creditors of the original beneficiary or even himself.2 One effect of these clauses is to render it in a large measure, if not wholly, impossible for the beneficiary to anticipate the period of enjoyment by selling or mortgaging his reversionary interest. The powers may be exercised after intimation of an assignation or the use of arrestments.3 A judicial factor may or may not be entitled to exercise these powers.4 Assumed trustees may exercise the powers unless the will indicates the contrary,5 and trustees appointed by the Court are in the same position.⁶ A very full form of clauses is given on p. 785.

Trustees' Powers.

1. To sell.—This is of course a power which must be conferred expressly if the trustees are to possess it, and it should rarely be omitted. But it will be kept in view that a sale may have a very material effect on the interests of the beneficiaries. For instance, if the estate

¹ Duchess of Montrose v. Stuart, 1887, 15 R. (H. L.) 19.

² Kinmond's Trs. v. Mess, 1898, 25 R. 819.

³ Chambers' Trs. v. Smith, 1878, 5 R. (H. L.) 151.

⁴ Howden v. Simson, 1895, 23 R. 113;

Macfarlane v. M.'s Trs., 1896, 4 S. L. T. 25, 26.

⁵ Brown's Trs. v. Young, 1898, 6 S. L. T. No. 48.

⁶ Macfarlane, supra.

owns an area of ground let for agriculture, with a certain present feuing value, but with the prospect of a much greater value in the course of ten or fifteen years, the liferenter may wish to have it sold, while the fiar may wish to have it retained. In a case 1 of this kind power of sale was refused by the Court, reversing the Lord Ordinary, and notwithstanding reports from men of skill in favour of sale. Other cases may be figured. The testator may accordingly wish to qualify the power of sale in some way. It is superfluous to give the trustees power of sale "by public roup or private bargain": the words quoted are implied.²

- 2. To grant (1) feus and (2) long leases, (3) to excamb, and (4) to borrow money aud grant security. These also are all powers which are not implied. Whether they need or should be conferred will depend upon circumstances.
- 3. To postpone Realisation.—The testator may hold property and investments of a kind which in ordinary course of administration the trustees would be bound to realise with all due despatch and within a year of his death. He may, however, have a strong belief in their worth or ultimate value, and may be very desirous that they should be retained. In that case special power should be introduced into the will.
- 4. To give Time.—This is but a special form of the preceding. It refers specially to sums due on personal obligation or credit, or at any rate not secured in a trust sense. A leading case is that of the testator's share in a co-partnery concern. There may be no contract of co-partnery, or the testator may wish his partners to have ampler time and consideration than they would be entitled to claim under its provisions.
- 5. Cautionary Obligations.—If the testator has incurred cautionary obligations for third parties, it will be explained to him that his trustees would be bound to require the principal debtor to pay up the debt, or at least to get a release of the testator's obligation from the creditor, and to press for this immediately. This would no doubt in most cases be the best thing for the estate; in others it might not. But however that may be, the testator may wish his friend to have the benefit of his credit for some time after his death. If so, special discretionary powers should be very carefully inserted. At any rate, if the testator has not already obtained a bond of relief from the principal debtor, he should be advised to obtain it, for without it his trustees may find themselves in a difficult legal position.
- 6. Investments.—The testator may have some special views of his own as to the powers of investment which the trustees should possess. But, as a general rule, assuming that suitable men are appointed to the trusteeship, the wider the powers the better. It will, however, be kept in view that it is not enough that an investment is within

52

¹ Molleson v. Hope, 1888, 15 R. 665. ² 1867 Act, s. 4.

the words of the will, as for instance "a debenture of a company registered under the Companies Acts and having its office in Great Britain." Just as trustees with the statutory powers only are not entitled to take any heritable security, but must satisfy themselves as to the particular security, so they must see that the particular debenture is a suitable investment within the class of debentures.¹

Trustees' Immunities.—This is one of the most anxious clauses in all instruments under which trusts are constituted. It is very difficult to say what clause will be sufficient to protect the trustees, or how far the protection will go. Practically the clause is not to be relied on.² The most radical—and perhaps the most just—view is, that as the office is purely gratuitous, the trustees should incur no civil liability except for such conduct as entails criminal responsibility also. Whether the clause would receive full effect is another question.

Mutual Wills.—The only forms of wills by two or more testators which are given in this book will be found on pp. 824-5. These are of a very simple nature, the only gifts being of absolute fees. It is not uncommon to find mutual wills—usually by husband and wife—of a much more involved character. But it is recommended that in these cases there should be separate wills. For this there are many reasons of different kinds.

The first of these is the consideration that if the survivor is to have power of revocation as regards his or her own estate after the death of the predeceaser, it is obviously undesirable that on the latter's death there should be published the survivor's testamentary directions which may afterwards be entirely altered, and yet that is what will happen if a mutual will be signed.

Power of Revocation.—Then many questions may arise on this head:—

1. Does it exist?—The question is—contract or testament?

In a mutual will which is purely testamentary a clause binding the parties not to alter would not be effectual because a testament is always revocable. . . . On the other hand . . . in a mutual instrument there may be a condition rendering it irrevocable against which neither party can operate successfully without the consent of the other, and the question here is whether this deed [will] is so contractual in its character as to exclude the possibility of revocation. . . . Wherever we find that the parties have contracted that they shall join their estates, and destine them in a certain way, and do that for special benefits conferred each upon the other, and declare that this destination is not to be revocable by the one without the consent of the other, then it is irrevocable.

Special questions arise as to express powers of revocation (1) under

1900, 2 F. (H. L.) 37.

Alexander v. Johnstone, 1899, 1 F. 639;
 Henderson v. H.'s Trs., 1900, 2 F. 1295.
 See observations in Ferguson v. Paterson,

3 Per Lord Trayner in Robertson's Trs. v. Baird's Trs., 1900, 2 F. 1097.

mutual wills which make the survivor fiar subject to an ultimate destination on his death, when the question is whether, e.g., a power to revoke "during joint lives" is limited to the primary disposition to the survivor and does not fetter the latter's power of revocation of the ultimate disposition, or whether on the other hand that ultimate disposition is irrevocable, the presumption being for freedom; and (2) under mutual wills of husband and wife, when the doctrine of donatio intervirum et uxorem tends to make revocable what might otherwise have been irrevocable. As to both of these cases see Lord Kyllachy in Noble.¹

- 2. Construction of Revocation Clause.—Suppose A. and B. make a mutual will giving say the survivor the liferent of the predeceaser's estate, and then going on to make ultimate dispositions, but giving the survivor power to "revoke" or to "alter or revoke" as regards both estates, what is the effect? Would power simply to "revoke" authorise the survivor to do anything but literally to revoke, with the result of enhancing residue if the revoked provision was not residuary, or of creating intestacy if it was, or if the revocation was total? And would power to "alter or revoke" have a different meaning, and if so, would it be confined to altering the shares and proportions in which the predeceaser's estate should go amongst the beneficiaries named by himself or some of them, or would it enable the survivor to introduce new beneficiaries of the predeceaser's estate? It is obvious that these questions may arise upon any power to revoke if given to another person than the testator (as is sometimes done) though the will should not be a mutual will, but it is under mutual wills that the case is most apt to occur. If the wider power be what is intended, it ought to be expressed as powers of alteration, revocation, and testing.
- 3. Effect of Revocation.—If A. and B. make a mutual will giving the survivor a liferent of the predeceaser's estate, and disposing of both estates jointly on the death of the survivor by gifts of legacies and residue, and if, say, the survivor revokes so far as regards his estate, the loss of this estate falls not entirely on the residuary legatee; all general legatees must contribute to the loss. Strictly, the result ought to be the same as if each testator had bequeathed separate legacies in proportion to their respective estates, but this would be almost impossible to apply, and the actual rule appears to be that, if one of two joint testators revokes, each ordinary legacy is held as written down to one half of its nominal amount.²
- 4. Vesting.—If under a mutual will of A. and B., a legacy of £200 be left to C. payable on the death of the survivor of A. and B., and assuming there is nothing which in a unilateral will would suspend vesting, does the full £200 vest on the death of the first deceaser, or does £100 vest on each death? And does it make any difference whether the

Noble v. N., 1902, 10 S. L. T. No. 328.
 1861, 24 D. 163. But see Lord Currichill
 So held in Wilsone's Trs. v. Stirling, at p. 182.



survivor has power of revocation as regards his own estate? There is an old case in which it was held that the whole vested on the first death.¹ But even if the survivor cannot revoke, may there not be a question whether the legacy, so far as given by the survivor, is not subject to the usual condition, viz., that the legatee shall survive the testator? Even on the assumption that provisions in a mutual will have a contractual element, it would seem that that cannot be stronger than a contract by A. to leave all his estate to B. That is binding, but to enable B. to enforce it he must survive A.

Enough has been said to shew some of the difficulties and dangers attending mutual wills and to direct attention to points which may be specially provided for if that form of will should after all be adopted.

Codicils. - The chief points are :-

- 1. Trusteeship.—New trustees appointed by codicil require no conveyance in their favour, even though all the trustees appointed in the will should then be dead, or though their appointment is revoked by the codicil.2 They do not even require to be expressly appointed as executors.3 It is not however clear that they would be tutors and curators though the will contained an appointment of the trustees therein named to those offices also; and therefore, if intended, these appointments also should be expressly conferred. It is thought that trustees appointed in general terms by codicil enjoy all discretionary as well of course as ordinary administrative powers conferred in the will. "Powers" is expressly used in the section of the 1868 Act referred to, but it is not to be forgotten that that section, as its opening words state, is a mere interpretation clause for the particular Act, and the enactment specially referred to is limited by the words "for the purposes of this Act." On the whole therefore it is recommended that the appointment should run as on p. 846.
- 2. Cumulative or Substitutional.—Where legacies are given by codicils to persons already favoured by the will or by previous codicil or both, the question is apt to arise whether the new is in addition to, or in substitution for, the old. These questions are clearly due to failure to take the simple and obvious precaution of saying in so many words which it is to be; and that ought always to be done. The presumption is that both are payable.
- 3. Conditions of Gift.—Akin to the last point is the question whether benefits given by codicil are to be on the same conditions as benefits given by the will to the same legatee or even it may be to other legatees. For instance, is the new legacy identical with the old as regards (1) time of payment, of which the most important instance is whether the new legacy is to be subject to a liferent to some one else if the

Nicholson v. Ramsay, 1806, Mor. Ap. 1.
 Legacy, No. 2, quoted in Wilsone, supra, at p. 182.
 1868 Act, s. 3, printed p. 227, supra. Executors Act, 1900, s. 3.

legacy given by the will is so postponed; (2) its alimentary character, which is most apt to arise in the case of a further annuity given by codicil; and (3) freedom from Government duty.

4. Consequential Alterations are very apt to be overlooked. For instance if by the will a provision is directed to be held for A. in liferent, and on A.'s death to be paid to B., and if by codicil A.'s liferent is revoked, does B. take an immediate fee, as regards both vesting and enjoyment, on the testator's death though A. survive?

Formalities of Execution.—If the testator holds property out of Scotland, it may be necessary to attend to formalities of execution required by the laws of the foreign countries in which the property is situated. This will specially be so in the case of real property. In England and Ireland the law as to execution of wills approaches more nearly to our general law of authentication of deeds: there must be two witnesses; the testator's signature must be made or acknowledged in the presence of the witnesses simultaneously; the witnesses must sign in presence of the testator and ought to do so in presence of each other; and there ought to be a docquet in the form on p. 847. In many cases where there are foreign assets it may be found convenient to have separate subsidiary testamentary instruments appointing trustees and executors of the assets in a particular foreign country, with directions to realise and to remit the proceeds to the home executors.

As to informal codicils supported by dispensing clauses in formal wills, see the recent case of Fraser.¹

WILL BEQUEATHING WHOLE ESTATE TO ONE PERSON

I, A., assign, dispone, and bequeath to B., as his $[or\ her]$ absolute beneficial property, the whole means and estate, heritable and moveable, real and personal, of what nature soever and wherever situated, which may belong to me at the time of my death, including, without prejudice to the said generality, all means and estate held, or which may be held, by me under special destinations, and all means and estate of which I have or may have power of disposal or appointment: And I appoint the said B. to be my sole executor $[or\ executrix]$ and universal legatory: And I revoke all former testamentary writings.—In witness whereof.

Testator's Debts and Funeral Expenses.—It is quite unnecessary to state that the gift is subject to these, for it cannot be otherwise, and it is not the will which creates the charge.

WILL BEQUEATHING SPECIAL HERITAGE TO ONE PERSON AND RESIDUE TO ANOTHER

I, A., being desirous of settling the succession to my means and estate in the event of my death:

¹ Fraser v. Forbes' Trs., 1899, 1 F. 513.



SPECIAL HERITAGE

In the first place, I dispone to B. the house 1 Queen Street, Edinburgh, and pertinents belonging to me [or the tenement and other property in the town of Bathgate and county of Linlithgow belonging to me, being the whole subjects particularly described in the disposition granted by X. in my favour, dated , and recorded in the division of the general register of sasines for the county of Linlithgow on], but always under burden of the heritable debt of £1000 at present affecting the same, or such part thereof, or such heritable debt, less or more, as may affect the said subjects at my death, with all interest and other consequents thereof; and the said B. shall be bound within one year after my death to deliver to C., after designed, a discharge or discharges by the creditors in such debt or debts, discharging the personal obligation undertaken by me, and the liability of my estate other than the said subjects, and of the said C., for the said debt or debts and consequents, and that all at the expense of the said B.:

RESIDUE

And in the second place, I assign, dispone, and bequeath to C., as his [or her] absolute beneficial property, the whole means and estate, heritable and moveable, real and personal, of what nature soever and wherever situated, which may belong to me at the time of my death, including, without prejudice to the said generality, my landed estate of Y., in the county of Z., and all other means and estate held, or which may be held, by me under special destinations, and the funds of which, under the will of my uncle the late D., I have power of appointment, and all other means and estate of which I have or may have power of disposal or appointment, but excepting the said subjects hereinbefore disponed to the said B., unless in the event of such disposition in his favour failing to take effect, in which case the said subjects shall fall within the foregoing general disposition in favour of the said C.: And I appoint the said C. to be my sole executor: And I revoke all former testamentary writings.—In witness whereof.

WILL BEQUEATHING WIFE'S WHOLE ESTATE TO HER HUSBAND, AND EXERCISING A POWER OF GIVING HIM A LIFERENT OF CERTAIN OTHER FUNDS

I, A., wife of B., for the affection which I have for my husband:

GENERAL DISPOSITION

In the first place, I assign, dispone, and bequeath to him the whole means and estate, heritable and moveable, real and personal, of what nature soever and wherever situated, which may belong to me at the time of my death, including, without prejudice to the said generality, all means and estate held, or which may be held, by me under special destinations, and all means and estate of which I have or may have power of disposal or appointment:

GRANT OF LIFERENT UNDER A POWER

And in the second place, Whereas under the trust disposition and settlement of my uncle the late C,, dated , and registered in the Books of Council

and Session on , or of whatever dates the same may be, I enjoy the liferent of a share of his estate, and further, I have power to give to any husband who may survive me a liferent right for the remainder of his life in such share of the estate of the said C., therefore I give and create such liferent right in favour of the said B., in the event of his surviving me, for the remainder of his life after my death; and I direct the testamentary trustees of the said C., or the other administrators of his estate, to pay such liferent and the full income and profits thereof to the said B. accordingly: Declaring that the said liferent shall be strictly alimentary, and not subject to the debts or deeds, nor liable to the diligence of the creditors of the said B.: And I appoint the said B. to be my sole executor and universal legatory: And I revoke all former testamentary writings.—In witness whereof.

WILL (1) BEQUEATHING PECUNIARY AND OTHER LEGACIES,

- (2) APPOINTING SPECIAL DESTINATION TO STAND, AND
- (3) GIVING RESIDUE TO A CHARITY
- I, A., being desirous of settling the succession to my means and estate after my death, do hereby,

PECUNIARY LEGACIES

In the first place, bequeath the following pecuniary legacies, to vest at my death, and to be paid at the first term of Whitsunday or Martinmas occurring three months after my death, and to bear interest at the rate of five per centum per annum from such term till paid, and all to be payable free of legacy and other Government duty, and free also of the expense of settling such duties, namely, (first) to B., the sum of £1000; (second) to each of C. and D. the sum of £500; and (third) to each of E., F., and G., the sum of £100:

LEGACY OF FURNITURE, JEWELLERY, ETC.

In the second place, I bequeath to H. the whole furniture, pictures, plate, books, china, and all other articles of household plenishing or ornament, and all provisions, wines, and liquors belonging to me which may be in my house in Edinburgh at the time of my death, and all watches, chains, and articles of jewellery which may then belong to me, and that all free of legacy and other Government duty, and expense of settling the same:

Confirmation of Special Destination of Landed Estate, with Legacy of Effects thereon

In the third place, Whereas I hold the estate of X., in the county of Y., under a destination by virtue of which the same will pass to K. if he should survive me, I declare that nothing hereinbefore or hereinafter contained shall prejudice such destination in the event of the said K. surviving me, in which event he shall take the said estate of X. preferably to all other beneficiaries in my estate, and in that event I hereby confirm the said destination, and of new destine and dispone the said estate to the said K.: And in the same event I bequeath to him the whole furniture, pictures, plate, books, china, and all other articles of household plenishing or ornament, and all provisions,

wines, and liquors belonging to me which may be in or about the mansion-house at the time of my death, and all articles of furniture and all other articles and effects in any of the other houses or buildings on the estate, and all live stock, grain, produce, and all other moveable property on the estate belonging to me, and all my carriages and horses and harness, whether on the estate or not: Declaring that the said K. shall take the said estate and other property as aforesaid free from estate, succession, legacy, and other Government duty, and expense of settling the same: But in the event of the said K. predeceasing me, my will and intention is, and I hereby provide, that the existing destination of the said estate shall not take effect, but that the said estate shall fall into residue:

LEGACY OF WEARING APPAREL

In the fourth place, I bequeath all my wearing apparel to my maid L. if she is in my service at the time of my death, and free from legacy and other Government duty, and expense of settling same:

RESIDUE

And in the last place, I assign, dispone, and bequeath to the [specify charity very exactly], the whole residue of my means and estate, heritable and moveable, real and personal, of what nature soever and wherever situated, which may belong to me at the time of my death, including without prejudice to the said generality, all means and estate held, or which may be held, by me under special destinations (but subject as aforesaid in the case of my estate of X.), and all means and estate of which I have, or may have, power of disposal or appointment: And I appoint the treasurer of the said [charity] for the time being to be my sole executor: And I revoke all former testamentary writings.—In witness whereof.

In the ordinary case it would be practically expedient, if not necessary, to have a trust disposition with trustees distinct from the residuary legatee, to carry out a testamentary scheme such as the above. But when the residuary legatee is an Institution of standing, a trust may, if desired, be dispensed with.

MUTUAL WILL BY HUSBAND AND WIFE

We, A. B. and Mrs. C. D. or B., spouses, for the love and affection we bear to each other, do hereby assign, dispone, and bequeath to the survivor of us in absolute beneficial property, and the heirs and assignees whomsoever of the survivor, the whole means and estate, heritable and moveable, real and personal, of what nature soever or wherever situated, that shall belong to the first deceaser of us at the time of his or her death, including all means and estate held, or which may be held, by such first deceaser under special destinations, and all means and estate of which such first deceaser may at the time of his or her death have the power of disposal or appointment: And we appoint the survivor to be the executor or executrix and universal legatory of the first deceaser: Reserving to each of us, without the consent of the other, full power to alter or revoke these presents in whole or in part at pleasure so far as regards the estate hereby conveyed by each of us respectively.—In witness whereof.

The effect of this clause will be to enable either of the spouses to revoke; so that, if he or she had been the predeceaser, the other would not have taken the predeceaser's estate; and yet, in the contrary event of the revoking spouse surviving, he or she may succeed to the predeceaser's estate. If desired, the clause may be framed so that revocation by either shall involve revocation by the other, thus:—

Reserving to each of us power to revoke without the consent of the other; but in the event of such power being exercised, the party revoking shall take no benefit under these presents, which shall thereupon absolutely fall as regards the estates of both of us.

But this does not meet the case of partial revocation. And how is the fact of revocation necessarily to be known? On the whole, unless the will run in the complete form above printed, it is recommended that there be two separate wills.

JOINT WILL BY THREE SISTERS

We, A. B., C. B., and D. B., sisters, for the love and affection which we have for each other, do hereby assign, dispone, and bequeath to the survivors and last survivor of us in absolute beneficial property, and their and her heirs and assignees whomsoever, the whole means and estate, heritable and moveable, real and personal, of what nature soever or wherever situated, that shall belong to the first and second deceasers of us at the time of their deaths respectively, including all means and estate held, or which may be held, by such first and second deceasers under special destinations, and all means and estate of which such first and second deceasers may at the time of their deaths respectively have the power of disposal or appointment: And we appoint the survivors of us to be the executrices and executrix and universal legatories of the first deceaser, and the last survivor of us to be the sole executrix and universal legatory of the second deceaser: Reserving always to each of us and the survivors, without the consent of the others or other, full power to alter or revoke these presents in whole or in part at pleasure so far as regards the revoker's estate including the estate to which she may then have succeeded, or may thereafter succeed, under these presents.—In witness whereof.

TRUST DISPOSITION AND SETTLEMENT WHERE IT IS NOT INTENDED THAT THERE SHOULD BE A CONTINUING TRUST

I, A., being desirous of settling the succession to my means and estate after my death, do hereby assign, dispone, and bequeath to and any other person or persons whom I may hereafter appoint, or who may be assumed into the trust hereby created, and to the acceptors or acceptor, survivors and survivor of them, and to the heir-at-law, being major, of the last survivor, as trustees and trustee for the purposes after mentioned (Declaring that power of assumption is hereby conferred on assumed as well as on the original trustees, that the majority of those accepting and surviving trustees who may



be resident in Great Britain from time to time, and if at any time there be only one trustee resident in Great Britain then such trustee alone, shall be a quorum, and that the trustees or trustee acting for the time are hereinafter referred to as "my trustees"), and to the assignees of my trustees, the whole means and estate, heritable and moveable, real and personal, of what kind soever and wherever situated, which shall belong to me at the time of my death, including all means and estate held by me at my death under special destinations, and all means and estate of which I may at my death have the power of disposal or appointment, together with the writings and securities, and the income, produce, and proceeds thereof: And I appoint my trustees to be my executors: But these presents are granted in trust only for the purposes following, namely:—

DEBTS, FUNERAL EXPENSES, AND TRUST EXPENSES

In the first place, For payment of my debts and funeral expenses, including the cost of erection of such memorial stone or tablet as my trustees may think suitable, and the expenses of executing this trust:

TO IMPLEMENT MARRIAGE-CONTRACT PROVISIONS

In the second place, To implement the provisions of mournings, interim aliment, furniture, etc., in favour of my wife [name] contained in the contract of marriage between us, dated , from the estate hereby conveyed, so that the estate settled by me under the said contract of marriage shall be left free in the hands of the marriage trustees to meet the other purposes of the said contract of marriage, but the said settled estate shall bear all its own Government duties.

The above assumes that under the marriage contract the widow has a liferent only. If she has an annuity, then unless the income of the settled funds is sufficient to meet the annuity, or unless the testamentary trust is also to be kept in force during the widow's lifetime, a clause like the following will be substituted:—

In the second place, In the event of my wife surviving me, to implement the provisions of mournings, interim aliment, furniture, etc., in her favour contained in the contract of marriage between us, dated , from the estate hereby conveyed; and further, in the same event, to pay over to the trustees acting under the said contract of marriage such a sum as in the uncontrolled discretion of my trustees shall, when added to the other estate in the hands of the marriage-contract trustees, be sufficient to yield an income which, after all necessary deductions, shall meet the annuity of \pounds provided to my wife by the said contract of marriage; and the trustees under the said contract of marriage shall hold such additional funds for the purposes, and with the powers and immunities, thereby declared and conferred with reference to the funds thereby settled by me, but subject always to the directions hereinafter contained:

LEGACIE8

In the third place, For payment to the following persons of the following legacies at the first term of Whitsunday or Martinmas occurring three months

after my death, with interest at the rate of five per cent. per annum from such term till paid, and all free of legacy and other Government duty, and free also of the expense of settling such duties, all which legacies shall vest at my death, namely [as on p. 823]:

LANDED ESTATE TO ELDEST SON SUBJECT TO ADDITIONAL ANNUITY TO MARRIAGE TRUSTEES FOR BEHOOF OF WIDOW

In the fourth place, I direct my trustees to dispone my estate of X., in the county of Y., with all the moveable property thereon 1 belonging to me (but subject always to the real burden after mentioned), to my eldest son B., with right to all rents and other returns not actually received by me in my lifetime; and on the other hand, on condition of his paying all outgoings not actually paid in my lifetime, though such rents, returns, and outgoings may be due for periods prior to my death: Declaring that my said son shall pay the expense of making up my trustees' title to the said estate and of disponing the same to him, and shall also pay all estate, succession, and other Government duties in respect of the said estate and other property hereby directed to be made over to him: Declaring that the provision under this purpose shall vest at my death; but that if the said B. should predecease me, the same shall lapse, and shall not accrue to his heir or issue: And further declaring that in the event of my said wife surviving me, the said disposition shall be granted under the real burden of payment by my said son and his successors in the said lands of an annuity or yearly sum of £ to the trustees for the time acting under the said contract of marriage, and that during the lifetime , at two terms in the year, Whitsunday and of my wife the said Martinmas, beginning at the first of these terms after my death for the period between my death and such term, and the next term's payment at the next term of Whitsunday or Martinmas, and so forth half-yearly, termly, and proportionally thereafter during the lifetime of my said wife, with a proportional part to the date of her death from the last preceding term, with a fifth part more of each termly payment of liquidate penalty in case of failure in punctual payment, and with interest at the rate of five per cent. per annum on each termly payment from the time the same becomes due till paid; and the said disposition shall contain directions as to repeating or referring to such real burden, and irritant and resolutive clauses, and such other clauses for the constitution, maintenance, and enforcement of such real burden as my trustees in their uncontrolled discretion may think right: And which annuity shall be held by the trustees under the said contract of marriage for the alimentary behoof of my said wife, and may by them be paid to her, or applied for her behoof, as they in their uncontrolled discretion may think proper; but in either case the same shall be for her alimentary use only, and shall not be capable of anticipation, nor subject to her debts or deeds, nor liable to the diligence of her creditors; which annuity shall be in addition to the annuity already provided to my wife under the said contract of marriage, and also to any annuity to which she may be entitled as my widow from the Widows Fund of the [name any Society or otherwise]: And if my son B. ¹ See fuller, pp. 823-4.

should predecease me, my trustees shall make other provision to their satisfaction for payment and security to my widow of an alimentary annuity of the amount, and under the conditions, hereinbefore in this purpose specified:

RESIDUE TO CHILDREN EQUALLY—VESTING AT DEATH— DEDUCTIONS IN CERTAIN CASES

In the fifth place, As regards the residue of my estate after carrying out all the foregoing purposes, or such of them as shall come into operation, I direct my trustees to pay and make over the same in equal shares, subject as after mentioned, to such of my whole children as shall survive me, jointly with the issue who may survive me of any of my children who may have predeceased me, the issue of such children taking (equally between or among them per stirpes, if more than one) the share, original and accresced, which his, her, or their parent would have taken if such parent had survived me: But declaring (first) that as my son C. has already received from me the sum of £ conform to [specify any document of debt], the same, but without interest before the date of my death, and with interest thereafter at the rate of centum per annum until division, shall be brought into account in ascertaining the amount of the estate for division, and shall be deducted from the share falling to the said C. or to his issue; (second) that any other sums which I may pay or advance to or for any of my children shall be treated in like manner; (third) that my son D. or his issue, before receiving his or their shares, shall deliver to the trustees a discharge by the Z. Bank of the cautionary obligation undertaken by me to the bank for his firm of M. & Co., and that at his or their expense, or if my trustees themselves pay up the debt to the bank, then the full sum which they pay to the bank shall, with interest at the last mentioned rate from the date of settlement to the date of division, be treated as part payment of the share falling to the said D. or to his issue; and (fourth) that the sum of \mathcal{L} payable to the trustees of the marriage contract between my daughter E. and her husband F., in terms of the obligation thereby undertaken by me, shall, with interest as last expressed, betreated as part payment of the share falling to the said E. or to her issue: And further declaring that all sums payable under this purpose shall vestat my death:

APPORTIONMENT OF MARRIAGE-CONTRACT FUNDS

And in the last place, With reference to the power of apportionment reserved to me in my own marriage contract as regards the capital of the estate thereby settled by me, and the addition thereto hereinbefore, in the event of my wife surviving me, directed to be made, I direct the trustees under my said contract of marriage to pay and make over the whole funds and estate in their hands on the death of the survivor of my said wife and myself, in equal shares, to such of my whole children as shall be in life at the death of the survivor of my said wife and myself, jointly with the issue who may then be in life of such of my children as may have predeceased, the issue of such children taking (equally between or among them per stirpes, if more than one) the share, original and accresced, which his, her, or their parent would have taken if such parent had survived: But declaring that if it should have happened that

the equalisations in the immediately preceding purpose directed to be carried out shall not have been fully given effect to out of the funds divided under that purpose, then the unsatisfied balances required for full equalisation as aforesaid, with additional interest at the said rate of per centum per annum to the date of division under this purpose, shall be satisfied and given effect to on the final division under this purpose, and that whether the shares shall fall to my children or to their issue:

EXCLUSION OF LEGAL RIGHTS

Declaring that the provisions hereby made in favour of my wife and children shall be accepted by them as in lieu and full satisfaction of their claims to terce, jus relictæ, legitim, and of every other right which they could claim or demand through my death, and that in the event of any of them claiming his or her legal rights, or any of them, in my estate [or in the event of any of my children or issue challenging the foregoing apportionment of the funds and estate under the said contract of marriage], or challenging these presents in any other respect, he or she shall forfeit, and in the case of my children and issue not only for themselves but also for their issue, all right, interest, and benefit under these presents, all which forfeited rights, interests, and benefits shall thereupon accresce to the other beneficiaries or beneficiary accepting these presents and the provisions herein contained in the same proportions and manner, for the same interests of liferent, fee, or otherwise, and upon the same conditions, as the other provisions in their favour respectively herein contained.

EXCLUSION OF HUSBANDS' RIGHTS

And declaring further that all provisions hereby made, direct or through my said marriage contract, in favour of or descending to females shall be exclusive of the *jus mariti*, right of administration, and any other right and power on the part of any husband to whom they are, or may be, married:

TRUSTEES' POWERS

And I provide and declare that my trustees shall, in addition to the powers and immunities conferred, or which may be conferred, on gratuitous trustees by statute, have the fullest powers of and in regard to realisation, investment, administration, management, and division as if they were beneficial owners; and particularly, but without prejudice to the said generality, they shall have the following powers, all to be exercised or not, and if exercised, then at such time and in such manner as to my trustees in their uncontrolled discretion shall seem proper, namely:—

(1) TO SELL OR HOLD

To sell and otherwise realise the trust estate; but declaring that my trustees may retain the investments of which my estate may consist at the time of my death, including shares and stocks and other assets, whether involving liability or of a speculative nature, or both, and that for such time or times as they may think fit, or indefinitely:



(2) TO COMPROMISE, ETC.

As also to compromise all matters and claims in which the trust estate is interested, or to settle the same by arbitration or advice of counsel: As also to accept part for the whole, and to give time ¹ to debtors, purchasers, and others, with or without security:

(3) INVESTMENTS 2

And also, in regard to any funds which they in their uncontrolled discretion may think fit not immediately to divide, to lend or invest the same in any way they may think fit, including loans on personal credit or obligation without security, or to retain the same in bank:

(4) TO GRANT DEEDS, WITH WARRANDICE

As also to grant all deeds which they may think necessary or desirable binding the trust estate and the beneficiaries in absolute warrandice:

(5) MODES OF SETTLEMENT WITH BENEFICIARIES

As also to settle and pay out the amount of the shares of the various beneficiaries either by conveying a portion or portions of the estate to them, or by paying their shares in money, or partly in the one way and partly in the other, as to my trustees in their uncontrolled discretion may seem proper, and upon such valuation or estimate of the amount and value of the estate, or any part or parts thereof, as the trustees shall deem fair, whether made by themselves or others:

(6) TO EMPLOY AGENTS, ETC.

As also to appoint any one of their own number, or any other person, to act as factor and law agent, and to allow him, though a trustee, the same professional remuneration to which he would have been entitled if he had not been a trustee, for which factors and law agents they shall not be liable:

IMMUNITIES

And my trustees shall be bound only to act honourably, and they shall not be liable for omissions or errors, or to do diligence further or otherwise than as they think fit, nor singuli in solidum, but each for his own actual personal intromissions only, and each shall be liable to account only for the funds actually received by himself, and not for any funds which he may have authorised a co-trustee, factor, or agent to receive; and any trustee who shall pay over to a co-trustee, factor, or agent, or shall do or concur in any act enabling such co-trustee, factor, or agent to receive, any moneys for the general purposes of the trust, or for any definite purpose, shall not be responsible for any loss resulting from his failure to see to the due application of the funds intrusted to such co-trustee, factor, or agent; and no trustee shall be liable for any loss or depreciation happening to the trust or the beneficiaries by or through the insufficiency, deficiency, or invalidity of any property, security, or investment, or any title acquired by or belonging to the trust estate, or in or upon which any funds of the trust estate shall be invested, nor for the ² Full investment clause, p. 833. ¹ See fuller form, p. 835.

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insolvency or default of debtors, or securities given by them, or of purchasers or others, nor for any loss, depreciation, or deficiency whatever which shall happen through his actings or omissions or default, or in any way whatever, unless such loss, depreciation, or deficiency shall happen through his own actual wilful fraud, and that without limitation by reason of anything herein contained or otherwise: And it is hereby declared that persons transacting with my trustees shall have no concern with the purposes of this trust, nor with the application of any money paid to my trustees, all persons being in all respects fully exonered and discharged by the receipts, discharges, or other deeds or writings to be granted by my trustees: And I appoint the said [name the trustees], and the acceptors or acceptor, survivors and survivor of them, to be tutors and curators to my children during pupillarity and minority, and also, so far as regards their interests under these presents, to all other pupil and minor beneficiaries: And I revoke all former testamentary writings.—In witness whereof.

TRUST DISPOSITION AND SETTLEMENT, WITH CONTINUING TRUST FOR LIFERENT TO WIDOW AND FEE TO SURVIVING CHILDREN

[As in preceding form, to end of first trust purpose.]

LEGACY TO WIDOW

In the second place, In the event of my wife B. surviving me, my trustees shall pay to her, as soon as possible after my death, the sum of \pounds , with interest at the rate of five per cent. per annum from the day of my death till paid:

ALIMENTARY LIFERENT

In the third place, In the event of my wife surviving me, my trustees shall allow her the liferent of the residue of the trust estate during her lifetime after my death, but that for her alimentary use only, and the same shall not be capable of being anticipated, nor shall it be subject to her debts or deeds, nor liable to the diligence of her creditors; and it shall be in the uncontrolled discretion of my trustees to determine what is capital and what is income, and when assets should be realised so as to become income-producing subjects, and what outgoings, or what proportion thereof, are chargeable against capital and income respectively; and their decisions shall be final and binding on all parties interested, and shall not be subject to challenge or review in any way or form: [Alternative form, p. 836]:

CAPITAL TO CHILDREN AND ISSUE

And in the last place, Subject always to the exercise of the discretionary powers after mentioned, and so far as the same may not be exercised,² I direct my

¹ There may be an appointment of tutors and curators in the marriage contract. The appointment cannot be extended to assumed trustees (Walker v. Stronach, 1874, 2 R. 120),

unless this has been altered by the Trusts. (Scotland) Act, 1884, s. 2.

² See such words referred to as important, per Lord Kincairney in *Calder*, 1901, 8. S. L. T. 258 at p. 352.

trustees upon the death of the survivor of my wife and myself, to pay and make over the residue of the trust estate, in equal shares, to such of my children as may be in life at the death of the survivor of my wife and myself, jointly with the issue who may then survive of such of my children as may have predeceased, the issue of such children taking (equally between or among them per stirpes, if more than one) the share, original and accresced, which his, her, or their parent would have taken if such parent had survived:

Power to Trustees to restrict Beneficiaries to an Alimentary Liferent 1

But declaring always that it shall be in the power of my trustees, if in their uncontrolled discretion they shall think fit, to restrict any of my children or issue to an alimentary right to the income of the share which would otherwise have fallen to be paid to him or her, such right and income to be incapable of anticipation, and not subject to the debts or deeds of such beneficiary, nor liable to the diligence of his or her creditors, and such restriction may be for life or for any shorter period, and may extend to the whole share or be limited to any part thereof, and may be relaxed from time to time in whole or in part; and further and specially, my trustees shall have power to pay or apply any part of the capital of such restricted share for the alimentary behoof of such beneficiary, subject to the other protective clauses above written; and so far as the capital of such share is not paid to or for behoof of such beneficiary, the same shall be held for his or her issue, if any, alive at his or her death, equally per stirpes; and failing such issue, the same shall revert to residue as if such beneficiary had predeceased me without issue; and for the purpose of carrying out such restriction and destination-over of the capital, my trustees may themselves retain the share, or hand over the same to other trustees, whom they are hereby authorised to appoint with all or any of the powers, discretions, and immunities hereby conferred on themselves:

Power to settle the Shares of Female Beneficiaries on their Marriages

And declaring further, with reference to the shares falling to my daughters or other female beneficiaries who may be married before my trustees have parted with their shares, that the same may be settled by my trustees on such trusts for behoof of such beneficiaries respectively, their children, issue, and husbands, or such of them, and on such terms and conditions, and in such way and manner, all as my trustees in their uncontrolled discretion shall in each case think fit; and for that purpose my trustees may avail themselves of the machinery of any trust created under the marriage contract of such beneficiary, and the discharge of the trustees thereunder [or of such daughter or other female beneficiary by herself alone] shall be a complete exoneration to my trustees.

(Insert exclusion of legal rights and husbands' rights and other clauses as in preceding form; but the following investment clause may be substituted, and some of the following clauses may be inserted:—)

¹ Fuller clauses may be adapted from p. 785.

INVESTMENT CLAUSE

As also to lend out or invest the whole or any part of the trust estate on such terms and for such period or periods, either as temporary or permanent investments or indefinitely, on heritable, moveable, or personal security, by way of first, or postponed, or pari passu charges, or on personal credit or obligation, or in the purchase of heritable or moveable property, including, without prejudice to the said generalities, (1) purchases of and loans on the security of the Government funds of any of the colonies of Great Britain, or of her Indian Empire; (2) obligations or acknowledgments of debt bearing to be secured over rates or assessments expressed to be levied by authority of any Act. general or special, of the Imperial Parliament, or issued by public bodies or trusts, whether county, municipal, parochial, or otherwise; (3) debentures or deposit receipts of companies (including banks) incorporated by any Act, general or special, of the Imperial or other Legislature, or registered under the Companies Acts of the Imperial or other Legislature, and carrying on business, or having an office or agency, in Great Britain; (4) debenture stock, or preference or guaranteed stock, or preference shares of said incorporated or registered companies, or in such other way and in such other obligations, securities, or investments as my trustees in their uncontrolled discretion shall think fit; and from time to time to call up, sell, alter, or renew the obligations, securities, and investments as may seem to them expedient.

In connection with the investment clause it may be thought proper to add the following clauses, or either of them:—

INSURANCE OF INVESTMENTS

Declaring that it shall be in the power and option of my trustees, in their uncontrolled discretion, to insure any investment or security to such extent, for such period; at such premium, and generally on such terms and conditions, as they may think fit; and in the event of their doing so, the premium or premiums may be wholly, or to such extent as they think proper, debited as a charge against income; but there shall be no duty on my trustees to effect any such insurances, and no responsibility for not having done so, or for any failure of any such insurance, if effected.

PURCHASE OF REDEEMABLE INVESTMENTS AT A PREMIUM

Declaring that in the event of my trustees purchasing or otherwise acquiring any investment or security which is subject to redemption at an amount under the sum paid therefor by my trustees, they shall be entitled to provide out of income against any loss of capital from this cause, and that to such extent and in such manner, by a sinking fund ¹ or otherwise, as they may think proper; but whether any such provision shall be made, and if any, then the extent, time, and manner of it, shall all be in the uncontrolled discretion of my trustees.

¹ Ultra vires if not expressly authorised. Heath v. Baxter's Trs., 1903, 10 S. L. T. No. 300.

Further, in many cases of continuing trusts some or all of the following clauses will be useful:—

(1) REALISATIONS

To sell the trust estate, and to dispone absolutely or in feu-farm, or by way of ground-annual or otherwise, and to grant long leases of, the heritable estate falling under the trust, and that in such lots and for such prices, feuduties, ground-annuals, tack duties, or otherwise on such terms, all as to them may seem proper, and either with or without duplications in the case of feus, ground-annuals, and long leases: As also to sell such feu-duties, ground-annuals, and others, and also such tack-duties and others, and the reversion of the subjects from which the same are payable, together or separately, and that all in such lots, at such prices, and otherwise on such terms as they in their uncontrolled discretion may consider proper: As also to excamb any part or parts of the trust estate:

(2) To Borrow

As also to borrow on the security of the trust estate, or any part or parts thereof, such sum or sums as they may from time to time in their uncontrolled discretion think proper:

(3) To LEASE

As also to let the trust estate for such terms, for such rents, and on such conditions, and with or without caution, all as to them in their uncontrolled discretion may seem expedient:

(4) To GRANT DEEDS

And for the purposes foresaid to grant and enter into all such dispositions, feu-charters, feu-dispositions, feu-contracts, contracts of ground-annual, long leases, contracts of excambion, bonds and dispositions in security and bonds and assignations in security, both containing powers of sale, and such other deeds and writings as may in their uncontrolled discretion appear to them to be requisite or desirable, with power to bind the trust estate and the beneficiaries in absolute warrandice:

(5) To arrange Securities

As also from time to time to make such arrangements regarding the rates of interest on the securities affecting the trust estate, whether existing at the commencement of the trust or created by them, and as regards the duration of the securities, and otherwise in regard thereto, as to them in their uncontrolled discretion shall seem expedient:

(6) ABATEMENTS OF RENT AND RENUNCIATIONS OF LEASES

As also to grant abatements of rent, temporary or permanent, and to accept renunciations of leases if they in their uncontrolled discretion shall think fit:

(7) MELIORATIONS, ETC.

As also to expend from time to time such sum or sums as they in their uncontrolled discretion may consider expedient on repairs, furnishings,

alterations, improvements, or meliorations on the trust estate, and in making additions to buildings, and erecting and furnishing new and additional buildings:

(8) To give Time to Partners

As also to give time to my firm of X. & Co. and my co-partners, present and future, in the settlement and payment of my share and interest in the firm, and all sums due by the firm to me on loan or any other account, and that notwithstanding and beyond the terms of the co-partnery, loan, or other contract, and with or without interest or security, and notwithstanding any changes in the membership or constitution of the firm or in its business, and that for such time, and from time to time, or indefinitely, all as my trustees in their uncontrolled discretion may think fit:

(9) To CONTINUE CAUTIONARY OBLIGATIONS

And whereas I have undertaken cautionary obligations for Y. and Z. and other persons, and may undertake further obligations of a like nature, and it may not be convenient for the principal debtors to have the same terminated, and it is my desire that my trustees should have power to allow such obligations to remain undisturbed and to continue the same, I specially empower them to do so without being bound to make inquiries as to the position of the principal debtors, or to require security, and that for such time or times respectively, and from time to time, or indefinitely, and notwithstanding the withdrawal of other cautioners or other changes (to which they are hereby authorised to consent), all as my trustees may in their uncontrolled discretion think fit; but while it is my will and intention, and I declare, that my trustees shall be entitled to act upon these powers to the fullest extent without liability, these powers are not, on the other hand, to give the principal debtors any right or claim to have the obligations continued if and when my trustees in their uncontrolled discretion shall think fit to require the same to be brought to an end:

(10) To CARRY ON BUSINESS

As also to carry on any business or businesses in which I may be engaged at the time of my death, and that for such time as my trustees may in their uncontrolled discretion think fit, or indefinitely; and for that purpose to appoint any one or more of themselves, or any of the beneficiaries, as managers ² or otherwise, and to pay them suitable remuneration, and to enter into all contracts.

(11) To appropriate Investments

As also to set apart and appropriate specific investments or assets of the trust estate to represent the whole or part of the share or shares of any particular beneficiary or beneficiaries, or of any share or shares of the trust estate, whether any beneficiary have a vested right thereto or not, and that at such valuations as my trustees shall determine, whether made by themselves or

remunerate a trustee as "factor or cashier." Mills v. Brown's Trs., 1900, 2 F. 1035.



¹ These words are necessary if intended. Smith v. Patrick, 1901, 8 F. (H. L.) 14.

² This is not covered by a power to

others, and thereafter the particular share or shares shall have the whole benefit and the whole risk of the appropriated investments or assets.

TRUST DISPOSITION (1) GIVING LIFERENT TO WIDOW, TER-MINATING ON RE-MARRIAGE, BUT IN SATISFACTION OF MARRIAGE-CONTRACT ANNUITY, AND UNDER BURDEN OF MAINTAINING, ETC., THE CHILDREN IN FAMILY; (2) FEE TO SURVIVING CHILDREN OR ISSUE ATTAINING TWENTY-FIVE YEARS OF AGE

[As on p. 825, to end of first trust purpose.]

LIPERENT

In the second place, In the event of my wife B. surviving me, my trustees shall allow her, but only so long as she remains unmarried, the liferent [go on as on p. 831, and then proceed], subject always to this exception, that it is my will and intention, and I declare, that all income not receivable before the date of my death shall be reckoned as income, and shall be included in this provision irrespective of the period for which the same may be payable, but without prejudice to my wife's right to an apportionment of the income current at the expiry of the liferent: But declaring (first) that in the event of my wife entering into a second marriage, this liferent shall cease as at the date of such second marriage; (second) that this liferent, while enjoyed, shall be in satisfaction of, and not in addition to, the annuity of £ undertaken by me to be paid to my wife in our contract of marriage, dated , but shall be without prejudice to her right to any annuity to which she may be entitled as my widow from the Widows Fund of the X. Society; and (third) that while my wife is in enjoyment of this liferent she shall be bound to maintain, clothe, and educate such of our children as remain in family with her:

CAPITAL TO SURVIVING CHILDREN AND ISSUE ATTAINING 25

And in the last place, On the death or re-marriage of my wife if she should survive me, or on my death if she should predecease me, my trustees shall, as soon as conveniently possible thereafter, pay or make over the trust estate in equal shares to such of my children as shall attain the age of twenty-five years and be in life at my death, or at the expiry of the said liferent, whichever shall last happen; but if any child shall fail to fulfil these conditions, but shall leave issue who shall do so, then such issue shall take (equally between or among them per stirpes, if more than one) the share, original and accresced, which his, her, or their parent would have taken if such parent had attained the said age and had survived as aforesaid, it being hereby declared that no right shall vest unless and until the prospective beneficiaries shall attain the said age and survive my death, or the expiry of the said liferent, whichever shall last happen:

POWER TO APPLY INCOME AND PART OF CAPITAL

But declaring that my trustees shall, after the death or re-marriage of my wife, have power to apply the whole or part of the income of the shares of

any prospective beneficiaries, and even part, not exceeding what my trustees may estimate to be one-[half], of the capital of such shares, for the maintenance, clothing, education, outfit, and advancement in life, or otherwise for the benefit of such prospective beneficiaries respectively, and that in such way and manner as my trustees may in their uncontrolled discretion think proper; but the prospective beneficiaries shall not be entitled to compel my trustees to make any payments either from capital or income, and if made, the same shall be purely alimentary, and not capable of anticipation, nor subject to the debts or deeds of such prospective beneficiaries, nor liable to the diligence of their creditors; and if and so far as not so applied, the income shall be added to and accumulated with the share from which the same has accrued, subject always to the power of my trustees to resort to it in any future year or years for the purposes foresaid; and all sums so applied shall be deducted from the share falling to the beneficiary for whose benefit they are so applied, or his or her issue:

An ALTERNATIVE FORM

(1) Income

But declaring that, after the death or re-marriage of my wife, my trustees shall have power to apply the whole or part of the income of the trust estate, or so much thereof as shall not have vested, for the maintenance, clothing, education, outfit, and advancement in life, or otherwise for the benefit of the prospective beneficiaries, or any one or more of them exclusively, and that in such proportions and in such way and manner as my trustees may in their uncontrolled discretion think proper; but none of the prospective beneficiaries shall be entitled to compel my trustees to make any such payments, and if made, the same shall be purely alimentary, and not capable of anticipation, nor subject to the debts or deeds of the prospective beneficiaries, nor liable to the diligence of their creditors; and if and so far as not so applied, the income shall be added to and accumulated with the general trust estate, without distinction of shares, but subject always to the right of my trustees to resort to it in any future year or years for the purposes foresaid, and such payments from income shall not be brought into account against the receivers thereof, or their issue:

(2) Capital

And further, with power to my trustees, after the death or re-marriage of my wife, but only in their uncontrolled discretion, if they think fit, to make advances to any prospective beneficiary out of the capital of his or her prospective share, though the same may not have vested, but not in the whole to an extent exceeding what my trustees may estimate to be one-[half] of such prospective share, and that at such interest, or without interest, as my trustees may in each case think fit; and such advances from capital, with or without interest, shall be deducted from the share falling to such beneficiary, or his or her issue.

Insert remaining clauses from the preceding forms as may be suitable.

838 WILLS

TRUST DISPOSITION AND SETTLEMENT (1) GIVING WIDOW

(a) LIFERENT OF HOUSE AND FURNITURE, ETC., DURING VIDUITY, AND (b) AN ANNUITY RESTRICTABLE ON FREMARRIAGE; AND (2) FEE TO SURVIVING CHILDREN OR ISSUE ATTAINING TWENTY-FIVE YEARS OF AGE

[As on p. 825 to end of first purpose.]

LIFERENT OF HOUSE AND FURNITURE

In the second place, I direct my trustees to allow my wife, in the event of her surviving me, so long as she remains my widow, to occupy, free of rent, the house and pertinents which may be occupied by me at the time of my death if it be my property, and in any event the use of all my furniture, pictures, plate, books, china, and all other articles of household plenishing or ornament: Declaring (1) that such house shall be put into proper condition and repair in all respects as soon as possible after my death, at the sight and to the satisfaction of an architect to be named by my trustees, and that all at the expense of my estate; (2) that the said occupation and use shall be purely alimentary, and not subject to the debts or deeds of my wife, nor liable to the diligence of her creditors; (3) that my wife shall not be charged with or liable for feuduty, ground-annual, interest of debt, any rates, taxes, or assessments in respect of property, fire insurance premiums, repairs, or other outgoings, tenant's taxes alone excepted, all other outgoings being paid by my trustees [or otherwise as may be intended]; (4) that if my wife should re-marry, the said liferent and use shall terminate as at the date of such re-marriage; and (5) that my trustees shall have no responsibility (though they shall be entitled) to see that the furniture and others foresaid are preserved, or are kept in proper condition, and shall incur no liability though the same should be missing, destroyed, or damaged: And in the event of the house occupied by me at my death not being my own property, my trustees shall apply such sum as they think fit, not being less than £ nor more than £ per annum, in providing a residence for my wife so long as she remains my widow, in the choice of which they shall consult her wishes, and they may enter into and renew leases for any period not exceeding years on any single occasion, but during the currency of any lease or right of tenancy of the house occupied by me at my death, that is to say, so long as my estate remains liable for the rent, that house shall be appropriated in satisfaction of this provision, and all the above written declarations shall apply to my wife's occupation in the same way as if the house had been my property. except the first condition above written as to putting the house into condition and repair, but my trustees shall, in addition to the said annual sum, execute at the expense of my estate all cleaning and repairs usually borne by tenants: And even if the house be my property at my death my trustees shall at the request and with the consent of my wife be entitled to sell the same, in which event the preceding alternative provision shall thereafter apply: [Alternative form, p. 845].

CONSUMABLE STORES TO WIFE

In the third place, I bequeath to my wife as her absolute property all provisions, wines, and liquors in my house at my death:

ANNUITY TO WIFE

In the fourth place, I direct my trustees to pay to my wife, in the event of her surviving me, so long as she remains my widow, an annuity or yearly sum of \mathcal{L} , free of all deductions, including income tax, which annuity shall be paid at such times as my trustees shall find most convenient: but declaring that, in the event of my wife entering into a second marriage, the said annuity shall be restricted to \mathcal{L} as from the date of such second marriage, and the said annuity and restricted annuity shall be purely alimentary, and not capable of anticipation, nor subject to the debts or deeds of my wife, nor liable to the diligence of her creditors: [Alternative forms, p. 846].

BURDEN OF MAINTAINING CHILDREN

And declaring with reference to the provisions hereinbefore made in favour of my wife under the second and fourth purposes of this trust, that while she remains my widow she shall be bound to maintain, clothe, and educate our children remaining in family with her:

FRE

And in the last place, Subject to the preceding purposes, and after fulfilling or providing for the same, my trustees shall pay or make over the residue of the trust estate (including the said liferented property and the sums retained to meet the charges thereon and the alternative provision of a residence and the said annuity or restricted annuity when the said liferent and annuity and restricted annuity respectively have lapsed) in equal shares to such of my children as shall attain the age of twenty-five years and be in life at the time when the funds respectively become available for division, that is to say: (1) my death, except as regards the property of which my wife is to have the liferent and use as aforesaid, and the sums to be retained as aforesaid to meet the charges on such liferented property and the alternative provision of a residence and the said annuity: (2) the re-marriage of my wife as regards the remainder, except what may then be retained to meet the restricted annuity; and (3) her death as regards such last mentioned sum: But if any child should fail to fulfil these conditions in whole or in part, but shall leave issue who shall do so, then such issue shall take (equally between or among them per stirpes, if more than one) the share, original and accresced, which his, her, or their parent would have taken if such parent had attained the said age and had survived the respective periods foresaid, it being declared that no right in the respective portions of my estate shall vest unless and until the respective beneficiaries shall attain the said age and survive the respective periods foresaid, and further, that the amount of the sums to be retained for the purposes before specified shall be in the uncontrolled discretion of my trustees:



POWER TO APPLY INCOME AND PART OF CAPITAL

But declaring that my trustees shall have power to apply the whole or part of the income, so far as not required for the purposes foresaid, of the shares of any prospective beneficiaries, and even part, not exceeding what my trustees may estimate to be one-[half], of the capital of such shares, so far as not required for the purposes foresaid, for the maintenance [complete as on p. 837]: And further declaring that these powers of advance are not to affect the obligation hereinbefore imposed on my wife, while she is and remains my widow, to maintain, clothe, and educate our children remaining in family with her

Insert remaining clauses as desired from preceding forms.

RESIDUE IN EQUAL SHARES TO TWO LIFERENTERS, AND THEIR SURVIVING ISSUE ATTAINING MAJORITY RESPECTIVELY IN FEE, WITH CLAUSE TO PREVENT LAPSE

LIFERENT

I direct my trustees to hold the residue of the trust estate for the liferent use of X. and Y. in equal shares, but for their respective alimentary use only, not capable of anticipation, nor subject to their debts or deeds, nor liable to the diligence of their creditors:

FEE

I direct my trustees to pay and make over one-half of the residue of the trust estate to the child, children, or issue of the said X. as after mentioned, and the other half to the child, children, or issue of the said Y. as after mentioned, but in each case only on the expiry of their respective parent's liferent if the same should come into operation: Declaring that those children only who survive their parent or the liferentrix and attain the age of twenty-one years shall be entitled to participate, but if any child shall fail to fulfil these conditions, but shall leave issue who shall do so, such issue shall take (equally between or among them, if more than one) the share, original or accresced, which his, her, or their parent would have taken if such parent had survived and had attained the said age:

TO PREVENT LAPSE

And further, in order to prevent intestacy to any extent, I provide and declare that if either of the said intended liferentrices shall die without leaving issue, or leaving issue who shall fail to obtain a vested right, the residuary clauses herein contained shall be read and construed as if my trustees were directed, and I hereby direct them, from my death, or from the death of such liferentrix, or such failure of her issue, whichever shall last happen, to hold the whole residue for behoof of the other liferentrix for her alimentary liferent, and with the other restraining clauses before written, and for her child, children, or issue in fee, but always under the conditions hereinbefore expressed:

VESTING

Declaring with reference to all shares of residue, that there shall be no vesting while the fund in question is subject to any liferent, nor unless and until the intended beneficiaries shall respectively attain the age of twenty-one years:

POWER TO APPLY INCOME AND PART OF CAPITAL

But my trustees shall, provided there is no subsisting liferent, have power to apply [as on p. 836]:

POWER TO APPROPRIATE INVESTMENTS

And my trustees may, if they think fit, set apart and appropriate assets and investments to represent each of the said halves of the residue, so that each half shall thereafter have the benefit of its own gains and advantages, and bear its own losses, without reference to the other; and a minute under the hands of my trustees, though not probative, shall be sufficient evidence of such appropriation.

[Complete from preceding forms.]

RESIDUARY CLAUSE GIVING SON'S SHARE ABSOLUTELY, AND DAUGHTERS' SHARES IN LIFERENT, AND THEIR ISSUE IN FEE, WITH POWERS TO APPORTION AND (FAILING ISSUE) TO TEST; WITH CLAUSES AGAINST LAPSE

In the last place, I direct my trustees to divide the residue of the trust estate into such number of shares as shall be equal to the number of my children alive or represented by issue at the time of my death; and with reference to these shares I direct my trustees as follows:—

SON'S SHARE

First. If my son X. shall survive me, one of such shares shall be paid to him, or if he shall have predeceased me leaving a child or children who survive me and attain the age of twenty-one years, such share shall be paid to such child or children on their respectively attaining that age, but only provided, further, that they are respectively in life at the respective periods of payment; and if any child or children shall fail to fulfil these conditions, but shall leave issue who shall do so, such issue shall take (equally between or among them per stirpes, if more than one) the share, original and accresced, which would have fallen to his, her, or their parent.

DAUGHTERS' SHARES—(1) Liferent

Second. One of such shares shall be retained by my trustees for the liferent use of each of my daughters Y. and Z. who shall survive me, but for their respective liferent alimentary use only, not capable of anticipation, nor subject to their debts or deeds, nor liable to the diligence of their creditors.

Daughters' Shares—(2) Fee

Third. The share liferented by each of my daughters, or which would have been liferented by her in terms hereof if she had survived, shall be paid and made over to her child or children, if any, who survive her and me, but only provided they respectively attain the age of twenty-one, and provided, further, that they are respectively in life at the respective periods of payment;

and in the event of any child or children failing to fulfil these conditions, but leaving issue who shall do so, such issue shall come in place of his, her, or their parent as regards the share, original and accresced, to which such parent was prospectively entitled; but with power 1 to each daughter, in the event of her surviving me, to apportion the share in which her descendants are interested between or among them, or to some or one of them exclusively, with power to her to restrict any beneficiary wholly or partly to an alimentary liferent, and to carry over the fee, or any part of it, to the issue of such beneficiary, or to any other beneficiary or beneficiaries, being her descendants, and the trust hereby created shall continue so as to carry out such purposes; but such powers of apportionment shall be subject to the directions as to vesting herein contained, and the same, and the powers of restriction, shall be exercisable only by will revocable at pleasure; and failing such apportionment, or so far as no such apportionment may apply, the division shall be equally per stirpes on the occasion of each division; and in the event of any partial apportionment, the beneficiary thereby favoured shall take no part of the unapportioned balance without bringing the apportioned part into account and allowing for the same accordingly, unless such partial apportionment shall otherwise direct.

DAUGHTERS' SHARES-(3) Failing Issue

Fourth. In the event of a failure of descendants of either of my daughters to take the share liferented by such daughter, or any part thereof, she shall have power to bequeath the same, or such part thereof, in such way as she may think fit, but only by will revocable at pleasure.

PROVISIONS TO PREVENT LAPSE

Fifth. In order to prevent intestacy, I provide and declare that if there is at any time a failure of trust purposes as regards any part or parts of the estate under the directions hereinbefore contained, such part or parts shall accresse to or for behoof of the other beneficiary or beneficiaries equally per stirpes reckoning from me, and the same shall be held for or paid to them, as the case may be, according to the directions hereinbefore contained with reference to their original interests and shares of liferent or fee respectively, and with the same alimentary and other protective clauses, and with the like powers of apportionment, restriction, and testing, all in the terms hereinbefore expressed, but always under the conditions as to vesting herein[after] declared; and this clause of accretion shall in like manner apply to such accresced shares in the event of any failure of trust purposes regarding the same or any part thereof.

RESIDUARY CLAUSE IN FAVOUR OF THREE BENEFICIARIES, VESTING AT DEATH, WITH CONDITIONAL INSTITUTION OF ISSUE, AND EXPRESSED TO PREVENT LAPSE

Subject to the foregoing purposes, I direct my trustees to pay and make over the residue of the trust estate in equal shares to such of the following persons, namely, X., Y., and Z., as shall survive me, jointly with the issue alive at my death of any of them who shall predecease me, such issue taking

1 Further clauses may be adapted from p. 785.

(equally between or among them *per stirpes*, if more than one) the share, original and accresced, which his, her, or their parent would have taken if such parent had survived me: declaring that the period of vesting shall be my death.

RESIDUARY CLAUSE IN FAVOUR OF THREE BENEFICIARIES IN UNEQUAL SHARES, VESTING AT DEATH WITH CON-DITIONAL INSTITUTION OF ISSUE, WITH CLAUSES TO PREVENT LAPSE

Subject to the foregoing purposes, I direct my trustees to pay and make over the residue of the trust estate to the following persons in the following proportions, namely, X. to the extent of one-half, and Y. and Z. to the extent of one-fourth each, declaring (1) that if any of the said intended residuary legatees shall predecease me leaving issue who shall survive me, such issue shall take (equally between or among them per stirpes, if more than one) the share, original and accresced, which his, her, or their parent would have taken had such parent survived me; (2) that if any of the said residuary legatees shall predecease me without leaving issue who shall survive me, the share which such residuary legatee would have taken if he or she had survived me shall not fall into intestacy, but shall go and accresce to the other residuary legatees or their issue, and that in the same proportions in which they take the balance of the residue, and if only one of the said residuary legatees, or issue of only one of them, should survive me, then the whole residue shall be paid and made over to such residuary legatee or his or her issue, my will and intention being that if any of them, or issue of any of them, survive me, there shall be no intestacy; and (3) that the period of vesting shall be my death.

TRUST DISPOSITION AND SETTLEMENT PROVIDING FOR ACCUMULATIONS FOR TWENTY YEARS, SUBJECT TO LIMITED PAYMENTS TO BENEFICIARIES

ANNUITY

In the second place, My trustees shall out of the free annual income of the trust estate pay to or apply for behoof of X., provided she be alive at my death, the sum of £ per annum, and that from the day of my death during her lifetime, subject to the provisions hereinafter written; and in the event of her predeceasing me, or in the event of her surviving me but dying leaving lawful issue before the completion of the period of twenty years next ensuing after the date of my death, my trustees shall out of the said free annual income pay to or apply for behoof of her surviving issue, and the per annum, and that from survivors and survivor of them, the sum of £ the day of my death or the day of the death of the said X., whichever may last happen, during the said period of twenty years or the remainder thereof subject to the provisions hereinafter written: Declaring that my trustees may either, as they may in each case from time to time think proper, pay the said sum of £ per annum to the said X., whom failing to her issue as aforesaid, and that at such time or times as my trustees may think proper, or

apply the same for her or their behoof respectively, and that at such time or times, and in such way and manner, and as regards issue also in such proportions (with power at any time, and from time to time, to exclude any one or more of such issue), all as my trustees may from time to time think proper: Declaring also that the said sum of \pounds , or such less sum as may be available as after referred to, and whether the same may be paid to the said X., whom failing to her issue as aforesaid, or applied by my trustees for her or their behoof respectively, shall be strictly alimentary, and not capable of anticipation, nor subject to her or their debts or deeds, nor liable to the diligence of her or their creditors:

RESTRICTION TO INCOME

But declaring that the said yearly provision to the said X., whom failing to her issue as aforesaid, shall be of the amount of \pounds only while and so long as the free income of the trust estate shall, in the opinion of my trustees, be sufficient to enable them to pay the same along with the other payments falling to be made therefrom; and in the event of the said free income being in any year, in the opinion of my trustees, insufficient for these purposes, the said provision shall be reduced for that year to such a sum as my trustees shall in their discretion determine, and they shall be entitled to reduce or increase the payment in any year so as to rectify any overpayment or underpayment in a previous year or previous years:

ACCUMULATION OF BALANCES

In the third place, The free surplus income, if any, accruing during the twenty years next ensuing after my death shall, subject to the other purposes of the trust, be dealt with as follows: My trustees may apply or appropriate the whole thereof, or such part or parts thereof as they may from time to time in their sole discretion think fit, in, to, or towards the paying off of debts heritable or personal, the purchase of lands and heritages and other property, heritable or moveable [in Scotland], or in or towards repairs, furnishings, alterations, improvements, and meliorations on the trust estate, and in making additions to buildings, and erecting and furnishing new and additional buildings, or for any one or more of these purposes, or otherwise in exercise of the powers hereby conferred; or they shall otherwise accumulate and capitalise the same:

Alternative,

After "conferred" proceed, or if they in their sole discretion think fit, they may from time to time otherwise accumulate and capitalise the same or any part thereof; and with regard to such free surplus income, if any, as shall not be so applied, appropriated, or accumulated, the amount thereof shall be ascertained as at the end of the 5th, 10th, 15th, and 20th years next ensuing after my death, and the same shall be paid to the said X. if in life at the said periods respectively, whom failing to her issue surviving from time to time: Declaring that all sums falling under this purpose may be either paid to or applied for behoof of the persons entitled thereto with the same powers and discretions to my trustees in regard to these payments as are conferred on them under the preceding purpose: And declaring that the provisions hereby

made for the said X., whom failing for her issue, whether the same may be paid to her or them or applied for her or their behoof, shall be strictly alimentary, and affected with the other protecting clauses contained in the preceding purpose:

INCOME AFTER TWENTY YEARS

In the fourth place, From and after the expiry of the said period of twenty years after my death the free annual income thereafter accruing on the trust estate shall be paid to or applied for behoof of the said X. if then in life, and during her survivance: Declaring that, as regards all sums falling under this purpose, my trustees shall have the same powers and discretions as are conferred on them under the two preceding purposes: And further declaring that the provision hereby made for the said X., whether paid or applied as aforesaid, shall be strictly alimentary, and affected with the other protecting clauses contained in the second purpose; and which provisions made by this present purpose shall be in substitution for those contained in the two preceding purposes, which shall cease and determine on this purpose coming into operation:

APPORTIONMENT BETWEEN CAPITAL AND INCOME

Declaring, with reference to this purpose and the other purposes hereinbefore and hereinafter written, but without prejudice to the powers and discretions hereby conferred, that my trustees shall be the sole and final judges of what sums received, on the one hand, and what charges, expenses, disbursements, and expenditure, on the other, or what proportions thereof, shall be credited to and charged against capital and income respectively: [Alternative form, p. 831]:

CAPITAL

In the fifth place, After the death of the said X. and after the expiry of the period of twenty years from my death, whichever of these events shall last happen, my trustees shall realise the whole trust estate and make it over to the lawful child or children, if any, of the said X. surviving at the term of division, and that equally between or among them, if more than one, but the surviving issue of any child dying before the term of division shall take (equally between or among them, if more than one) the share, original and accresced, which his, her, or their parent would have taken on survivance: And it is hereby declared with regard to the provisions hereby made, that no beneficial interest shall vest until the period of division: And further, I declare that the word "issue" shall throughout these presents extend to and include descendants of whatever degree, but the division being always per stirpes.

LIFERENT OF HOUSE UNDER A TRUST

I direct my trustees to allow B. the liferent use of the house 1 King Street, Edinburgh, with fittings, but that for his alimentary use only, not subject to his debts or deeds, nor liable to the diligence of his creditors, declaring that he

shall be bound to pay feu-duty [ground-annual], rates, taxes, assessments, and repairs during the period of his liferent; and further, that he shall be bound to pay to my trustees the yearly premium of fire insurance on a policy to be effected by them in their names covering the said house to the extent of \pounds , and the rent thereof to the extent of \pounds , but that he shall not be bound to pay any succession or other Government duty, nor any casualty or duplicand, of all which my general estate shall relieve him: [Alternative form, p. 838].

ANNUITY UNDER A TRUST

(1) CHARGE ON CAPITAL

I direct my trustees to pay to B. an annuity or yearly sum of £ for the remainder of his life after my death, payable at two terms in the year, Whitsunday and Martinmas, beginning at the first of these terms after my death for the period from my death to that term, and so forth thereafter at the said two terms, and with a proportional payment to the date of his death from the last preceding term: Declaring (1) that the said annuity shall be purely alimentary, and not capable of anticipation, nor subject to the debts or deeds of the said B., nor liable to the diligence of his creditors: (2) that it shall be a charge on capital if income should be insufficient; and (3) that it shall be payable free of all deductions, including income tax and Government duty, of which the said B. shall be relieved by my general estate.

(2) RESTRICTED TO INCOME

Say "an annuity or yearly sum of \mathcal{L} , restrictable as after mentioned," and, after the first declaration as above, proceed—

and (2) that the said annuity shall be payable out of income only; and if the free available income is in any year insufficient, then such free available income shall alone be paid to the said B, but with right to the said B to resort to the available income of any previous year or of any future year during his lifetime to supply such deficiency.

This will leave B. to pay Government duty and income tax.

CODICIL

I, A., designed in the foregoing trust disposition and settlement (hereinafter referred to as "my will"), being desirous of making certain alterations thereon and additions thereto, do hereby,

CHANGES IN TRUSTEESHIP

In the first place, Recal the appointment of B. as a trustee, executor, tutor, and curator, and appoint C. and D. to be trustees, executors, tutors, and curators, with the same powers, discretions, and immunities, and to the same effect in all respects, as if they had been appointed in my will; and I note for the information of my trustees that E., named as one of my trustees in my will, is now dead:

REVOCATION OF LEGACY

In the second place, I revoke the following legacies contained in my will, namely, the legacy of \pounds bequeathed to F., and the legacy of \pounds bequeathed to G.:

REDUCTION OF LEGACIES

In the third place, I reduce the legacy of £500 bequeathed to H. in my will to a legacy of £250, but otherwise on the same terms as therein expressed:

INCREASE OF LEGACY

In the fourth place, I increase the legacy of £250 bequeathed to K. in my will to a legacy of £500, free of legacy and other Government duty and expense of settling the same, and otherwise on the same terms as therein expressed:

Or

In the fourth place, I bequeath to K. a legacy of £500, payable at the first term of Whitsunday or Martinmas three months after my death, with interest at the rate of five per cent. per annum from that term till paid, and that free of legacy and other Government duty and expense of settling the same, which legacy hereby bequeathed shall be in substitution for the legacy of £250 bequeathed to the said K. in my will:

Or,

In the fourth place, I bequeath to K. a legacy of £250, free of legacy and other Government duty and expense of settling same, which legacy shall be in addition to, and shall be payable at the same time and on the same terms as, the other legacy of the same amount bequeathed to the said K. in my will:

CONFIRMATION OF WILL

And, except as altered by this codicil, I confirm my will.—In witness whereof.

DOCQUET IN ENGLISH FORM

Signed by the said A. as and for his last will in the presence of us, who in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses.

Signed by the said A. as and for a codicil to his last will and testament in the presence of us [etc., as above].

The witnesses will add their designations to their signatures.

SECTION XLV

DEEDS OF APPOINTMENT

Generally.—The distinction may be taken between (1) powers of appointment or disposal, i.e. general powers to give the property to any one, and (2) powers of apportionment, i.e. limited powers to direct in what shares a special class shall take, e.g. the children of a certain person or marriage. A power to divide the property among charities is of a wider nature and is somewhat between these two, but it is beyond the present subject. An equally important distinction is whether the power is capable of being exercised by either inter vivos or mortis causa act or only by one, and which, of these. Under a provision in the form of a direct bequest (without a trust) to A. "for her sole and separate use in liferent, and at her own option as to destination in the event of her death," held that A. had not a fee, and further that her power of disposal was mortis causa only,1 but Lord Moncreiff observed that A. "could probably defeat the expectancy of the testator's heirs ab intestato by executing an irrevocable deed disposing of the capital." A power "to leave and bequeath or otherwise dispose of" was held to authorise inter vivos exercise.2 On the other hand a conferred power "during life to sell, burden or otherwise dispose of," with a substitution of heirs, was held not to authorise testamentary exercise.3 As to the advantage of restricting the exercise to testamentary acts, see p. 808.

General Powers.—There appears nothing to prevent the holder of a general power exercising it in his own favour. In that case if A has a liferent of the fund under a trust coupled with a general power, he will, after exercising the power in his own favour, be entitled to require immediate payment of capital, assuming that the liferent is not alimentary, and that both liferent and power are given unconditionally and quære whether it is even necessary to go through the form of an appointment. In the case noted the trust directions were to pay the income to certain persons, "and at their respective deaths to pay the capital" to their respective heirs or assignees. It was held that this last

⁵ Rattray's Trs. v. R., 1899, 1 F. 510, but see Douglas, supra.



¹ Reid v. R.'s Trs., 1899, 1 F. 969.

Thomson's Trs. v. Pringle, 1901, 9
 L. T. 8.

³ Miller's Trs. v. Findlay, 1896, 24 R. 114.

⁴ Douglas' Trs., 1902, 5 F. 69.

word imported a general power, that this plus the liferent made a fee, and that the corpus was immediately claimable.

Effect of Divorce.—When under a contract of marriage powers are conferred upon the spouses, it appears that a divorced spouse forfeits the power, so that if it be a joint power the other spouse may exercise it alone. This is not confined to general powers, in which case it is obvious, as these powers are of the nature of property; but it extends to special powers, i.e. practically powers to apportion among the children of the marriage. It is clear enough that a subsequent divorce would not affect a prior delivered appointment, i.e. an appointment by inter vivos as distinguished from testamentary act.

Powers Act² (see p. 807).—The Act applies to all deeds of exercise dated after the Act though the power was created before the Act. It is assumed that it would apply to a testamentary exercise dated before the Act but coming into operation on the death of the done of the power after the Act. A question may still be stated whether under, e.g., a power to divide between A. and B., it is competent to give the whole to one of them. The second section of the Act requires effect to be given to any provision in the deed creating the power "which shall declare the amount, or the share or shares, from which no object of the power shall be excluded or some one or more object or objects of the power shall not be excluded." But this does not cover the case figured, and it is thought that under a power to divide the whole might be given to one though strictly that is not a division at all. The word in the Act is "appoint."

Implied Powers.—Under marriage contract provisions the father has an implied power of appointment of estate settled by himself upon the children of the marriage. But this is subject to the terms of the contract. If equality be expressed or clearly contemplated the power does not exist.³ It does not appear that the mother has any similar power with reference to estate settled by her. When the power exists it may even be delegated.⁴

Ultra Vires Appointments.—The power must be exercised according to its terms, any breach of which will be ultra vires of the donee of the power. The most common instances are:—

1. Giving a share to a non-object, e.g. (1) under a power to appoint to children of the marriage between A. and B., giving a share to A.'s child by another marriage, (b) giving a share to an illegitimate child under a power to appoint to children, (c) under a like power giving a child a liferent and destining the fee to his or her issue, (d) giving grandchildren a share in room of their parent under a power which is expressly or by construction confined to immediate children.⁵

¹ Gavin's Trs. v. Johnston's Trs., 1901, 4 F. 278.

² 37 and 38 Vict. c. 87.

³ Wylie's Trs. v. W., 1902, 10 S. L. T. No. 259.

⁴ Campbell v. C., 1789, Mor. 6849.

⁵ Cattanach's Trs. v. C., 1901, 4 F. 205. 54

2. Adjecting unauthorised conditions, e.g. that the share shall be settled under trust or entail. As to the effect of an appointment being partly ultra vires that will depend upon whether the good is separable from the bad or is inextricably mixed up with it. "If you cannot disconnect that which is imposed by way of condition or mode of enjoyment from the gift, the gift itself may be found to be involved in conditions so much beyond the power that it becomes void." But when the conditions are separable from the gift "then the gift may be valid and may take effect without reference to the conditions." Thus if a £1000 fund be directed to be divided into fifths, and one-fifth to be paid to each of four out of the five objects of the power, and the remaining fifth to one who is not an object, the appointment will be good enough except as regards this last £200, which (in the absence of any hotchpot clause) will be divided equally as unappointed among the five objects of the power.2 In the same way a separable unauthorised condition will be held pro non scripto. This must be held to over-rule the older law laid down in Baikie 3 by Lord Curriehill, though quoted with approval by Lord Rutherfurd Clark so late as 1890,4 to the effect that "a failure to execute the power in any respect vitiates the whole appointment; the reason is that you cannot tell what appointment the party intrusted with the power would have made had he known that what he attempted to do was to some extent at least inept."

An appointment is not invalidated because certain parts of it are ultra vires if these parts never come into operation.⁵ In Wright's case the appointment was thus: A share was given in liferent to an object of the power, her surviving husband (not an object) was to have a postponed liferent, the capital was to go to her issue, whom failing then as she might appoint; she was never married; the appointment was held good.

It is hardly possible to say what deeds will and what will not be held effectual as exercises of powers. Certain points have, however, been decided or have received judicial countenance.

1. An elementary question is—is it competent to give any beneficiary a liferent and a liferent only? It now appears that this question must be answered in the negative. But of course regard must be had to the terms of the power. Thus if a fund were destined to the children and issue of a certain marriage "for such estates and interests and in such shares and under such restrictions" as A. might appoint, it could not be questioned that he would be entitled to give any beneficiary a liferent only. But a power to impose "conditions and

¹ M'Donald v. M'D.'s Trs., 1875, 2 R. (H. L.) 125.

On this last point, the disposal of the unappointed share, see further p. 853, infra.

³ Baikie's Trs. v. Oxley, 1862, 24 D. 589.

⁴ Gillon's Trs. v. G., 1890, 17 R. 435.

⁵ Wright's Trs. v. W., 1894, 21 R. 568.

Matthews Duncan's Trs. v. M. D., 1901,
 F. 533 (power by reservation); Warrand's Trs. v. W., 1901,
 F. 369 (by constitution).

restrictions" is not enough. Matthews Duncan's case shews that the exercise of the power is not validated by the appointer giving the trustees a discretionary power to pay over the capital to the beneficiary.

Lord M'Laren's view is that so long as the whole estate is given to objects of the power, there is no objection to one or some of them getting their shares as "so much a year." On this view if A. and B. were the objects of the power it would be allowable to give the liferent of the whole fund to A., and subject thereto to give the corpus to B. But (1) if it were a power under which no one could be excluded this would probably be bad, for it might result in A. surviving for only a day, and taking therefore an illusory interest; and (2) unless there were power to appoint under restrictions, etc., it would appear that B. would, if he thought fit, be entitled to object to his postponement. That might result in his receiving one-half instead of the whole, but one-half in possession might be more than the value of the reversionary whole expectant on A.'s death.

- 2. There was a series of cases in which a liferent was held to be effectually appointed when the two following elements concurred, viz.: (1) a power authorising appointments under conditions, etc., and (2) an exercise of it which gave the appointee not only a liferent but also a power of testamentary disposal.³ But these cannot now be relied on. "I do not think that the principle of these cases should be carried further," 4 and Lord Adam's own judgment in Wright was not approved in Warrand.
- 3. If the liferent is given to an object of the power, and the fee to his or her issue, the liferenter's consent will validate the whole appointment. Further, if there are two objects of the power, A. and B., and if the liferent of the whole is given to A., the fee being given to the issue of A. and B., B. himself being excluded, A.'s consent will validate the appointment of so much of the capital as goes to his issue. Whether it will validate also the appointment of the balance of the capital is not clear. See the Lord Ordinary (Fraser) that it will not, and indications contra by Lord Moncreiff, L.J.-C., and Lord Young, in Mackie. There is some authority for saying that the liferenter's consent would validate an appointment of the fee to an outside object altogether, e.g. a public charity; though this has been questioned (see Mackie, at p. 1237). But if the principle be once recognised, it is difficult to see why it should not be allowed to operate to the full extent.
- 4. If, on the other hand, an object of the power is cut down to a liferent, the fee of the liferented part being given to his issue, who are

¹ Warrand, supra; Neill's Trs. v. N., 1902, 4 F. 636.

² Neill, supra.

² Lennock's Trs. v. L., 1880, 8 R. 14; Wallace's Trs. v. W., 1891, 18 R. 921; Wright, supra.

⁴ Lord Adam in Matthews Duncan; M'Kirlie v. Logan's Trs., 1903, 10 S. L. T. No. 354.

⁵ Mackie v. M.'s Trs., 1885, 12 R. 1230.

not objects, there is some authority for the view that if the liferenter does not consent, his liferent develops into a fee. This is clearly so if there should be present in the deed of appointment an initial appointment in fee to the object of the power with an attempted rider thereon in the form of a restriction to a liferent and the carrying over of the fee to remoter issue. But otherwise apparently not.

- 5. But the consent principle is apparently not admitted unless the consenting object of the power has received some interest under the appointment in question, nor beyond the part of the fund to which that interest extends. Thus A is an object of the power and his issue are not; he is excluded; the capital is given to his issue: it appears from the opinions in *Mackie* that A.'s consent will not validate the appointment as against the other objects. Again, if the fund is £1000, A. receives the liferent of £500, and the whole capital is given to his issue, his consent will support the gift to his issue only as regards the £500 which he liferents.
- 6. If A. is an object of the power and his issue are not, and if A. is excluded, and an immediate share attempted to be given to the issue, not only will A.'s consent not validate the gift to his issue, as stated above, but his refusal of consent gives him no claim to the share '; it will go as unappointed, which will no doubt result in his taking a part of it, or even, it may be, the whole, under the operation of a hotchpot clause.

Election.—Assuming that the power is exercised in such terms as to expose the appointment to challenge, it may still be the case that the appointees are practically barred from enforcing the right of challenge by the fact that if they were to do so they would, under the principle of election or approbate and reprobate, lose more than they would gain. This, however, requires two things, viz.: (1) that the appointer shall be entitled to put them to their election, and (2) that he shall in fact have done so expressly or by reasonable implication of intention. Take the ordinary case of a man making his will and in it including an appointment of his marriage contract funds. There may be many questions as to his powers in regard to these funds, but he is master of his other estate, and he can in his will make participation in the latter contingent on approbation of what he has done regarding the former. But then he must do so, and in a distinct and substantive manner, for where "an attempt is made ineffectually to attach limitations to the appointment the appointee may both take the fund absolutely and other gifts contained in the same deed without thereby giving force or vitality to the inoperative directions on the principle of election." 5

Fraud on the Power.—A fundamental rule is that a limited

¹ Mackie, supra, at pp. 1287, 1242.

² Warrand, supra.

³ Neill, supra.

⁴ Mackie, supra, at p. 1242.

⁵ M'Donald v. M'D., 1876, 4 R. 45, at p. 69; Matthews Duncan, supra.

power is not to be exercised for the benefit of the done of the power.¹ He may not sell appointments. If this rule be infringed, the deed of appointment will be set aside. This is a distinct risk to those intending to purchase from, or lend to, the appointee on the faith of the appointment, as it is a matter on which it may be impossible to obtain information.

Irrevocable Appointments.—It is often essential to know whether the power authorises an irrevocable appointment. In English deeds and wills conferring powers, they are usually stated to be exercisable "by deed, with or without power of revocation and new appointment, or by will or codicil." This, however, is not usually the case in Scotland. If nothing is said in the instrument creating the power as to the manner of its exercise, it is recognised that it may be by deed inter vivos, and that it may be irrevocable.2 It ought to bear to be irrevocable, and it may proceed to state that it is delivered, and the appointee may, in token thereof and that he has accepted delivery, sign the deed. Assuming that the deed says nothing about being revocable or otherwise, the question will depend upon delivery. If, on the other hand, the instrument creating the power limits its exercise to "will revocable at pleasure," these conditions must be complied with, and anything else will be ultra vires. If, finally, the instrument creating the power limits its exercise to testamentary writing, but without the words "revocable at pleasure," there appears to be ground for maintaining that there may be a valid contract not to revoke.³ But, notwithstanding the analogy of the case cited, it can hardly be thought that a subsequent inconsistent appointment would be bad; at most it would give rise to a claim of damages for breach of the contract not to revoke, and of course the funds subject to the appointment, not being in bonis of the donee of the power, would not be available to answer the claim. goes without saying that any dealing under these circumstances is a distinctly risky affair.

Partial Appointments.—There is no obligation on the donee to exercise the full power at one time, or at all: a partial appointment is quite valid.⁴ There are, however, some matters specially requiring attention:

1. Hotchpot Clause.—This is not a term of Scots law, but it is very convenient, and there is no equivalent. Suppose A. has power to appoint £1000 between B. and C.; he makes an appointment of £500 to B., and dies without making any other appointment. Justice would seem to require, and it would probably be intended, that the other £500 should go to C. But, in the absence of a hotchpot clause in the settlement or deed of appointment, this second £500 will be divided

⁴ Smith Cuninghame, supra.



¹ Smith Cuninghams v. Anstruther's Trs., 1872, 10 M. (H. L.) 39; M'Donald v. M'Grigor, 1874, 1 R. 817.

² Wylie v. W., 1902, 10 S. L. T. 258.

³ Paterson v. P., 1893, 20 R. 484.

equally between B. and C., so that B. draws £750 and C. £250.¹ The clause in question declares that no beneficiary who draws any share under any partial appointment shall be entitled to any part of the unappointed balance without bringing the appointed share into hotchpot (or accounting) and allowing for the same accordingly, unless the deed of appointment shall direct to the contrary. If this clause is in the instrument creating the power, there is no occasion for any similar clause in the deed of partial appointment, but otherwise the declaration should be introduced into the deed of appointment; if, on the other hand, it is intended that the beneficiary receiving the partial appointment shall have that share in addition to an equal share of any balance which may ultimately be left unappointed, a declaration to that effect must be inserted if the settlement contains a hotchpot clause, and had better be inserted even if the settlement does not.

- 2. Clauses of Discharge.—Closely connected with this matter of hotchpot clauses is the question as to the effect to be given to a clause in a deed by which the beneficiary receiving the partial appointment accepts it in full of his or her share of the fund. This was the great question in the Smith Cuninghame case.2 It was held that not only did these clauses not bar the appointees from sharing in any unappointed balance, but that they did not even have the effect of bringing the appointed shares into hotchpot. On consideration, it is reasonably clear that if a parent settles £10,000 in trust for himself in liferent and his children in fee, with a reserved power of appointment, he cannot, by appointing a reversionary sum of £1000 to each of his three children in exchange for clauses of discharge, re-purchase for himself the remaining £7000 of the fund. But it by no means follows—and this was recognised in the Smith Cuninghame case as at least a question—that the deeds might not be so worded as to embody a contract among the children so that the discharge by one or more might operate in favour of the others.
- 3. Ranking of Successive Partial Appointments.—Suppose the fund is £1000; a deed of partial appointment of £500 is delivered to A. and declared irrevocable; next year a similar deed to the same amount is delivered to B.; the fund shrinks to £800: how does the loss fall? So far as is known, there is no Scots authority on this question, but there appears to be a good argument to the effect that the deeds rank in the order of their dates. After £500 has been appointed to A., all that remains for appointment is the surplus, if any, after paying the £500. This is law in England.³ It appears desirable to insert a clause of ranking: at least the receiver of the first deed will desire a clause of primo loco ranking.

no reference to this question, and the case cannot be regarded as an authority.

¹ Johnson's Trs. v. Sandilands, 1903, 5 F. 518. The interlocutor in Bowie's Trs. v. Paterson, 1889, 16 R. 983, is to the contrary effect, but the only opinion delivered contains

² Smith Cuninghams v. Anstruther's Trs., 1872, 10 M. (H. L.) 39.

³ Sugden on Powers, 8th Ed., 639.

Vesting.—An ordinary 1 power of appointment gives no authority to do anything but fix the shares: it does not authorise any interference with the period of vesting, express or implied, established in the instrument which creates the power. If it did it would simply be altering the objects of the power. Care should be taken not to expose the deed of appointment to the risk of challenge on this head. should bear to be granted under the conditions of the settlement or will. Further, if the shares have not vested it will be proper to make provision for what would otherwise be a lapse in the appointment owing to beneficiaries therein named predeceasing the period of vesting. But a lapse even if it should take place will not bring down the other parts of the appointment. The contrary was argued, but rejected, in Stirling.² There, however, a partial lapse occurred owing to want of clearness in the terms of the apportionment. The circumstances were: under a marriage contract a fund was settled for the liferent of the widow, and after her death, to the extent of one-half, for the children of the husband's first marriage and the survivors subject to apportionment. A deed of apportionment was executed giving £10 to one of the children of the first marriage, and the balance of that half of the fund to the other children of the first marriage (unnamed and without survivorship) "equally among them share and share alike." When this deed was executed there were three children of the first marriage, A. (to whom the £10 was appointed), B. and C. A. and B. survived the widow, C. survived his father, but predeceased the widow without issue. Held that the survivorship in the marriage contract postponed vesting till the widow's death and (dissenting Lord Young) that the share which would have fallen to C. had he survived did not accresce to B., but fell, as unappointed, to A. and B. equally.

Intimation to Trustees.—It is not necessary, in point of title, that a deed of appointment should be intimated to the trustees who hold the fund. If an irrevocable deed is granted but not intimated, and a later inconsistent deed is intimated, the former will still be preferable. This points to another risk involved in transactions in which reliance is placed on a deed of appointment. Inquiries of the trustees may fail to disclose a prior deed of appointment, but these inquiries will of course be made. And any deed of appointment should be intimated to the trustees, for (1) they might otherwise pay away the fund in ignorance of it, (2) intimation is an element in the matter of delivery, and (3) it may prevent injustice to, and questions with, third parties.

Appointment in Bond.—It is not necessary that the appointment

¹ A power to appoint to the objects "at such age or time," and under "such limitations, restrictions, and conditions," held to authorise postponement of vesting till age thirty, though, failing appointment, twenty-

one was the age of vesting (Cattanach's Trs. v. C., 1901, 4 F. 205). Quære how far would this go? Would age seventy be sustained? Opinion of counsel, contra.

2 Stirling's Trs. v. S., 1898, 1 F. 215.

should be a separate deed. It may quite well be in the form of clauses in a security-deed granted by the appointee, under which he mortgages his appointed share.¹ This form has indeed a certain advantage from the lender's point of view. But it is not recommended in the interest of the beneficiary, for the form of the appointment naturally gives room for the argument that it was intended to be only ancillary to the loan transaction, and to fall if and when the security-deed was discharged. But this would not necessarily be so. The same question will arise in a slightly different form, and from the lender's point of view, if the party in whose favour the appointment was made wishes to raise a second loan on the same security, relying on the one appointment contained in the first bond.

REVOCABLE APPOINTMENT BY WIDOW OF FUNDS PROVIDED UNDER CONTRACT OF MARRIAGE BY HER HUSBAND AND HERSELF

I, A., considering that by the antenuptial contract of marriage entered into between me and B., my late husband, dated , the said B. assigned to the trustees therein named a policy of assurance on his life with the X. Assurance Company for £1000 with profits, and it was thereby provided that the trustees should allow me, in the event of my surviving my husband, the liferent of the proceeds of the said policy, and that on my death, in the event which has happened, the capital thereof should be paid to the children of the marriage, and the survivors and survivor of them, and the issue of such as might have died leaving issue, and that in such shares as the said B. might appoint, which failing, then as I after his death should appoint, and failing appointment, then as therein mentioned: And further by the said contract of marriage I conveyed to the said trustees the whole means and estate, heritable and moveable, real and personal, then belonging to me, or which should belong to me during the subsistence of the marriage, and it was thereby provided that the trustees should allow me the liferent of the estate thereby settled by me, and should on my death, in the event which has happened, pay the capital thereof to the children of the marriage, and the survivors and survivor of them, and the issue of such of them as might have died leaving issue, and that in such shares as I and the said B. should appoint by joint deed, which failing, then as I after his death should appoint, and failing appointment, then as therein mentioned: Further considering that the said B. died on or about without having made any apportionment of the said policy fund,2 and without any joint apportionment having been made by him and me of the estate settled by me: Further considering that the trustees acting under both

trusts constituted in the said contract of marriage are C., D., and E.: Further considering that four children were born of the marriage, namely, F., G., H., and K., that the said F. died unmarried, that the said G. died leaving two children, L. and M., who are both in life, and that the said H. and K. are also



¹ Bowie's Trs. v. Paterson, 1889, 16 R. ² His will, if any, may have been an implied exercise of the power.

in life: And now seeing that I am desirous of exercising the powers of apportionment with reference both to the said policy fund and also to the estate settled by myself:

OPERATIVE CLAUSES

Therefore I hereby direct and appoint the said C., D., and E., and the survivors and survivor of them, and their successors in office, and any judicial factor or other officer who may come to have the administration of the said funds and estate, to divide the same on my death in the following proportions, namely, (first) to the said H. three sixths, (second) to the said K. one sixth, and (third) to each of the said L. and M. one sixth, but subject in all respects to the terms of the said contract of marriage: And in the event of any of the said appointees failing to take a vested interest in the said apportioned shares, or any part thereof, I direct and appoint that if the party so failing shall leave issue, then the same shall be paid to such issue, but if not, then the same shall be paid to the appointees who take a vested interest, in proportion to their original shares, but all subject in all respects to the terms of the said contract of marriage:

CLAUSE OF FORFEITURE

And I provide that any one challenging these presents in whole or in part shall forfeit not only all right or interest hereunder and in the funds and estate herein dealt with, but also all right and interest in all other funds and estate belonging or which may belong to me or of which I have or may have power of appointment or disposal, all which forfeited interests shall accrue to the other beneficiary or beneficiaries of the said respective funds and estate in proportion to the amount and according to the nature of their original interests therein respectively: And I reserve power of revocation.—In witness whereof.

PARTIAL IRREVOCABLE APPOINTMENT TO RANK PRIMO LOCO

I, A. [narrate the power]: Further considering that I have never exercised the said power to any extent: Further considering that I am desirous of making an irrevocable appointment to the extent of £1000 in favour of C. for his benefit, by enabling him to raise money by sale or loan for the purpose of his advancement in business or otherwise: Therefore I hereby irrevocably appoint to the said C. the sum of £1000 out of the first and readiest of the said fund payable at my death, with interest thereon at the rate of five per cent. per annum [or at the average rate yielded by the trust fund] from my death till paid: And I declare that the said sum of £1000 and interest shall rank primo loco on the said fund and income thereof after my death, and I direct the trustees [of the said B.] to pay the same primo loco accordingly: Declaring that these presents are subject in all respects to the terms of the said [trust disposition and settlement]; Providing that if any part of the said fund should remain unappointed, the said C. or his issue shall not be entitled to participate therein except on condition of bringing into account the said sum of £1000 hereby appointed, and allowing for the same accordingly: And I have instantly delivered these presents, and in token

thereof, and that he has accepted delivery, these presents are subscribed by the said C.—In witness whereof.

IRREVOCABLE APPOINTMENT, INCLUDING RENUNCIATION OF LIFERENT

I, A., considering that under the trust disposition and settlement of B., dated , and registered in the Books of Council and Session on , the said B. directed his trustees to set apart the sum of £1000 in their names, and to pay me the income thereof during my life, and on my death to pay the same to my children in such shares as I should appoint: Further considering that the said sum was set apart accordingly, and is now represented by [specify the investments]: Further considering that I have three children in life, C., D., and E., who have all attained majority, and that I am desirous of appointing the said fund and investments irrevocably to the said C., D., and E. in equal shares, and, further, of renouncing my liferent in their favour, so that they may be in titulo, if so disposed, to apply for payment of the capital in my lifetime: Therefore, In the first place, I hereby irrevocably appoint the said fund and investments to the said C., D., and E. equally among them; and, In the second place, I hereby absolutely and irrevocably renounce and assign to the said C., D., and E. equally among them, my liferent right in the said fund and investments, and all income payable in respect thereof, past and current as well as future: And I authorise and direct the trustees of the said B to pay all such income to the said C., D., and E., and also the capital whenever the said C., D., and E. request them to do so, whether in my lifetime or not, and I declare that the receipt of the said C., D., and E. shall be a full exoneration and discharge to the said trustees: And I warrant these presents absolutely to the said C., D., and E., and to the said trustees: And I have instantly delivered these presents, and in token thereof, and that they have accepted delivery, these presents are subscribed by the said C., D., and E.—In witness whereof.

In order to this deed being effectual, three things are necessary, (1) liferent not alimentary or otherwise protected ¹; (2) fee indefeasibly vested ²; and (3) when the capital goes to two or more beneficiaries whose rights rank pari passes the trustees are not bound to pay any part of the capital, though the liferent may to that extent have been renounced, except on the discharge of all the fiars. ⁸ But of course it may be competent for the liferenter to appoint the whole capital to one or more of the fiars, which will take the case out of the rule, or short of that it may be competent to give the appointed share a preferential ranking. Before the money is paid over the Government duty will be commuted and paid.

See p. 424.
 Muirhead v. Muirhead, 1890, 17 R.
 Haldane's Trs. v. Haldane, 1895, 23 R.
 Haldane's Trs. v. Haldane, 1895, 23 R.
 Haldane's Trs. v. Haldane, 1895, 23 R.

SECTION XLVI

ASSUMPTION, APPOINTMENT, AND RESIGNATION OF TRUSTEES

ASSUMPTION OR APPOINTMENT

Assumption.—1. Generally.—Trustees have power of assumption "unless the contrary be expressed," and the power is held to be excluded when some one else is, by the instrument creating the trust, entitled to appoint new trustees. Thus in the case cited power to make new appointments was reserved to the spouses and the survivor, and the trustees were expressly authorised to assume after the death of both spouses; held that the trustees could not assume so long as either spouse survived. Executors nominate, even though not truly trustees, may assume co-executors.²

- 2. Quorum.—By the Trusts Act, 1861 (s. 1), trustees, "or a quorum of them," have implied power to assume new trustees. But the signatures of all the trustees should be obtained. The power to a quorum does not mean that they may proceed to exercise it without consulting the other trustees. A deed of assumption so granted has been held bad, but it depends upon circumstances.
- 3. Sole Trustee (or all Trustees) Resigning.—By the Trusts Act, 1867 (s. 10), it is provided that—

if any trustee entitled to resign his office is at the time sole trustee, he shall not be entitled to resign until, with the consent of the beneficiaries under the trust of full age and capable of acting at the time, he shall have assumed new trustees, who shall have declared their acceptance of office.

This clearly applies if the assumption and resignation are unico contextu, the assumption being made because of the resignation. But assuming it to be clear, on the facts, that the assumption and resignation are two unrelated acts, the consent of the beneficiaries is not required: see s. 1 of the 1861 Act, which gives "power to such trustee if there be only one . . . to assume new trustees." There is the further question whether the provision applies to the case of two or more (being the whole) trustees desiring to resign office at one time. In terms it does not, but in spirit

¹ Munro's Trs. v. Young, 1887, 14 R. 574.

² Executors Act, 1900, s. 2.

³ Wyse v. Abbott, 1881, 8 R. 983.

⁴ Malcolm v. Goldie, 1895, 22 R. 968.

it clearly does; and certainly the trustees should either obtain the consent of the beneficiaries or apply to the Court, in terms of the same section, for the appointment of new trustees or a factor. As regards these questions, there is this to be said, that they cannot arise if the resigning trustee or trustees obtain a discharge from the beneficiaries, as they certainly ought to do. The discharge will narrate the assumption, which will be an express consent thereto.

- 4. Trustees appointed by the Court have not power of assumption, unless expressly conferred by the Court (1867 Act, s. 13).
- 5. Assumed Trustees.—The question is sometimes raised whether assumed trustees have themselves power of assumption. The Trusts Act, 1861 (s. 1), provides—

All trusts . . . under which gratuitous trustees are nominated, shall be held to include . . . power to . . . the trustees so nominated . . . to assume new trustees.

What does "nominated" mean? It is submitted that the clause covers the case of trustees nominated in a deed of assumption as well as those nominated in the trust deed. For (a) under sec. 1 of the Trusts Act, 1867, the words "gratuitous trustees" include "all trustees, whether original or assumed"; (b) by the same Act (s. 13) it is enacted that trustees appointed by the Court are not to have power to assume new trustees unless expressly conferred; and if it had been intended that assumed trustees were not to have the power. one would have expected to find that expressed; (c) by the 1861 Act the power of resignation is conferred on "any trustee so nominated," and by Sched. A of the 1867 Act it is express that this includes assumed trustees; and (d) the form of deed of assumption in Sched. B of the 1867 Act is not consistent with the view that the granters of it must have been original trustees. Of course original trustees, in assuming new trustees, cannot confer the power if it does not exist independently. But the testator certainly may; and to avoid all question it is suggested that wills and trust deeds should contain a clause declaring that power of assumption is conferred on assumed as well as on the original trustees.

6. Insanity, Incapacity, or Absence.—Under sec. 11 of the 1867 Act, if a trustee is incapacitated by insanity or physical or mental disability, or is continuously absent from the United Kingdom for six months, the other trustee or trustees may assume. But if a quorum cannnot be obtained, the consent of the Court is necessary.

Appointment.—1. By spouses under lapsed Marriage Trusts.— Under marriage contracts where the trusteeship has failed the spouses may appoint new trustees without going to the Court.²

2. By beneficiaries in lapsed trusts.—See p. 875 as to appointment without going to the Court.

¹ Maxwell's Trs. v. M., 1874, 2 R. 71. ² Newlands v. Miller, 1882, 9 R. 1104.

- 3. Surviving testator under mutual will.—As to the power of the surviving testator regarding the trusteeship of the predeceaser's estate, see the case noted below.¹
- 4. By the Court under the Trusts Acts, and also ex nobili officio when circumstances make it expedient.²

Terms of the Deed.—(1) Codicils.—Assuming that it is the case of a testamentary trust, reference will be made not only to the will, but also to any codicil or codicils, and the new trustees will be assumed as trustees under the will and codicil or codicils. If, however, the codicil or codicils contain absolutely nothing but alterations in the trusteeship, there is then no necessity for assuming the trustees as trustees under the codicils, and it is thought to be better not to do so.

- (2) Title of Assuming Trustees.—This should be set out, whether it be (a) a codicil, (b) a deed of assumption, or (c) a decree of the Court; and in this last case it will be added, "under which express power of assumption was conferred upon us."
- (3) Specification of Original Trustees.—It is difficult to see why this should have been required, but it is so under the Sched. B to the 1867 Act. Some little awkwardness is introduced when changes in the trusteeship have been made by codicils. Various cases may be figured. The matter is altogether immaterial, except for the statutory form, and the aim should be to study brevity, and the exclusion of what is really irrelevant matter, as much as possible.
- (4) Conveyance to Old and New Trustees.—If the old trustees are about to resign, it is for consideration whether the statutory form should not be altered to the extent of making the conveyance to the new trustees only. It does appear rather inconsistent to convey the estate to persons who are not intended to hold it. See also p. 863, and for form, p. 868.
- (5) Destination and Quorum.—In the statutory form three points are mentioned in this respect, namely, (a) survivorship, (b) destination to the heirs of the last survivor, and (c) the majority to be a quorum. These are all unnecessary, as being all implied at any rate; and if they were not, it is not easy to see how they could competently be introduced by trustees merely in assuming new trustees. If and so far as the trust deed is silent on these points, the statutory form should be followed. But care will be taken to see that, so far as the trust deed is express on any of these points, its terms are exactly repeated. Thus the destination to the heir-at-law may be limited by the words "being major," and the provision as to a quorum may make it consist of a majority resident in the United Kingdom or in Great Britain.
 - (6) General Conveyance.—Insert "me" or "us" after "belonging
 - Welsh's Trs. v. W., 1871, 10 M. 16.
 Malcolm v. Goldie, 1895, 22 R. 968;
 Dick and ors., Petrs., 1899, 2 F. 31ε.

to" in the clause "belonging to or under my (or our) control." As to dispensing with the conveyance altogether in certain cases, see p. 863.

- (7) Special Conveyances.—Dealing here only with the case of heritable property and heritable securities in Scotland, the question whether special conveyances of these should be incorporated in the deed of assumption depends upon which course will be the more economical, and that is a question of circumstances. The alternative is a notarial instrument on the prior title and the deed of assumption as a general conveyance. Assuming that the title of the granters is complete, then if, when the property or security comes to be dealt with by way of sale or discharge, any one of these granters is alive and acting, it will never be necessary to complete the title of the assumed trustees at all. If, therefore, there is a fair chance of that being the case, it is not necessary to have any special conveyance. If, on the other hand, the assuming trustees are just about to resign office, a special conveyance will be taken as a matter of course. If, again, the title of the granters is not complete, it is obvious that they cannot grant a special conveyance: in that case the course is a general conveyance only, followed by a notarial instrument in favour of all the acting trustees, either immediately or when it is required. When special conveyances are included the deed of assumption will be recorded with a warrant "for preservation as well as for publication" in the county or all the counties in which the properties are situated. registration is necessary in any burgh register, the extract, when received from the Register House, will be recorded in the burgh register with a separate warrant thereon saying nothing about preservation. What has been said above as to not taking infeftment in favour of the new trustees is subject to the remarks infra as to completion of title. See further, infra, as to separate special conveyances.
- (8) Consent to Registration.—This is altogether unnecessary, and in any case the reference to the registers of sasines which occurs in the statutory form will be omitted.

Two Trusts under Marriage Contracts.—When the assumption is under a contract of marriage by which two trusts are constitutedthe one by the husband and the other by the wife—there is no need for more than one deed of assumption, but it will be framed so as to make it clear and express that the new trustees are assumed under both trusts, and that both trust estates are conveyed. See p. 866.

Separate Special Conveyances.—As a matter of conveyancing care will be taken to see that in point of fact whatever is necessary to give the new trustees a title to the various assets of the trust is carried through. Thus there may be English or other foreign assets; there may be assets standing in the names of the trustees ex facie as individuals; and even as regards assets in Scotland standing in the names of the trustees as such, e.g. stock of banks or companies,—in all

of these cases it may be necessary to have special deeds of transfer, so as effectually to carry the assets in question. In these cases especially it is recommended that if the old trustees are at the same time retiring, the conveyances should be to the new trustees only. Indeed, in certain cases, any other course will be found unworkable.

Acceptance of Office.—There should be an express acceptance of office by the new trustees. The best way is to incorporate this in the deed itself; but if that is omitted, the acceptances should be written on the principal deed before it is given in to be registered.

Stamp Duty.—The stamp duty on a deed of assumption is £1 if it contains (1) an appointment of trustee and (2) a conveyance. The stamp duty is not increased by including in the deed any or all of the following:—(1) One appointment and one conveyance with reference to two trusts under a contract of marriage, (2) special conveyances of the trust assets, (3) an acceptance of office, (4) a minute of resignation by the old trustee or trustees, and (5) an acceptance by the new trustees of intimation of the resignation. Each separate special transfer will require a 10s. stamp. If the only asset is, say, a holding of English railway stock, and a separate transfer thereof is insisted upon by the company, a saving of 10s. may be effected by omitting any conveyance from the deed of assumption altogether. That deed will then require a 10s. stamp only. This course would also be available if the only asset were a bank deposit receipt, which in point of fact could be transferred by indorsement, and in many similar cases.

Completion of Title.—There can be little doubt that it is the duty of the trustees to see that their title to the trust property is completed and stands in the names of all the trustees, so that the estate and beneficiaries shall have the protection thereby implied. There is no difficulty, on the score of expense, as regards almost all kinds of property except heritable property and heritable securities. As regards these, however, the matter of expense is important. It has been dealt with above from a mere conveyancing point of view. But it will be the agent's duty to advise the trustees that the title should be completed; and if that is not to be done, there should be a written record that it was decided not to do it, notwithstanding the agent's advice. In another aspect the completion of title to various kinds of property, e.q. shares in banks and other companies, may involve personal liability on the part of the trustees to the creditors of the companies, and therefore this will be explained, and nothing will be done without express written instructions.

RESIGNATION

Who entitled to resign?—(1) Non-gratuitous Trustee.—This refers to any trustee "to whom any legacy or bequest or annuity is

· expressly given on condition of the recipient thereof accepting the office of trustee under the trust," and who accordingly is not "entitled to resign the office of trustee . . . unless otherwise expressly declared in the trust deed" (1867 Act, s. 1). It is hardly necessary to point out that this does not apply to a trustee who takes a legacy or other benefit under the deed, unless attached to the benefit there is the condition that non-acceptance of office shall entail forfeiture. be intended that, notwithstanding the legacy and condition, the trustee should still be entitled to resign office, it ought to be expressly declared that the trustee shall be deemed a gratuitous trustee, "with all the powers competent to any other gratuitous trustee, including power to resign office"; but less may do.1 In order to avoid any question as to the effect of resignation upon the legacy, it will be well to continue "without forfeiture of or prejudice to the legacy (or legacies or otherwise) hereby bequeathed to him." But it is difficult to understand the frame of mind which would give such a conditional legacy and at the same time supply the means of defeating the condition. If circumstances should arise rendering continuance in office very inconvenient, the Court may give power to resign on condition of returning the legacy,2 or even without that condition,8 or may refuse the power even though repayment be offered 4; and a doubtful resignation will not be confirmed by the Court ex post facto.5

(2) Sole trustee (or all trustees) resigning. See p. 859.

Executorship.—In testamentary trusts resignation as trustee infers resignation as executor if that office is also held (1867 Act, s. 18).

Form of Resignation.—This is alternative, either—

- 1. A "minute of the trust entered in the sederunt book of the trust, and signed in such sederunt book by such trustee and by the other trustees or trustees acting at the time" (1867 Act, s. 10); or
 - 2. Separate minute of resignation.

The advantages attached to the former method are that it saves stamp duty, intimation, and *induciæ*. The disadvantages are that the evidence is not easily producible to companies, etc., and not being capable of registration, may be lost altogether.

In the case of the separate minute of resignation, it is held that a 10s. stamp is required; the stamp is not increased though two or more trustees resign in the one document. Registration in the books of Council and Session is referred to in the Act, and is usual, but is not essential. In framing the separate minute the word "at" will be inserted in the phrase "as (at) and from" which occurs in the statutory

¹ Assets Co. v. Shiress, 1896, 4 S. L. T. No. 185.

² Orphoot, Petr., 1897, 24 R. 871.

³ Guthrie, Petr., 1895, 22 R. 879 (conflicting personal interest).

⁴ Scott v. Muir's Trs., 1894, 22 R. 78.

⁵ Maclcan, Petr., 1895, 22 R. 872.

form; and as regards the specification of the original trustees (which is required), reference is made to p. 861. If the resigning trustee was not an original trustee, the deed of assumption or decree under which he was appointed requires to be set out.

Intimation and Induciæ.—When the resignation is by separate minute, the resigning trustee is (s. 10 of 1867 Act) "bound to intimate the same to his co-trustee or trustees, and the resignation shall be held to take effect" at intervals after the intimation, or last intimation, as follows:—(a) One month if the other trustees are within Scotland, (b) three months, if not, and (c) six months if the address cannot be found, in which case the intimation is edictal. It is not clear what are the purpose and effect of these periods of intimation or induciæ, but at any rate the resignation is not revocable during their currency.

Divestiture.—Both parties, i.e. the resigning trustee on the one hand, and the continuing trustees and beneficiaries on the other, are interested to see that the former is divested of the trust estate. In many special cases special conveyances will be required, as to which see p. 862 in the converse case of assumption. So far as the matter of time goes, the resigning trustee is quite in titulo to grant conveyances after his resignation. This might not be clear on principle, but sec. 10 of the 1867 Act provides that—

any retiring trustee, or trustees who may have already retired, shall be bound when required, and at the expense of the trust, to execute all deeds necessary for divesting them of trust property.

But it is the interest of the retiring trustee to have the divestiture carried into execution at once. This, of course, refers especially to the case of assets to which liabilities are attached. It should be seen that the resignation is intimated, and is fully acted upon, to the effect of removing the name of the resigning trustee from share registers, etc.²

DEED OF ASSUMPTION IN ORDINARY FORM WITHOUT SPECIAL CONVEYANCES

We, A. and B., the accepting and surviving trustees acting under the trust disposition and settlement granted by X. in our favour, dated , and registered in the Books of Council and Session on , do hereby assume C. and D. as trustees under the said trust disposition and settlement: And we dispone and convey to ourselves and the said C. and D., as trustees under the said trust disposition and settlement, and the survivors or survivor, and the heirs of the last survivor, the majority while more than two are acting being a quorum, All and Sundry the whole trust estate and effects, heritable and moveable, real and personal, of every description or wherever situated, at present belonging to us or under our control as trustees under the said trust disposition and settlement, together with the whole vouchers, titles, and

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¹ Fullarton's Trs. v. James, 1895, 28 R. ² Dalgleish v. Land Feuing Co., 1885, 105. ³ R. 223. See s. 7 of the 1891 Act.

instructions thereof: And we the said C. and D. hereby accept office as trustees foresaid.—In witness whereof.

Stamp, £1.

DEED OF ASSUMPTION UNDER MARRIAGE CONTRACT CONTAINING TWO SEPARATE TRUSTS

We, A. and B., the accepting and surviving trustees under the two trusts constituted under the contract of marriage between X. and Y., dated , and registered in the Books of Council and Session on , do hereby assume C. and D. as trustees in both trusts under the said contract of marriage: And we dispone and convey to ourselves and the said C. and D., as trustees in the respective trusts under the said contract of marriage, and the survivors or survivor, and the heirs of the last survivor, the majority while more than two are acting being a quorum, All and Sundry the whole trust estates and effects, heritable and moveable, real and personal, of every description or wherever situated, at present belonging to us or under our control as trustees in the respective trusts under the said contract of marriage, together with the whole vouchers, titles, and instructions thereof: And we the said C. and D. hereby accept office as trustees foresaid.—In witness whereof.

Stamp, £1.

DEED OF ASSUMPTION WITH SPECIAL CONVEYANCES

We, A. and B. [as on p. 865, to the words "instructions thereof" inclusive, and proceed], and particularly, but without prejudice to the said generality, we grant the following special conveyances of particular assets of the said trust estate: That is to say:

1. Special Conveyance of Heritable Property

In the first place, we, as trustees foresaid, dispone to ourselves and the said C. and D., as trustees foresaid, and the survivors or survivor, and the heirs of the last survivor, and the assignees of the said trustees or trustee, (first) All and Whole the lands of Y., in the county of Z., being the subjects particularly described in the notarial instrument in favour of us, as trustees foresaid, recorded in the division of the general register of sasines for the county of Z. on [specify teinds, etc., so far as necessary]; and (second) the house I King Street, in the city and county of Edinburgh, being the subjects particularly described in the other notarial instrument in favour of us, as trustees foresaid, recorded in the division of the general register of sasines for the county of Edinburgh on the [specify teinds, etc., so far as necessary], With entry to the said respective subjects hereinbefore disponed as at the term of [insert last term to which rent paid]: And we assign the writs and the rents of the said respective subjects:

2. Special Conveyance of Heritable Bonds

In the second place, we, as trustees foresaid, do hereby assign and dispone to and in favour of ourselves and the said C. and D. as trustees foresaid, and the survivors or survivor, and the heirs of the last survivor, and the assignees whomsoever of the said trustees or trustee, (first) a bond and disposition in security, dated and recorded as aftermentioned, for the sum of

£ granted by E. in favour of F., with interest from the term of [last term to which interest paid]; and also All and Whole [describe or refer to the security-subjects, all as specified and described in the said bond and disposition in security, recorded in the division of the general register of sasines for the , To which bond and disposition in security county of we acquired and have right conform to the following writs, namely, (1) assignation by the said F. to the said X. [the testator] dated , and recorded in the said last mentioned division of the general register of sasines on , (2) the said trust disposition and settlement of the said X., and (3) notarial instrument in favour of us, as trustees foresaid, recorded in the said last mentioned division of the general register of sasines on (second) but only to the extent after mentioned, a bond and disposition in and recorded as after mentioned, for the sum of security, dated £1000 granted by G. in favour of us, as trustees foresaid, with interest from the term of [last term]; and also All and Whole [describe or refer to the security-subjects], all as specified and described in the said last mentioned bond and disposition in security, recorded in the division of the general register of sasines for the county of on : But declaring that these presents do and shall assign the said last mentioned bond and disposition in security only to the extent of £500 of the principal sum therein contained, with the interest thereof from the term of [last term], and penalties corresponding thereto if incurred, ranking pari passu with the remainder of the principal sum contained in the said bond and disposition in security, interest, and penalties:

3. Special Conveyance of Stocks and Shares

And in the third place, we, as trustees and executors foresaid, do hereby assign and transfer to ourselves and the said C. and D., as trustees under the said trust disposition and settlement, and the survivors or survivor, and the heirs of the last survivor, and the assignees whomsoever of the said trustees or trustee, All and Sundry the stocks and shares specified in the inventory thereof annexed and signed as relative hereto, and hereby adopted and held as repeated brevitatis causa, and that all subject to the several conditions on which we the said A. and B. held the same immediately before the execution hereof; and we the said A., B., C., and D. hereby accept the said stocks and shares subject to the said conditions: And we the said C. and D. hereby accept office as trustees foresaid.—In witness whereof.

INVENTORY REFERRED TO IN THE FOREGOING DEED OF ASSUMPTION

Company.	or Shares.	Number (and Distinctive Numbers) of Shares.
•		
	′	1

Stamp, £1.

DEED OF ASSUMPTION BY SOLE TRUSTEE WHO IS RESIGNING, AND CONTAINING HIS RESIGNATION

I, A., sole surviving trustee acting under the trust disposition and settlement granted by X. in favour of me, and of Y. and Z., both now deceased, dated , and registered in the Books of Council and Session on , Considering that I, being desirous of resigning office as trustee foresaid, have, with consent of the beneficiaries under the trust, arranged to assume B., C., and D. as trustees, and immediately thereupon to resign office: Therefore

Assumption and General Conveyance

In the first place, I do hereby assume the said B., C., and D. as trustees under the said trust disposition and settlement: In the second place, I dispone and convey from myself to the said B., C., and D., as trustees under the said trust disposition and settlement, and the survivors or survivor, and the heirs of the last survivor, the majority while more than two are acting being a quorum, All and Sundry the whole trust estate and effects, heritable and moveable, real and personal, of every description or wherever situated, at present belonging to me or under my control as trustee under the said trust disposition and settlement, together with the whole vouchers, titles, and instructions thereof [here insert particular conveyance, if wished]:

RESIGNATION

In the third place, I do hereby resign, as from and after the date hereof, the office of trustee under the said trust disposition and settlement:

ACCEPTANCE OF OFFICE BY NEW TRUSTEES

And in the fourth place, we the said B., C., and D. hereby accept office as trustees foresaid; and also accept intimation of the foregoing resignation, and dispense with any inducion of period of notice.—In witness whereof.

Stamp, £1.

DEED OF ASSUMPTION BY ONE OF TWO TRUSTEES UNDER AUTHORITY OF THE COURT

I, A., one of the two trustees under the trust disposition and settlement granted by X. in favour of me and B., dated , and registered in the Books of Council and Session on , Considering that in respect of the incapacity [or continuous absence from the United Kingdom for six months] of the said B., who is the other trustee under the said trust disposition and settlement, I have been authorised by the Court of Session to grant these presents conform to Act and Decree dated , and extracted on : Therefore I do hereby assume C. and D. as trustees under the said trust disposition and settlement; and I dispone and convey to myself and the said B., C., and D., as trustees under the said trust disposition and settlement, and the survivors or survivor, and the heirs of the last survivor, the majority while more than two are acting being a quorum, All and Sundry

the whole trust estate and effects, heritable and moveable, real and personal, of every description or wherever situated, at present belonging to me and the said B., or under my and his control, as trustees under the said trust disposition and settlement, together with the whole vouchers, titles, and instructions thereof: And we the said C. and D. accept office as trustees foresaid.—In witness whereof.

DEED OF ASSUMPTION BY AN ORIGINAL AND AN ASSUMED TRUSTEE WHERE THERE WAS A CODICIL AFFECTING TRUSTEESHIP

We, A. and B., the surviving trustees, original and assumed, acting under the trust disposition and settlement granted by X. in favour of me the said A., and also in favour of Y., dated , and codicil thereto dated , by which he recalled the appointment of the said Y. and appointed Z., now deceased, to be a trustee, both registered in the Books of Council and Session on , and to which office of trustee I the said B. was assumed conform to deed of assumption granted by me the said A. and by the said Z. dated , and registered in the Books of Council and Session on , do hereby assume C. and D. as trustees under the said trust disposition and settlement and codicil: And we [as in previous forms].

DEED OF ASSUMPTION BY TRUSTEES APPOINTED BY THE COURT

We, A. and B., the trustees acting under the trust disposition and settlement granted by X. in favour of Y. and Z., both now deceased, dated , and registered in the Books of Council and Session on , to which office of trustees we were appointed under Act and Decree of the Lords of Council and Session dated , and extracted on , whereby special power was given to us to assume new trustees, do hereby assume, etc.

MINUTE OF RESIGNATION BY AN ORIGINAL TRUSTEE

I, A., do hereby resign, as at and from the date hereof, the office of trustee under the trust disposition and settlement granted by X. in favour of B. and C. and myself, dated , and registered in the Books of Council and Session on : And we the said B. and C.¹ hereby accept intimation of the foregoing resignation, and dispense with any inducive or period of notice.—In witness whereof.

Stamp, 10s.

MINUTE OF RESIGNATION BY AN ASSUMED TRUSTEE OR A TRUSTEE APPOINTED BY THE COURT

I, A., do hereby resign, as at and from the date hereof, the office of trustee under the trust disposition and settlement granted by X. in favour of B. and

The resigning trustee or trustees will sign before the other trustee or trustees.



870 ASSUMPTION, APPOINTMENT, AND RESIGNATION OF TRUSTEES

C., dated , and registered in the Books of Council and Session on , and to which office of trustee I was assumed by deed of assumption granted by the said B. and C. in my favour dated , and registered in the Books of Council and Session on [or, and to which office of trustee I was appointed by Act and Decree of the Lords of Council and Session dated , and extracted on]: And we the said B. and C. hereby accept [as in previous form].

MINUTE OF RESIGNATION BY ONE TRUSTEE UNDER TWO TRUSTS

I, A., do hereby resign, as at and from the date hereof, the offices of trustee under both trusts constituted in the contract of marriage between X. and Y. dated , and registered in the Books of Council and Session on : And we, B. and C., the remaining trustees in the said trusts, hereby accept intimation [as before].

Stamp, 10s.

MINUTE OF RESIGNATION BY TWO TRUSTEES UNDER ONE TRUST

We, A. and B., do hereby resign, as at and from the dates of our respective signatures hereto, our respective offices of trustee under the trust disposition and settlement granted by X. in favour of C. and ourselves dated , and registered in the Books of Council and Session on : And I the said C.¹ hereby accept intimation of the foregoing resignations, and dispense with any *inducics* or period of notice.—In witness whereof. Stamp, 10s.

IN VIRTUE OF AUTHORITY BY THE COURT

I, A., in virtue of special authority given to me by the Court of Session under Act and Decree dated , and extracted on , do hereby resign [ordinary form].

1 The resigning trustee or trustees will sign before the other trustee or trustees,

7

SECTION XLVII

COMPLETION OF TITLE IN CASES OF JUDICIAL APPOINTMENTS AND LAPSED TRUSTS

This section deals with the completion of titles to heritable and moveable property in the following cases:—

- 1. New trustees appointed by the court.
- 2. Judicial factors on trust or other estates.
- 3. Heir of (a) testator, (b) intestate, or (c) last surviving trustee intervening.
- 4. Beneficiary making up title direct.
- 5. Curators bonis to minors and persons under incapacity.
- 6. Factors loco tutoris.
- 7. Factors loco absentis.

1. NEW TRUSTEES APPOINTED BY THE COURT

The enactments are Trusts Act, 1867, s. 12 (extended to non-gratuitous trustees by the Trusts Act, 1884), and the 1874 Act, s. 44.

The 1867 Act applies to both heritable and moveable property, and no matter what the state of the title may be. It bears reference to sec. 38 of the Titles Act, 1860 (23 & 24 Vict. c. 143), which has been repealed; but that, of course, does not prevent this reference in the 1867 Act continuing to receive full effect.

The provisions of the 1874 Act are limited (1) to heritable property, including heritable securities; (2) to which a trust title has already been completed and recorded, i.e. in the persons of the former trustees.

THE 1867 ACT

Form.—The petition for appointment will describe or refer to the heritable property, including heritable securities, and will either describe the moveable property or refer to an inventory of the moveable property (i.e. other than heritable securities) appended to the petition. The interlocutor making the appointment, or a subsequent interlocutor, will do the same.

¹ Royal Bank, Petrs., 1898, 20 R. 741.

- Effect.—(1) Heritable Property, including Heritable Securities.— The warrant "shall be held to be a disposition of the lands and an assignation of any heritable securities" in favour of the trustee or trustees so appointed by the former trustee, "whether in life or deceased, for the purposes of such trust."
- (2) Moveable Property.—The warrant is "an assignation of such moveable or personal property in favour of the trustee or trustees so appointed."

Procedure to obtain Infeftment in Heritable Property and Securities.

- 1. When the former Trustee was Infeft.—Record the extract warrant de plano.
- 2. When the former Trustee was not Infeft.—Expede a notarial instrument.—
- (a) Irredeemable Rights.—Sched. J, 1868 Act, if the conveyance by the last infest proprietor was a special disposition; if not, then Sched. L of the 1868 Act.
- (b) Heritable Securities.—Sched. MM, 1868 Act, if the deed granted by the creditor last infeft was a special assignation; if not then Sched. N, 1874 Act.

THE 1874 ACT

Form.—The warrant to complete the title must be granted in "the interlocutor whereby the appointment is made," i.e. in the same interlocutor in which the trustees are appointed, and not in any subsequent interlocutor. It must set forth (1) the trust deed, (2) the other title or titles (if any) by which the trust title had been completed, (3) the register or registers of sasines where such deed or title or titles are recorded, and (4) "the lands," which includes heritable securities.

Procedure.—Record the extract interlocutor de plano.

Effect.—This operates a "title by infeftment in the estate in favour of the trustee . . . thereby appointed, in the same manner as if he had been a trustee named in the completed and recorded title, in conformity always with the nature and terms of the appointment, and to the effect of enabling him to perform the duties of the office to which he is appointed."

2. JUDICIAL FACTORS

The enactments are sec. 24 of the 1868 Act, and sec. 44 of the 1874 Act. The latter has not repealed the former.¹

THE 1868 ACT

Application.—It has been suggested that the 1868. Act (1) does not apply if the person whose estate is under judicial management, or

1 Histop, Petr., 1901, 9 S. L. T. No. 145.

the trustee or former factor, had only a personal, and not a feudalised, title; and (2) does not apply, in any case, to heritable securities. The ground of the suggestion that the section is limited to completed titles no doubt is, that it says that the warrant may be recorded de plano, but it is careful to add that the recording shall be equivalent only to the recording of a disposition granted by the person whose estate is under management, or by the trustee or former factor, as the case may be (as to the effect of which see infra), and that is no reason for inferring that the warrant is altogether inapplicable when the former trustee or factor had an unfeudalised title.

Then as to the suggestion that the section does not apply to heritable securities, it is to be observed that "lands" expressly embraces "securities"; that "conveyance" expressly embraces "assignation"; that the words in the section as to the warrant implying clauses of holding (which might be supposed to be incongruous in the case of securities) are limited to cases where the warrant does apply to land held by burgage or non-burgage tenure; and as regards the references to Scheds. E and G, these are referred to also in the statutory form of security; and, after all, it is to the lands that a title is to be made up, only in security instead of absolutely.

For these reasons, it is submitted that the section may safely be used in all cases, whether the last title was recorded or not, and whether the assets are redeemable or irredeemable rights. At the same time, it may be useful to point out alternative methods.

First.—As regards heritable securities, if it be a case of the appointment of a judicial factor on a trust where a trust title has previously been recorded, the matter is of no importance, for the application of the 1874 Act (infra) is not doubted. Again, if the factor be appointed on a deceased's estate, he will be able to obtain confirmation, and to make up a title as executor (1868 Act, Sched. JJ, or Sched. MM, according to circumstances); but this will not do if executors are excluded, nor apparently where the deceased died infeft and testate. Again, the heir of the last trustee may be able to intervene under sec. 43 of the 1874 Act. Finally, there is always the method of declaratory adjudication.

Second.—As regards irredeemable rights where the last trust title was not completed, sec. 43 of the 1874 Act may be available; or suppose it is the case of a judicial factor upon a deceased's estate, the heir of the testator or intestate may complete a title and convey to the factor; failing all which, declaratory adjudication.

Form.—It is not necessary that the warrant be granted in the same interlocutor by which the appointment is made. In fact it will probably not be granted till caution has been found. It may even be on a separate petition or note.

¹ If indeed he requires it, having regard to the J. F. Act, 1889, s. 13.

Effect.—The warrant is equivalent to a conveyance in favour of the factor granted by the person, whether in life or deceased, whose estate is under judicial management; or where the factor has been appointed on an estate which was vested in a trustee or former factor, then it is equivalent to a conveyance by the trustee or former factor, whether in life or deceased, for the purposes of the estate or trust or factory.

Procedure to obtain Infeftment.—1. Where the constructive granter of the conveyance as above explained was infeft, record the warrant de plane. But in this connection, suppose it is A.'s estate, that he was infeft, that there was a trustee or former factor, B., who was not infeft, and C., a new factor, has obtained warrant to complete title, the constructive granter of the disposition in favour of C. is B., and he was not infeft, so that it is an example of the case next explained.

2. Where the constructive granter of the conveyance was not infeft. It has been suggested that even in this case the title may be completed by de plano recording, but it is submitted that there is no ground for this opinion. No doubt the section goes on to say that the warrant may be recorded, but, as already pointed out, it is careful to state that the recording shall be equivalent only to the recording of an actual conveyance by the granter of the constructive conveyance implied in the warrant of the Court; and if he was not infeft, it is elementary that he could grant no warrant for de plano infeftment. Factors loco tutoris and curators bonis, and their wards, are put in a more favourable position, but that is done expressly in so many words, and is limited to their case (see infra, p. 877). It follows that the procedure will be by notarial instrument, as to which see p. 872.

THE 1874 ACT

The operation of sec. 44 of the 1874 Act is expressly limited (1) to judicial factors on *trust estates*, and (2) to cases where a trust title has already been completed and recorded. On the other hand, these conditions being present, it is not questioned that it applies to heritable securities as well as to irredeemable rights.

For form, procedure, and effect, see p. 872.

3. Intervention of Heir

This rests partly on common law, partly on statute.

1. Heir of Testator or Intestate.—It is a very old method of completing the title of trustees to get the heir to intervene. In fact, until modern legislation, it was only through the actual or constructive intervention of the heir that general disponees could obtain infeftment. And still in many cases this will be a possible method where otherwise difficulties present themselves. Of course the heir must be major. If there be any objection to allowing him to take infeftment, it is not necessary that that should be allowed to happen: he can be served

and then convey, and the trustees or factor may be infeft on a notarial instrument. This will be possible wherever there has been no infeftment since the deceased's death. It will not apply to heritable securities unless executors are excluded.

- 2. Heir of last surviving trustee, where the trust title contains a destination to heirs.—In this case service as heir of provision in trust will be competent. Apparently it applies to heritable securities.
- 3. Heir of last surviving trustee under sec. 43 of the 1874 Act.—
 The difference here is that it is not necessary that there should be a destination to heirs in the trust title. The statutory provisions are:
 (1) the heir must be major and subject to no legal incapacity; (2) there must be no contrary provision in the trust deed, and no contrary order by the Court; (3) except under the order of the Court, or with consent of all the beneficiaries (being all major and capax), the heir shall not administer the trust, but shall forthwith make over the property to (a) any trustee or factor appointed by the Court, (b) any trustee appointed by any person having power under the trust deed to make the appointment, (c) "any person or persons whom the beneficiaries as aforesaid may have concurred in appointing to execute the remaining purposes of the trust," or (d) the beneficiaries themselves, if the whole other purposes have been fulfilled.

It will not often be desired that the heir should administer the trust: but it may be pointed out that, except under the orders of the Court, it will rarely be safe for him to do so. He would require the consent of "all the beneficiaries," all being major and capax. There does not appear to be any ground for saying that this means only all then in life, so that unless there are in life (and all major and capax) persons who among them have a vested right to the whole estate, he cannot act except under the orders of the Court.

But the most interesting part of the section is that which is quoted above. The same condition as to all the beneficiaries attaches; but if that be fulfilled, the beneficiaries may themselves appoint new trustees; and thus between this on the one hand, and the heir's intervention on the other, the trust capacity and title are continued without any application to the Court. In point of fact this procedure is practically unknown.

4. BENEFICIARY MAKING UP DIRECT TITLE

(1) Under sec. 14 of the Trusts Act, 1867, "when any person shall be entitled to the possession, for his own absolute use, of any heritable property, or moveable or personal property, the title to which has been taken in the name of any trustee, or curator bonis, or factor loco absentis, or factor loco tutoris, or judicial factor, or other person, who has died or become incapable of acting without having executed a conveyance,"

the person so entitled may apply to the Court, by petition, for warrant

to complete title. The form, effect, and procedure are the same as stated on pp. 871-2 with reference to the appointment of new trustees.

The section applies, of course, to heritable securities, and there is no restriction no matter whether the former title may have been completed or not.

On the other hand it has been decided that when the original beneficiary is dead, the beneficiary's testamentary trustees are not entitled to proceed under this section. This was apparently on the ground that, being trustees, they were not entitled for "absolute use," nor "beneficially entitled"; but the clear opinion was expressed that the section was not available to any assignee at all, or to anyone except the original beneficiary. This decision was against the clearly-indicated view of the Lord Ordinary; and with deference it is submitted that, whether the decision be or be not well founded, the dictum which would debar all derivative titles from the benefit of the section is not warranted.

At the same time, the words "absolute use" would, it is thought, bar a petition by, say, a liferenter, even though both liferenter and fiar concurred for their respective interests; in that case the fiar might be barred by the words "entitled to the possession."

The section is limited to property "the title to which has been taken in name of any trustee," etc. The words italicised are somewhat peculiar. Would they cover the ordinary case of a general testamentary conveyance to trustees who have done nothing towards completing a title in their persons? It is submitted that they would and that the clause really is wide enough to cover all property which has last been held by a trustee, etc., under whatever title, whether completed or not.

- (2) Declaratory adjudication is really better here, for it has none of the limitations just referred to. It will also probably be cheaper. Of course it will in the ordinary case be in absence only, but in that respect it is no worse than a warrant obtained in an unopposed petition. And in the case of personal property confirmation may give a cheaper title.
 - 5. CURATORS BONIS TO MINORS AND PERSONS UNDER INCAPACITY
 - 6. FACTORS Loco TUTORIS
 - 7. FACTORS Loco ABSENTIS

The statutory enactment is sec. 24 of the 1868 Act. What is stated on p. 873 as to the extent of the application of that section holds here also. But there are several divergences in other matters between these cases and the case of an ordinary judicial factor:—

1. The ordinary rule is that the title should be completed in the person of the ward and not of the guardian. This produces no incon-

¹ Macknight, Petr., 1875, 2 R. 667.

venience; for so far as title is concerned, and though it has been completed in the ward's person, the guardian is entitled to act for him without any further title.¹ If the curator find that his authority is not recognised outside Scotland, then, though really unnecessary, the Court will grant special power, e.g. to sell and transfer English stocks.²

2. Sec. 24 of the 1868 Act provides that warrant may be obtained to complete title either in the person of the guardian or of the ward; and further, that—

where the estate is that of a pupil, minor, or lunatic in whose person a title has not been made up, such warrant shall be held to be a conveyance in favour of the pupil, minor, or lunatic, or of the judicial factor [that is, guardian] appointed to such pupil, minor, or lunatic, as the case may be, granted by a predecessor or author having such title.

It accordingly appears that whatever the state of the title, and no matter who was last infeft, or how long it is since anyone was infeft, the warrant may always be recorded *de plano* to the effect of operating a complete feudalised title.

- 3. Under the Judicial Factors Act, 1889, s. 11, the office of factor loco tutoris is automatically converted into that of curator bonis on the ward attaining minority, and of course the title follows automatically also.
- 4. Factors loco tutoris and curators bonis may be appointed in the Sheriff Court in cases of small estates, i.e. where the annual income of the whole estate, heritable and moveable, does not exceed £100.3 The appointment is made in the sheriffdom of the ward's residence. It is difficult to see how the sheriff can grant warrant to complete title to property lying beyond his jurisdiction. But there is no reason why he should not grant power to the guardian to complete the ward's title habili modo. This would be the officer's authority, and then he could complete the ward's title by service in the proper Court; but of course this throws away the special facility given in sec. 24 of the 1868 Act as above stated. These Sheriff Court appointments do not include factors loco absentis, and it would appear that they do not include curators bonis to minors—see the expression "pupil or insane person" in sec. 4, subsec. 1.

PETITION FOR APPOINTMENT OF NEW TRUSTEES AND WARRANT TO COMPLETE TITLES

Unto ¹ the Right Honourable the Lords of Council and Session,

The Petition of A. and B.

Humbly sheweth,-

That by his trust disposition and settlement dated , and registered in the Books of Council and Session on , the late C. conveyed his ¹ Scott, Petr., 1856, 18 D. 624; M*Caig, Petr., 1902, 10 S. L. T. No. 124.

8 S. L. T. No. 350.

3 43 & 44 Vict, c. 4.

whole estate, heritable and moveable, to D. and E., as trustees for the purposes therein mentioned.

The purposes of the trust are briefly 2 as follows:-

- 1. To pay his debts and funeral expenses and the expenses of the trust.
- 2. To pay pecuniary legacies to the amount of £2000.
- 3. To make over certain articles as specific legacies.
- 4. To allow the petitioner A., his wife, now his widow, the liferent of the residue of the estate.
- 5. To make over the residue, on the expiry of the liferent, to and among his children, and the survivors or survivor of them, the issue of any of them who may predecease the period of division to take the share, original and accrescing, which their parent would have taken if surviving.

The testator's debts and funeral expenses have been paid. The pecuniary and specific legacies have been paid and made over.

The purposes of the trust are now (1) the widow's liferent, and (2) the ultimate division of the fee of the residue.

The said D. and E., the trustees named by the testator, accepted office, but are now both dead.

The trust estate consists of the following assets:—

HERITABLE PROPERTY

- 1. House, 1 Graham Street, Glasgow, let at £50 per annum.
- 2. Shop, 10 Leith Street, Perth, let at £20 per annum.

HERITABLE SECURITIES

3. Loan to F. over the estate of X., in the county of Stirling .					£2000
4	. Loan to G. over tenement 1, 2, and	3 Murd	och Ter	race,	
	Edinburgh	•	•	•	1500
	Personal Property				
5	Debenture of the Y. Company Limited	•	•		2000
6	6. Deposit receipt of the Z. Company Limited				1000
	Making, in addition to the heritable prop	erty, a 1	total of	•	£6500

The testator was survived by five children, namely, the petitioner B., three other sons, H., I., and K., and one daughter, L. The son H. has since died without issue. The petitioner B. has attained majority. The other children are in pupillarity.

In consequence of the death of the trustees named by the testator, it is necessary that new trustees should be appointed by the Court, and this petition is accordingly presented under sec. 12 of the Trusts (Scotland) Act, 1867. The petitioners suggest M. and N. as trustees. They have expressed their willingness to act if appointed. It is further desired that they should obtain power to assume trustees, and warrant to complete titles to the trust assets.

May it therefore please your Lordships to appoint this petition to be intimated on the walls and in the minute-book in common form, and to be served on the said I., K., and L.; and thereafter, on

resuming consideration, with or without answers, to appoint the said M. and N. and the survivor of them, or such other persons as your Lordships may think fit, to be trustees and trustee under the said trust disposition and settlement of the said C., with all the powers competent to the trustees thereby appointed, and with power to assume new trustees 8: And also to grant warrant to the trustees so appointed to make up and complete titles in their favour as such trustees to (primo) the following heritable properties forming part of the trust estate, namely, (first) All and Whole that house 1 Graham Street, Glasgow, in the county of the barony and regality of Glasgow, with the solum thereof, ground attached, and pertinents, being the subjects particularly described in the disposition granted by O. in favour , and recorded in the division of the of the said C., dated general register of sasines for the county of the barony and regality of Glasgow on , but always with and under [refer to conditions 4 if necessary, 5 and (second) All and Whole that shop 10 Leith Street, in the city and county of Perth, with the solum thereof, etc. (all as before 5); (secundo) the following heritable securities 6 forming part of the trust estate, namely, (first) a bond and disposition in security, dated and recorded as after-mentioned, for the sum of £2000 granted by F. in favour of the said C., with all interest due and to become due thereon; as also All and Whole [describe or refer to (a) security subjects, and (b) if necessary the conditions, all as specified and described in the said bond and disposition in security recorded in the division of the general register of sasines for the county of Stirling on , to which bond and disposition in security the said D. and E., as trustees foresaid, completed title, conform to the following writs, namely: (1) the said trust disposition and settlement of the said C., and (2) notarial instrument in their favour recorded in the division of the general register of sasines ; and (second) a bond and for the county of Stirling on disposition in security, dated and recorded as after mentioned, for the sum of £2000 granted by G. in favour of P., and all interest due thereon; and also All and Whole [describe or refer to (a) security-subjects, and (b) if necessary, the conditions, all as specified and described in the said last-mentioned bond and disposition in security recorded in the division of the general register of sasines for the county of Edinburgh on , but that only to the extent of the principal sum of £1500, and interest due and to become due thereon, to which last-mentioned bond and disposition in security, to the extent foresaid, the said D. and E., as trustees foresaid, acquired right conform to the following series of writs, namely: (1) trust disposition and settlement of the said P. dated , and registered in the Books of Council and Session on (2) notarial instrument in favour of Q. as sole trustee of the said P. recorded in the division of the general register of sasines for the county of Edinburgh on ; and (3) assignation, to

the extent foresaid, by the said Q., as trustee foresaid, in favour of the said D. and E., as trustees foresaid, dated , and recorded in the division of the general register of sasines for the county of Edinburgh on ; and (tertio) the personal property forming part of the trust estate, specified in the inventory thereof annexed hereto: And to authorise separate extracts 8: And to find that the expenses of and connected with this application, and the completion of the new trustees' titles, form a charge against the capital of the trust estate; and to decern; or to do further or otherwise as to your Lordships shall seem proper.

According to justice, &c.

INVENTORY OF PERSONAL PROPERTY REFERRED TO IN THE FOREGOING PETITION

- 1. Debenture bond granted by the Y. Company Limited in favour of the said D. and E., as trustees foresaid, for the sum of £2000, dated .
- 2. Deposit receipt granted by the Z. Company Limited in favour of the said C. for the sum of £1000, dated , to which the said D. and E., as trustees foresaid, acquired right conform to confirmation in their favour, as executors of the said C., granted by the sheriff of , and dated at on
 - ¹ Judge.—Any Lord Ordinary (s. 16 of the Trusts Act, 1867).
- ² Statement of Trust Purposes.—Very often these are practically quoted, except that inverted commas are not added. It is submitted that this is not justifiable, and that a very short, but accurate, paraphrase should be given.
 - ⁸ Power of assumption must be expressly conferred (a. 13 of the Act).
- ⁴ Feuing Conditions and Burdens.—If it be necessary to refer to these under the titles, the references should be inserted here, for this is just a disposition and assignation of irredeemable and redeemable rights respectively.
- ⁵ Old Trustees' Infeftment.—If the old trustees had completed a title, here specify it as is done in the case of the securities. This is to comply with sec. 44 of the 1874 Act.
- ⁶ Specification of Securities.—As here indicated, and for the reason above given, it is recommended that the prayer should follow the ordinary form of assignation of heritable securities in all details (1868 Act, Sched. GG).
- ⁷ Inventory of Personal Property.—There is no reason why the personal property should not be included in gremio of the prayer; if (as here) there are few items, that seems really the neater course.
- ⁸ Separate Extracts.—Here it will be found convenient to have five extracts, applicable respectively to (1) the appointment and the personal property, (2) the Glasgow house, (3) the Perth shop, (4) F.'s security, and (5) G.'s security.
- To Feudalise.—If the old trustees had completed titles to both properties and both securities, or in such cases as they had done so, the new trustees will record the extracts de plano. So far as the old trustees' titles were not recorded, notarial instruments will be necessary. See p. 872.

PETITION BY BENEFICIARY FOR COMPLETION OF DIRECT BENEFICIAL TITLE IN HIS PERSON TO WHOLE ESTATE

Unto the Right Honourable the Lords of Council and Session,

The Petition of A.

Humbly Sheweth,-

That by antenuptial contract of marriage dated , entered into between B. and C., the petitioner's father and mother, both now deceased, trusts were constituted by each of the said spouses.

On the one part, the said B. assigned to D. and E., as trustees, two policies of assurance on his life, each for £1000 with profits, and he bound himself to keep them in force. The trust purposes applicable to the proceeds were (1) for the liferent of C. in the event of her surviving her husband, and (2) for the children of the marriage, or such of them as should survive both spouses, with clauses conditionally instituting the surviving issue of predeceasing children, and reserving power of apportionment to the said B.

On the other part, the said C. conveyed to the said D. and E., as trustees, all the means and estate then belonging to her, or which should belong to her during the subsistence of the marriage. The trust purposes applicable thereto were (1) for the liferent of the said C., (2) thereafter for the liferent of the said B. in the event of his surviving his wife, and (3) for the children of the marriage, or such of them as should survive both spouses, with clauses conditionally instituting the surviving issue of predeceasing children, and reserving power of apportionment to the said C.

The marriage between the said B. and C. was celebrated on . It was dissolved by the death of the said B. on . The said C. died on .

Three children were born of the marriage, namely, (1) the petitioner, (2) F., and (3) G.

The said F. predeceased both parents, he having died on . The said G. survived her father, but predeceased her mother, she having died on . Neither of them left issue, neither having been married.

The said D. and E. accepted office as trustees. On the death of the said B. they realised the proceeds of the said policies of assurance, which, including bonuses, amounted in all to \pounds

The estate received in virtue of the settlement by the said C. consisted of (1) her share of the estate of her father H., which amounted to \mathcal{L} or thereabouts, and (2) a legacy of \mathcal{L} left by I.

The trust estates held under the said contract of marriage are now represented by the following investments [specify as on p. 878].

The titles to all these investments stand in the names of the said D. and E. as trustees under the said contract of marriage.

The said D. and E. are both now dead.

In virtue of the facts above set forth the petitioner is entitled, for his own absolute use, to all the heritable and moveable property above specified, but no conveyance thereof has been executed in his favour, or can now be executed in respect of the fact that the said D. and E. are both dead. Under these

circumstances this petition is presented, under sec. 14 of the Trusts (Scotland) Act, 1867, for authority to complete a title to the said property in the petitioner's name.

May it therefore please your Lordships to appoint this petition to be intimated on the walls and in the minute-book in common form, and thereafter, on resuming consideration hereof, to grant warrant to the petitioner to complete a title in his own name to [specify the assets in the manner shewn on pp. 879-880]: And to authorise separate extracts, and to decern; or to do further or otherwise as to your Lordships shall seem proper.

According to justice, &c.

INVENTORY OF PERSONAL PROPERTY [as on p. 880].

Notes.—See notes 1, 2, 4, 6, and 8, p. 880.

Capital and Income.—It may happen that part of the income goes to the executor of, say, a liferentrix, and not to the petitioner. This must be adjusted.

To Feudalise.—If the trustees had completed titles, the extracts will be recorded de plano. Otherwise, notarial instruments.

SECTION XLVIII

INDEMNITIES TO TRUSTEES

CONSENTS and indemnities given to trustees may have relation to many different matters, but the common case is that they refer to ultra vires investments. There are five main grades of these consents or obligations:—

- 1. A mere consent. This means merely that the consenter will not challenge the investment, but he does not purport to answer to any extent for any other beneficiary, retaining unimpaired, on the contrary, his full proper share of such salvage as may remain in the event of a loss occurring.
- 2. A security to the trustee over the granter's share of the salvage of the particular investment to the effect of securing the trustee to that extent against claims of liability at the instance of other beneficiaries in respect of that investment, this security, however, not extending to the granter's share of the other trust assets.
- 3. A similar security extending to the granter's whole share and interest in the trust estate.
- 4. A security as last mentioned, coupled with the granter's personal obligation to relieve the trustee of all claims at the instance of other beneficiaries, thus giving the trustee a claim against the granter's whole means and estate, including, but not limited to, his share and interest in the trust.
- 5. A new element is introduced when the investment is such as to involve liabilities to outsiders, e.g. calls on shares. In the first place it will be observed that here the only question is not whether the investment is ultra or intra vires. For even if it be intra vires as against the beneficiaries that will be no answer to a call, so that even in that case the trustees may require an indemnity before they consent to hold the shares. But in the same case, assuming that the loss on the shares still leaves the estate solvent, the trustees are safe without any indemnity. If, however, there is no other estate, or if it is insufficient to meet the calls, then much the same question arises as is dealt with in the other cases above stated. A consent or approval, if given by one whose interest is not alimentary, and who is otherwise competent to give

it, will bar any claim at his instance, but it will not entitle the trustee to compel the granter to relieve him of the calls.¹

In order to illustrate the first four cases let it be supposed that the trust estate consists of £1100; that £100 is safely invested, that the remaining £1000 is invested *ultra vires*, the result being a loss of £700, thus leaving a net fund of £400; that there are two beneficiaries A. and B. equally interested, of whom A. has, while B. has not, given a consent or indemnity to the trustee in respect of the *ultra vires* investment. According to the terms of the document A. may be in any of the four following positions:—

- 1. A. may be entitled to claim £200, being his half of the remaining fund of £400. The trustee is here left to make up out of his own funds £350 (being half of the loss), in order to pay B. his full share, viz., £550. A.'s loss, £350; trustee's loss, £350.
- 2. A. may in effect require to abandon the whole salvage of the ultra vires investment to B. A. will still draw £50, being his half of the good investment. B.'s £550 will come from the good investment, £50, the salvage of the bad investment, £300, and from the trustee personally, £200 = £550. A.'s loss, £500; trustee's loss, £200.
- 3. A. may require to abandon the whole trust estate to B., whose £550 will then be made up from the estate, £400, and from the trustee personally, £150 = £550. A.'s loss, £550; trustee's loss, £150.
- 4. A. may in addition be bound to find £150 from his other means and pay it to the trustee to enable him to meet B.'s claim without any personal loss to himself. A.'s loss, £700; trustee's loss, nil.

From the foregoing it is clear that it is very important to consider carefully (1) the terms of the document, (2) whether all the beneficiaries, or how many of them, join, and (3) the extent and nature of their rights in the estate.

Terms of the Indemnity.—The document ought to set out that the granter has read and considered the will or deed constituting the trust, that the investment is ultra vires and is a breach of trust, that the granter has requested the trustee to make the investment; the operative clause will be framed so as to make it clear which of the various positions above stated the granter is to occupy; if there are two or more granters the obligation if any ought to be joint and several; there may be an assignation of the granter's share to the trustees in security; and a clause may be added to the effect that the deed is to be effectual not-withstanding that the other beneficiaries, if any, do not grant a similar document, or the reverse, as may be the intention of parties. The deed ought to be granted before the investment is made.

Alimentary Interests.—Subject to what is stated on p. 886 with reference to the discretion conferred on the Court under the Trusts Act, 1891, an alimentary liferenter or annuitant cannot give a valid

¹ City of Glasgow Bank v. Parkhurst, 1880, 7 R. 749.

consent to the effect of cutting down or prejudicing the claim against the trustee in respect of the liferent or annuity.1 The same rule will apply (or at least must for safety be assumed to apply) in all cases of protected rights as explained on p. 424. This disability requires to be kept in view not only by the trustee, but also by any other beneficiary, e.g. the fiar, who may intend to join in the indemnity. In that case the effect will be that the fiar may require not only to lose his capital and it may be to make up the shares of other fiars, if any, but also in addition to allow the remaining capital, if any, to be encroached upon in order to make up to the liferenter or annuitant the income on what was lost, or to provide funds for that purpose. But notwithstanding, and without any relaxation of this disabling protection, the liferenter or annuitant may of course competently grant a personal obligation of indemnity, though the protected interest will not be available to meet any claim under it, except by order of the Court under the 1891 Act.

Contingent Interests. — Consents or indemnities granted by beneficiaries whose shares are not vested are in a peculiar position, and in this respect it practically makes no real difference whether the shares are purely contingent or vested subject to defeasance. In the first place it is obvious that these consents or indemnities give but a doubtful protection to the trustees, the only thing which will give complete protection being the consent of all the beneficiaries, all being competent to grant it, and all having an absolutely vested right; though even then, if liabilities to third parties are concerned, the protection may come to depend on the solvency of the granters assuming that they have given an indemnity which covers claims of that kind. So far from the point of view of the trustees. But the main peculiarity of these indemnities is from the point of view of the contingent beneficiaries themselves, and it is not quite so obvious. The risk is that the whole burden of implementing the indemnity may fall upon one of several granters if the others should fail to take a vested interest. And while the burden thus rises, the share of the estate falling to the granter in question may remain stationary, e.g. if all the other granters leave issue who take in their own right and of course without being bound to recognise the indemnity. Suppose a trust fund of £9000 is destined to A. in liferent and to B., C., and D. and the survivors and survivor in fee, the issue of predeceasers to take their parent's share. B., C., and D. jointly and severally indemnify the trustees against liability for an ultra vires investment. £3000 is lost. C. and D. predecease the period of payment (and therefore without a vested right), each leaving issue. The issue claim their full rights = £3000 to each family. This exhausts the fund. B. gets nothing.

¹ Sanders v. S's Trs., 1879, 7 R. 157.

INDEMNITY UNDER THE TRUSTS ACT, 1891

Section 6 of the Trusts (Scotland) Amendment Act, 1891, provides—

Where a trustee shall have committed a breach of trust at the instigation or request, or with the consent in writing, of a beneficiary, the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use whether she has or has not powers of disposal or alienation, make such order as to the Court shall seem just for applying all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

This enactment has received very little judicial elucidation. The only case is *Henderson*, and in it the application of the statute was refused. Of the English cases with reference to the corresponding English enactment it may be said that the chief result is to shew the wisdom of having the trustee's full claim and remedy against the beneficiary and his interest reduced to a formal shape in writing instead of relying upon the statute. Comparing claims based on express indemnities and those based upon the statute, we see—

- 1. An express indemnity can, and in ordinary course will, bind the beneficiary personally; the statute does not even entitle the Court to give a decree to that effect; the indemnity of which it speaks is truly a real burden or charge by way of security and relief.
- 2. On the other hand the statute empowers the Court to do what the beneficiary himself or herself could not do, viz., (1) to hold an alimentary liferenter or liferentrix (and in the latter case though she be a married woman) to any request or consent so as to bar any claim against the trustee at the instance of the requester or consenter; and not only so, but also (2) to apply the remaining interest of the instigating, requesting, or even merely consenting alimentary beneficiary in relief to the trustee of the claims of other beneficiaries, e.g. the fiars, and outside claims, e.g. calls. But "it is the duty of a trustee to protect a married woman restrained from anticipation against herself when she asks him to commit a breach of trust," and in that case, though she had shared in the benefit of the application of the money applied in breach of trust, she was let free.

Then as to the relation between an express consent or indemnity on the one hand, and the remedy under the statute on the other, it is to be observed—

1. Writing is not necessary in order to bring the statute into possible operation subject to the discretion of the Court. This is on the view that the words "in writing" which occur in the section apply

¹ Henderson v. Henderson's Trs., 1900, 2 F. 1295. . ² Bolton v. Curre [1895], 1 Ch. 544, per Romer, J. See further re Holt [1897], 2 Ch. 525,

enly to "consent" and not to "instigation" or "request." That view received effect in the English case of Griffith, and the words of the English Act are on this point identical. Of course it is quite true that if no writing of any kind exist, it may be practically impossible to prove the "instigation" or "request"; but then there may be writing in existence to prove the fact though the instigation or request itself was not constituted or contained in writing, and the point is that that is not essential. But as a practical matter it appears that in a subsequent proof it would be almost hopeless to shew successfully that the beneficiary's action was "instigation" or "request," and not, as he would then contend, a mere consent, in which case it would be useless as not being given in writing.

- 2. The terms of the document granted by the beneficiary may be such as to bar the trustee from invoking the statute at all to the effect of extending or raising the remedy of the trustee against the beneficiary's interest. That is on the footing that the document embodies the complete arrangement and contract. That would of course be the effect of the form printed on p. 891. But a much less pointed writing might have the same effect, e.g. such as the following:-"I consent to your investing £1000 in North British Ordinary Stock to the effect that I shall not hold you responsible for my share of any part of the investment which may be lost." It seems clear that in face of this document the trustee could never claim under the Act to impound the consenter's share of the salvage of that investment or his share of the other trust funds in relief of claims by non-consenting beneficiaries. other hand the fact that the trustee was offered and did not take, or declined to take, a charge over the beneficiary's interest does not bar a claim under the Act, not even as against a subsequent assignee for value.2
- 3. When the document granted by the beneficiary is an obligation of indemnity and relief, it does not appear to be very important whether it does or does not (though it ought to) contain clauses giving the trustee an express power of retention. The reasons are (1) that the granter's whole interests in the estate are, like all his other estate, liable to meet this like any other debt or obligation, and (2) as regards preferences the trustee seems to be safe under his rights of retention and compensation, assuming that no assignation has been intimated nor any diligence used by a third party prior to the indemnity being granted.

THE CONDITIONS OF THE ACT'S APPLICATION

In addition to what has been already stated—

1. There ought to be an admission or proof that the beneficiary knew that what was being done was a breach of trust. But it cannot be said that this is essential, and it is necessary to distinguish the following cases: (1) positive breaches of trust, e.g. a loan on debenture of a limited

² Bolton v. Curre [1895], 1 Ch. 544.



¹ Griffith v. Hughes [1892], 3 Ch. 105.

company where the trustees have merely the statutory powers of investment; in that case the beneficiary will be bound, though he did not in fact realise that it was a breach of trust, unless the trustee misled the beneficiary; (2) negligence in the exercise of a trust power, e.g. an imprudent investment of a class authorised by the trust deed; here apparently the particular facts shewing the imprudent nature of the investment would require to be put before the beneficiary, for he has a right to expect that the trustees will act with proper care in making the investment, and if they do not they cannot throw the consequences on him unless they can shew that he instigated, requested, or consented in writing to their non-performance of their duty in this respect.¹ But of course the document may be expressed so as to put the burden of enquiry on the beneficiary.

2. "Instigation" or "request" must of course be before the investment is made or other act done. It is not clear that a "consent" could be given afterwards²; but it must be understood that this has reference to mere consents to be made effectual as securities under the statute, for of course a proper obligation of indemnity with or without an express right of retention may be granted as effectively after as before the act is done, though a prudent trustee will refuse to move until the instrument is executed and delivered. And even as to a "request" or "instigation" it may be recorded in an ex post facto writing, though it may then be no doubt subject to a certain degree of suspicion. On these, as on all other points, it will be kept prominently in view that as against an alimentary beneficiary the trustee's only hope is in complying with the Act. English case of Raby suggests the question how far the indemnity under the Act will be carried by the Court. That was a case before the English Trustee Act, 1888. But Raby's case has since been partly explained away,4 and the words of the Act are quite plain: "All or any part of the interest of the beneficiary in the trust estate." There does not therefore seem any possible doubt as to the extent of the discretionary power conferred upon the Court, but it may very well be that they might find facts and circumstances moving them to a more limited exercise. It will be observed that there are here two questions, viz.: (1) how much of the beneficiary's interest is to be impounded? and (2) against what claims is it to be held by the trustee as a security? It seems safe to say that a mere consent will not under the Act, any more than before it, 5 go further than to bar the consenter from holding the trustee liable, and will not give any right of retention of the consenter's other interests in the estate whether for claims of other beneficiaries or

¹ Somerset v. Earl Poulett [1894], 1 Ch.

²But in *Henderson*, *supra*, Balfour, L. P., seemed to assume that it might.

³ Raby v. Ridehalgh, 1855, 7 De G. M. & G. 104.

⁴ Per Lindley, L. J., in *Chillingworth* v. Chambers [1896], 1 Ch. 685.

⁵ City of Glasgow Bank v. Parkhurs, 1880, 7 R. 749.

of outsiders. Against this view it may be argued (1) that it denies all effect to the Act in the case of a "consent," and (2) that it is not enforcing the Act at all, for no interest of the consenter is "applied . . . by way of indemnity." But the answers are: (1) that but for the Act an alimentary consenter would have been absolutely free, and (2) that the Act assumes that the trustee has been compelled out of his own pocket to replace the loss, and then under the Act he applies for an order to retain and apply the consenter's interest in the money so replaced: e.g. the income in the case of a liferenter.

THE TRUSTEE'S SECURITY

In taking an indemnity the trustee is very much in the position of a lender taking a security over the beneficiary's interest in the estate, and the points therefore are—

- 1. The granter's financial ability.
- 2. The extent of his interest in the trust estate.

But these are not material if the following points concur: (1) all the beneficiaries consenting; (2) all with absolutely vested rights; (3) no alimentary protection; and (4) no possibility of outside claims, e.g. calls.

- 3. The title to it, e.g.—
- (1) Whether alimentary or otherwise subject to restraint as stated above.
- (2) The validity of any transmissions if the granter of the indemnity be an assignee.
- (3) Whether the share is free from prior rights and claims, e.g. (a) settlement by marriage contract, (b) securities, (c) arrestments.

THE APPORTIONMENT OF THE LOSS

1. The Trustee-Beneficiary.—The ordinary rule between two trustees who commit a breach of trust is that they must bear the loss equally. But that rule is ousted if one of the trustees has obtained an exclusive benefit from the breach of trust, in which case he may have to bear the whole loss. Now suppose that one of them is, and that the other is not, a beneficiary. The former may or he may not have taken benefit from the breach of trust, but whether or no, the rule in England is that he must bear the loss without contribution from his co-trustee. That means not only that he is not entitled to require that part of his own share should be replaced by the co-trustee, but further that he must primarily make up the shares of all the non-committed beneficiaries to the extent of his own share, which will thus be wholly lost before the co-trustee will be liable for anything. The rule has been applied where the beneficial interest emerged to the trustee after he and his co-trustee had committed the breach of trust. It is quite clear

¹ Chillingworth v. Chambers [1896], 1 Ch. 685.

that this result may not be in accordance with justice or the true position of parties. Thus one of two trustees may be the husband of the liferenter, and the other trustee may be the fiar. The former is not a beneficiary, but he has a manifest interest to obtain a large income return, while the latter's only interest during the liferent is to keep the capital intact however small the income may be. Again, suppose there are two brothers equally interested in the capital subject to their mother's liferent, and that one is, while the other is not, a trustee. plain enough that the true position is that in the first of these cases the trustee-beneficiary ought to be wholly relieved by the non-trustee beneficiary, and that in the second case the two beneficiaries ought to share the loss equally, except as regards claims by their own respective issue, which they should respectively arrange for exclusively. These matters ought to be made express in the documents. The first would be properly met by taking a joint and several indemnity by the liferentrix and her husband with a charge on her interest in favour of the trustee-beneficiary only. The second is provided for in the full form printed on p. 895.

- 2. Capital and Income.—Assuming that a liferented fund is placed on an *ultra vires* investment on the indemnity of the liferenter and all or some of the fiars, the question may very well arise whether any loss is *inter se* to fall upon the one or the other, and it may be desired to regulate this in the deed.
- 3. Beneficiaries unequally interested.—Here the question will be whether the loss is to be borne equally or in proportion to the shares in the estate. This question will present itself differently according to the terms of the deed, e.g. as it does or does not contain a personal obligation of indemnity, and to the extent of the loss, e.g. suppose all the estate is lost and there is a liability beyond for calls. It may at first be thought that of course the liability ought to follow the ratio of the shares, but a little reflection will bring up difficulties. E.g. (1) a supposed beneficiary may turn out to have no title; (2) of two contingent beneficiaries one may live to obtain a vested interest and one may not, and yet the latter's children may take what would otherwise have been his share and may otherwise be liable for his debts; (3) what is to be the effect of one of the granters purchasing or succeeding to an additional share? Beyond suggesting these points it is impossible to deal here with all the cases which may arise in practice; but assuming simple facts there might be added-

And further declaring that as between us the said B. and C. the liability in connection with the said investment and these presents shall be borne in the proportions following, viz., two-thirds by me the said B. and one-third by me the said C.; but always without prejudice to our joint and several liability to the said trustees.

A BARE CONSENT [Case No. 1, p. 883]

I, A., consent to B., C., and D., the testamentary trustees of E., investing £1000 of the capital of the trust in a debenture of the X. Company Ltd. for per cent. per annum. This consent is to be effectual irrespecyears at tive of whether the other beneficiaries, or any of them, do or do not consent, or whether their consents, if given, are or are not effectual. But on the other hand it imports merely that I will not object to the said investment, and does not import that I am or that my share or interest in the said estate or any part thereof is to answer or be answerable for the claims of other beneficiaries, and it is not to infer any personal liability on my part, and is not to be made a ground of claiming under the Trusts (Scotland) Amendment Act, 1891, or otherwise any security over or right of application or retention of any part of my share or interest in the said estate, except that I will not hold the trustees liable for my share of any loss on the said investment [as to renewals, etc., as below if desired]. In giving this consent I understand that the said investment is or may be ultra vires or otherwise such as I would or might be entitled to object to but for this consent, and I do not rely on any information or representation given or made by the trustees.-In witness whereof.

A CONSENT GIVING A LIMITED CHARGE [Case No. 2, p. 883]

We, the parties following, viz., A., wife of B., and C., wife of D., with the consent and concurrence of our said respective husbands, and we, the said B. and D., taking burden on us respectively for our said wives and for our own right and interest if any, do hereby consent to E. and F., the testamentary trustees of G., lending the sum of \mathcal{L} over the estate of X. belonging to Y. for

years at per cent. postponed to prior debt amounting to £ and certain rent charges, annual rents, annuities, and other charges, and we respectively agree that the said trustees and the [survivors and] survivor of them and their successors in office and representatives may retain and apply the shares and interests, present and future, vested and contingent, capital and income, now belonging or that may hereafter belong to us the said A. and C. or to any of us respectively, but only of the funds which may be recovered from the said investment, by way of indemnity and security to them against all claims at the instance of other beneficiaries, and generally against all loss, damage, responsibility, and liability which may be incurred for or through the said investment. But on the other hand these presents are not to be made a ground of claiming under the Trusts (Scotland) Amendment Act, 1891, or otherwise any security over or right of application or retention of any part of our shares or interests in any part of the said estate other than the proceeds. of the said investment, and they do not infer any personal liability on our part except only to refund to the trustees any sums which we may draw or receive from the said investment, but without interest thereon, and that only as against the respective receivers thereof. The trustees may renew the said investment for such further period or periods as they may think fit or indefinitely, and either expressly or otherwise, and these presents shall extend and

apply to all continuations of the investment. There is no duty on the trustees to keep themselves informed as to the position of the investment or to take action or to do diligence, and they may make or agree to such compositions, compromises, postponements, restrictions [reconstruction schemes], or other arrangements, or any surrender or discharge, all as they in their uncontrolled discretion may think fit, and without notice to us, and all without prejudice to these presents. In signing these presents we understand that the said investment is or may be ultra vires, or otherwise such as we would or might be entitled to object to but for these presents, and we do not rely on any information or representation given or made by the trustees. These presents are to be effectual as regards each of us respectively irrespective of whether they are effectual against the others of us and irrespective of whether the other beneficiaries or any of them do or do not consent, or whether their consents, if given, are or are not effectual.—In witness whereof.

A CONSENT GIVING A GENERAL CHARGE [Case No. 3, p. 883]

[Last form to and including "belong to us . . . respectively"], not only in the funds which may be recovered from the said investment, but also in the whole trust estate, present and future, by way of indemnity [as above]. The trustees may renew [as above, to end].—In witness whereof.

A PERSONAL OBLIGATION OF INDEMNITY WITH A GENERAL CHARGE [Cases Nos. 4 and 5, p. 883]

We [state the parties] having requested, as we do hereby request, X. and Y., the testamentary trustees of Z., to [state exactly what it is], and they having agreed to do so conditionally on these presents being executed, we being interested in having the said investment made, do hereby jointly and severally agree to relieve and indemnify the said X. and Y., and the survivor of them and their successors in office and representatives, from and against all loss, damage, responsibility, liability, [calls], claims, and expenses which may be sustained or incurred by or made upon or against them on account of or by or through the said investment [or any renewal thereof], and that whether to, by, or at the instance of other beneficiaries in the trust estate or otherwise. And we respectively agree that the said trustees and their foresaids may retain and apply the shares and interests, present and future, vested and contingent, capital and income, now belonging or that may hereafter belong to us respectively, not only in the funds which may be recovered from the said investment but also in the whole trust estate present and future by way of further indemnity and security to them against all loss, damage, responsibility, liability, claims, and expenses as aforesaid. The trustees may renew [as on p. 891 to end].—In witness whereof.

DEED OF APPROBATION, AUTHORITY, AND INDEMNITY EXTENDING TRUSTEES' POWERS AND IMMUNITIES

A., liferenter; B. and C. and G. (a pupil), fiars; B. and E., trustees.

We, A., B., and C., considering that by his holograph will dated , and registered in the Books of Council and Session on the late D. (hereinafter

called "the testator") appointed me the said B., and E., to be his trustees, and he directed his trustees to allow me, the said A., the liferent of his estate, and on my death to pay the capital to us the said B. and C., and our deceased brother F. or our and his respective issue, and the said F. is survived by a pupil child Further considering that the testator died on , and I the said B. and the said E. accepted office as and still are his trustees: Further considering that no express powers of investment were by the said will conferred on the trustees, and that the said E. has no interest but to confine the trust investments strictly within the powers of the trustees, but in order to increase the income of the estate payable to me, the said A., he has concurred with me the said B. in making investments of the trust funds in excess of the trustees' implied powers, as appears from the list of the present trust investments annexed and signed as relative hereto. Further considering that if the trustees were to realise the said investments, and to replace them by investments falling within the implied powers of the trustees, the result would probably be a considerable diminution of the income of the estate which we are all interested in and desirous of avoiding: Therefore in consideration of the amount of the trust income in the past, and of our interest and desire to enable the trustees with greater safety, should they think fit to do so, to avoid any considerable diminution of the income in the future in consequence of such a restriction of the investments as aforesaid, and for sundry other good causes and considerations,

1. APPROVAL TO DATE

In the first place, we, all the granters hereof, approve of the securities and investments, past and present, of the trust estate.

2. Extension of Powers

In the second place, we, all the granters hereof, empower the present trustees of the testator and the survivor of them and their successors in office acting by a majority of their number as a quorum (all hereinafter embraced in the expression "the trustees"), to continue the securities and investments as the same are set out in the said list for such time or times and from time to time or indefinitely, or as permanent investments, all if and as they in their uncontrolled discretion may think fit. As also to lend out or invest the whole or any part of the trust estate on such terms and for such period or periods either as temporary or as permanent investments or indefinitely, not only in any manner open to trustees under the laws of Scotland or England, the one without prejudice to the other, but also on heritable or moveable security or on personal credit or obligation [go on with investment powers as on p. 833, or as may be desired, or in such other way, or on or in such other obligations, securities, or investments as the trustees in their uncontrolled discretion shall think fit, and from time to time to renew, alter, sell, or call up all obligations, securities, and investments as to them may seem expedient.

3. Immunities

In the third place, we, all the granters hereof, agree and declare that the trustees shall not be liable for any loss or depreciation which has happened

or may happen to the trust estate or the beneficiaries by or through the continuation or renewal of any security or investment taken or made by the testator or by or through any security or investment, past, present, or future, taken or made by the trustees, or by or through the bankruptcy, insolvency, or wrongful act of any person or company with whom any monies, securities, or effects have been, are, or may be deposited or entrusted, or with whom any contract or engagement has been or may be made, or by or through the insolvency or default of debtors, purchasers, or others, or for any loss, depreciation, or deficiency whatever which has happened or may happen through their actings, omissions, errors, negligence, or default, or in any way whatever, actual wilful fraud alone excepted, and that without limitation by reason of anything herein or in the said will contained or otherwise, and the trustees shall not be liable to do diligence unless or further or otherwise than as they in their uncontrolled discretion may think fit.

4. REMUNERATION OF LAW AGENT

In the fourth place, we, all the granters hereof, authorize the trustees to employ any of their number or any firm of which any of them may be a partner as factor and law agent, and to pay such trustee or his firm the same remuneration to which he or the firm would be entitled if he were not a trustee, and we approve of the trustees having done so in the past.

5. GUARANTEE AND INDEMNITY

In the fifth place, we, all the granters hereof, jointly and severally guarantee and bind ourselves and our respective heirs, executors, and representatives whomsoever all jointly and severally as follows, viz.: (first) that all the powers, discretions, immunities, and agreements hereby conferred and herein contained are and shall be and remain fully operative and effectual to the trustees; and (second) to free, relieve, and indemnify the said E. and all future trustees of, from, and against all and every liability, responsibility, action, claim, and demand which the said E. has sustained or incurred, or which he or any future trustee may sustain or incur, or to which he has or he or they may become exposed to or at the instance of any person or persons whomsoever by or through or in consequence of or in respect of or in relation to any investment which has been continued or made, or any act, deed, matter. or thing whatever which has been or may be done or omitted to be done within the terms of, or covered by, the powers, discretions, immunities, and agreements foresaid, and of from and against all attendant and consequent loss, damage, and expense.

6. Assignation in Security

In the sixth place, in security of the agreements, indemnities, and obligations herein contained, we assign to the said E. and his representatives for behoof of himself and themselves and all future trustees, all our respective shares, rights, and interests present and future in, to, and out of the testator's estate, capital and income, with full power to retain and realise the same and apply the same and the proceeds thereof to their relief.



7. APPORTIONMENT OF LOSS BETWEEN THE FIARS

And, in the last place, we, the said B. and C., considering that we are in all respects equally interested in and similarly situated with reference to the said estate, except only that I, the said B., am, and that I the said C., am not a trustee, therefore it is agreed between us the said B. and C. that we and our respective representatives shall bear equally all loss of whatever kind in respect of the various matters and things hereinbefore referred to, except only in so far as regards any liability which may be enforced or attempted to be enforced by the issue or representatives of either of ourselves, of which and of all relative expenses we shall respectively relieve the other absolutely, and we bind ourselves accordingly, and in security thereof we respectively assign to the other all our respective shares, rights, and interests, present and future, in, to, and out of the testator's estate, capital and income, with powers as But declaring that these arrangements between us the said B. and C. are without prejudice to and postponed to the joint and several liability hereinbefore undertaken in favour of the said E. and future trustees, and to the preferable and catholic security hereinbefore constituted in his and their favour.-In witness whereof.

Annex a list of investments.

INDEMNITY BY CREDITORS TO TRUSTEE IN A SEQUESTRA-TION WITH REFERENCE TO LITIGATIONS, ETC.

We, the parties named and designed in the testing clause hereof, being claimants on or otherwise interested in the sequestrated estates of A., considering that in the course of the sequestration questions have arisen regarding inter alia the matters following, viz.: [state them articulately, e.g.] (first) the validity of two bonds and dispositions in security granted by the bankrupt in favour of B. for £200 each, which bonds are dated respectively , and are recorded in the division of the general register of sasines for the county of respectively, or of whatever on other dates of execution and recording the same may respectively be; and (second) a claim by C., or the party or parties in his right, to the ownership of Waverley House, Buchanan Park, Inverness, and ground attached thereto and pertinents. Further considering that we are desirous that the trustee on the said sequestrated estates, viz., D., should, if and so far as he may think fit. dispute the validity of the said two bonds, or one or other of them, or the securities thereby attempted to be created, and should dispute the right of property claimed by the said C., and should claim the said subjects on behalf of the bankrupt estate. And now seeing that the said D. has requested us to grant these presents, which we have agreed to do, therefore we all bind ourselves jointly and severally, and our respective heirs, executors, and representatives whomsoever all jointly and severally without the necessity of discussing them in their order, to free, relieve, and indemnify the said D. and his successors in office and their respective heirs, executors, and representatives (all hereinafter referred to as "the trustee"), of, from, and against all legal and all other expenses which the trustee may incur, both to his own agents, counsel, and all others employed and to be employed by him, and also to all parties with whom he may litigate, and all other parties, and their respective agents, counsel, and others, and of, from, and against all obligations, liabilities, damage, and damages which he may undertake or incur, or in which he may be found liable, in any manner of way in connection with all and whatever investigations, litigations, actions, arbitrations, references, proceedings, steps, and procedure he may think proper to make, raise, enter into, take, resist, or defend, with reference to the matters foresaid, and each or either of them, and any part or parts thereof respectively, declaring particularly but without prejudice to the above written generality (first) that these presents shall apply to and cover all litigations in the supreme and inferior Courts, including the presenting and opposing of reclaiming notes to the Inner House of the Court of Session, and all investigations which the trustee may instruct to be made though no action should follow thereon; and (second) that the trustee shall be entitled to compromise or to abandon all questions and actions in his uncontrolled discretion, and as regards compromises on such terms and conditions as he in his uncontrolled discretion may think fit, all without prejudice to the foregoing obligation. And further, each of the parties signing these presents agrees that the same shall be in all respects binding and effectual as regards himself [or herself] and his [or her] foresaids irrespective of who may or may not also sign the same and though any of the other signatures should not be genuine or should be null or reducible or should otherwise be or become ineffectual.—In witness whereof.

SECTION XLIX

DISCHARGE OF TRUSTEES

A DISCHARGE may be obtained: (1) from the beneficiaries, (2) from the continuing or new trustees, (3) from the Court, under sec. 9 of the Trusts (Scotland) Act, 1867, if both the preceding are impossible or refused, and (4) from the Court in an action of multiplepoinding.

Discharge by Trustees.—This refers to the case of a resigning trustee or the representatives of a deceased trustee. It is of course quite proper that both of these should receive discharges. The 1867 Act (s. 2) empowers the continuing trustee "to discharge trustees who have resigned, and the representatives of trustees who have died." Lord M'Laren 2 states a clear opinion that the discharge would not bar claims at the instance of the beneficiaries. The contrary opinion has also been indicated. But at least it is obvious that there is a serious question; and it is certainly recommended that the beneficiaries, so far as sui juris, should be combined with the trustees as granters of the deed.

Further, the resigning trustee, and the representatives of a deceased trustee, should see that he is relieved of all obligations of every kind undertaken by him on behalf of the trust, and that not merely in the form of a general obligation of relief by the beneficiaries (which is right enough), but by actual discharges by the creditors.

So far from the point of view of the resigning trustees. But the position of the continuing or new trustees who are asked to grant a discharge must also be considered. It seems clear that they will be liable for discharging resigning trustees, or the representatives of deceased trustees, in circumstances in which discharges should not have been granted, and the more effectual the discharges are to the receivers, the greater the prejudice to the beneficiaries, and therefore the greater the liability incurred by granting the discharge. In any case, it appears that the deed, if granted by trustees only, should never discharge omissions. The only assumption on which it can be asked or granted is that the intromissions and actings of the resigning or deceased trustee have been in all respects regular.

¹ Matthew's Trs., 1894, 2 S. L. T. No. ² Wills, 1258, 181. ³ Menzies on Trustees, ii. 210. 897



Discharge by Beneficiaries inter se.—It is important to keep in mind that though one common deed of discharge may be granted by the beneficiaries in favour of the trustees, it does not necessarily imply a settlement of disputes regarding the estate, and a discharge by the beneficiaries inter se. When that is intended (which will be the common case), express words should be introduced, making the discharge operate not only between the beneficiaries and the trustees, but also between or among the former inter se.

Indemnity.—This is the common obligation of relief in favour of the trustees. In connection with it the first question is, whether the intention is to relieve the trustee of all claims. E.g. take the case of an ultra vires investment involving liability. The beneficiary may be quite willing to discharge his claim against the trustee, but he may not be willing to reverse the position and become a debtor to, instead of a creditor of, the trustee in respect of the investment. If this limitation be intended, it will of course be made express; and it may be well to put in an express clause negativing liability even though there is no indemnity clause at all.

As to whether there should be any indemnity clause, it is to be noted that no indemnity is obtained in the case of judicial discharges, whether under the 1867 Act or in a multiplepoinding. Nor, in most cases at any rate, is it obvious that it is necessary. If there be any debt or obligation of the testator of which the trustees have no knowledge, and if they do not denude until six months after his death, they could not be personally liable for the debt, or for having denuded. If, on the other hand, it is a debt contracted by themselves, they ought to have knowledge of it; and in that case, as well as in the case of all the testator's known debts, they will of course insist upon actual immediate relief, not merely an obligation to relieve.

If an indemnity is to be included, there remain two questions, namely, (1) whether it should be expressly limited to the amount received by the beneficiary, which clearly it ought to be; and (2) whether, when there are two or more granters (or beneficiaries, whether concurring in one common discharge or not), the obligation of each should be several or pro rata only. It is thought that the beneficiary is entitled to have it limited to a pro rata liability.²

Note that this clause does not give creditors of the trust a title to sue the granter of the discharge.³

Warrandice.—The same rule applies; each is bound to warrant the discharge of his own share only.² In the case cited it was held that this was the sound construction of a discharge by several beneficiaries who were each entitled to and received a separate share of the estate,

¹ City of Glasgow Bank v. Parkhurst, ² M'Farlane v. Donaldson, 1835, 13 S. 1880, 7 R. 749.

³ Henderson v. Stubbs, 1894, 22 R. 51.

though the clauses of discharge and warrandice were granted "for our respective rights and interests and taking burden on us for each other and with mutual consent."

Precautions before Denuding.—The trustees will—

- 1. See that all liabilities of whatever nature incurred by the testator or themselves are paid, or otherwise that the creditors consent to the denuding. If the disponee is to be liable for the debts the general estate should be discharged by the creditors.
- 2. Obtain a certificate from the Inland Revenue that all claims for duty have been satisfied.
- 3. Examine as to all intimations affecting the share of any beneficiary. In particular in the case of married women enquiry should be made as to the existence of any marriage contract which might contain a general conveyance carrying her share of the estate. For in the first place, even though the trustees might receive a good discharge from the beneficiary herself if they did not know of the marriage contract, that result would not be satisfactory; and in the second place it is not at all impossible that though there has been no intimation, one or some of the trustees in the one trust may also be trustees in the other, and under these circumstances it is clear that payment to the lady herself would be in breach of their duty.¹

Disposition on Denuding.²—Conveyances granted under these circumstances differ in a number of important respects from a disposition granted on sale, and mistakes may easily be made.

- 1. Narrative.—The disponee's right under the trust should be set out, but as briefly as possible.
- 2. Destination. See p. 814.—If the whole destination go in, it is only right to qualify the deed by the statement that it is granted and accepted only according to the true construction of the will.
- 3. Description. See p. 361.—In cases where the discrepancy in description between the title and the will may cause trouble, the beneficiary should make up title by or through service if possible.
- 4. Term of Entry.—This should not be treated as a matter of form, but should be carefully adjusted in order to express the true commencement of the beneficiary's right to the rents. And further, if he is to draw the whole of the current term's rents, care should be taken to avoid the expression "with entry at the date hereof"; it should be at least as at the preceding term.
- 5. Assignation of Writs.—The point is not to omit to add an express assignation of any collateral obligations, e.g. relief of casualties or stipend, of which the trustees may be in right but which do not run with the lands. The result of omitting this may be serious.
 - 6. Obligation to relieve of Feu-duties, etc.—This ought to be omitted.

Graeme's Tr. v. Giersberg, 1888, 15 R.
 For forms, see pp. 338-5.
 Speirs v. Morgan, 1902, 4 F. 1069.

Feu-duties and public burdens ought to be adjusted; and as to casualties, to bind the estate to relieve the disponee would infringe the rule of the legatee taking *cum onere*, but here, in contradistinction to the case of sale, silence is clear enough, for there can be no implied obligation.

7. Warrandice.—This is a fertile source of error in deeds of the nature under consideration. The trustees are probably bound to grant warrandice from their own facts and deeds, though even of that there may require to be many qualifications, e.g. bonds, leases, servitudes, alterations of marches, granted and carried through by the trustees; and indeed if they have been any length of time in the management of say a landed estate, it is the safer course to express nothing as to even fact and deed warrandice. But in no case ought any warrandice upon the trust estate to be allowed to go in as matter of form. There may be very special cases in which some such clause is required to comply with the express terms of the will, in which case the trustees will need to be careful to keep themselves safe and to keep matters right with the other beneficiaries. But in all ordinary cases the rule holds that the legatee must take cum onere, and accordingly there must be no warrandice upon the trust estate. It need scarcely be pointed out that a clause binding the estate or the testator's representatives in warrandice from his facts and deeds would practically be as objectionable as absolute warrandice. If there be known debts upon the property, then (1) if the creditors have discharged the general estate and if the legatees have given a bond of corroboration, but by separate deed or deeds, nothing need be said of the debts in the disposition; otherwise (2) the least expensive and a very satisfactory course is that the disposition, corroborative obligation, and discharge should all be incorporated in one instrument.

Transfers of Shares, etc.—1. Companies' restrictions.—It may be that the articles of association give the company a right of purchase even though the transmission proposed is not a sale (which is thus a more severe regulation than a right of pre-emption), and more commonly a right of veto of the transferee. In an extreme case this might be checkmated by keeping up the trust, which, however, is very awkward. The regulations may also prescribe a special form of transfer.

- 2. Title to grant.—Assuming that the testator held the shares it is not necessary that the executors should go upon the register to enable them to transfer.³ Nor, of course, is this altered by any clause in the company's articles to the effect that the executors shall be the only persons whom the company shall be bound to recognise, though it is often so appealed to by officials. Indeed, if there be any liability upon the shares the executors will not go upon the register.
- 3. Stamp.—When there are numerous small holdings of little value, and especially if each has to be divided among even a few beneficiaries,

³ Companies Act, 1862, s. 24.



¹ See p. 808.

² See p. 305.

stamps become a serious item. Each transfer requires 10s. You may not transfer so many shares to each of A., B., and C. in one transfer. Many companies require a separate transfer for each class of shares though to the same transferee. In the case of English companies there is no avoiding the stamps, though, of course, the holdings may by arrangement be divided so as to minimise the number of transfers as much as possible. But in the case of companies in Scotland it may sometimes be arranged to make one omnibus transfer covering the shares of many different companies, for which there is only one stamp of 10s., and on this being registered for preservation, the companies will sometimes act upon production of an extract with an undertaking for reproduction.

General Denuding.—It sometimes happens that after trustees have denuded and been discharged an unknown asset of the trust turns up and the beneficiary requires a title to it. If any of the trustees be living a supplementary deed can be obtained, for there is no force in the objection sometimes stated that after discharge the trustees have no title. If the trustees be all dead, sec. 14 of the Trusts Act, 1867, applies.¹ But the expense of these courses may be avoided if the beneficiary is able to produce a universal deed or clause of denuding and conveyance by the trustees to him. No doubt as to personal property there may be a question as to the want of confirmation. A clause of this kind² may be tacked on to any special conveyance, or incorporated in the discharge, which in that case the trustees also will sign. If in the discharge the stamp will be increased by 10s.

DISCHARGE BY SOLE RESIDUARY LEGATEE

I, A., considering that the late B. (hereinafter called "the testator"), by his trust disposition and settlement (hereinafter called "the will") dated , and registered in the Books of Council and Session on conveyed his whole means and estate, heritable and moveable, real and personal, to C. (who predeceased him), D. (whose appointment was revoked by codicil dated), E. (who declined office), F., and G., as trustees, and he appointed his trustees to be his executors: But the said conveyance and appointment were made in trust for the purposes therein mentioned, which were briefly as follows: (first) for payment of debts and funeral and testamentary expenses, (second) for payment and delivery of certain pecuniary and specific legacies, (third) a liferent of the residue was provided to his wife, my mother, in the event (which happened) of her surviving him, and (lastly) the fee of the residue was given to me, all as the will and codicil, which contain various other clauses, and which are here specially referred to brevitatis causa, in themselves more fully bear: Further considering that the testator died on , and the said F. and G. accepted office as trustees and executors foresaid, and subsequently assumed K. as a trustee, conform to deed of

¹ See pp. 875, 881.

³ Form, p. 902.

assumption dated and registered , and thereafter the said F. resigned office, conform to minute of resignation dated and registered , and the said G. and K. have since continued to be and now are, the testator's trustees:

FULFILMENT OF PRIOR PURPOSES

Further considering that the trustees paid the testator's debts so far as known, and his funeral expenses, and paid and delivered the said legacies [except so far as the same had lapsed], that they have paid or provided for all testamentary expenses and Government duties, and that they duly satisfied my mother's liferent to the date of her death, which occurred on :

ACCOUNTS

Further considering that the trustees have submitted to me full accounts and vouchers and a statement of the estate falling to be made over to me, with all which I am satisfied, as I hereby acknowledge, and of which statement a copy is annexed hereto, and is subscribed by me as relative hereto; and, further, I approve of all the investments specified in the said statement, and accept the same as equivalent to cash: And now seeing that the trustees have paid and made over to me the full sum of \pounds brought out in the said statement, partly by cash payment and partly by transfer of investments accepted as cash, of all which I approve, and of which sum of \pounds I hereby acknowledge the receipt, and it is accordingly proper that I should grant these presents:

DISCHARGE, ETC.

Therefore I hereby absolutely, finally, and for ever discharge the said G. and K., and also the said F., and their respective heirs, executors, and representatives whomsoever, and the factors and law agents employed by them, of their whole actings, transactions, intromissions, and management under the will and codicil, or in relation to the testator's estate in any manner of way, and of the will and codicil themselves and all therein contained, and of all that may be competent to follow thereon, and of the testator's estate and residue thereof, and of all omissions, if any, which I might lay to their charge: And I bind myself to relieve and indemnify the said G., K., and F., and their foresaids, and the factors and law agents employed by them, of and against all claims and demands of whatever nature which may be brought against them in connection with the said trust up to the amount of estate received by me as aforesaid: And I warrant absolutely my right and title to receive the estate made over to me as aforesaid:

GENERAL CONVEYANCE

And we, the said G. and K. as trustees and executors foresaid, do hereby in corroboration of the special transfers before referred to, and also and further and in addition thereto, do hereby assign, transfer, and dispone to the said A. all means, estate, assets, and claims forming part of or competent to the estate of the testator or which we are or may come to be competent to assign, transfer, or dispone as aforesaid: And we consent to registration for preservation.—In witness whereof.

Annex brief list of securities and cash.

DISCHARGE TO TESTAMENTARY TRUSTEES, WITH VARIOUS SPECIAL CLAUSES

We, the parties following, namely, (first) A.; (second) Mrs. B. or C. or D., sometime wife of the late C., and now wife of D., executrix duly confirmed of the said C. conform to the following writs, namely, (1) the will of the said C., dated and registered , (2) confirmation by the sheriff of , dated at on , and (3) eik thereto, dated , with the special advice and consent of the said D., and I the said D. for myself, my own right and interest, and as taking burden on me for my wife; (third) E.; and (fourth) (1) F., (2) G., and (3) H.; and we all with joint consent and assent:

NARRATIVE CLAUSES-WILL

Considering that the late X. (hereinafter referred to as "the testator"), who died on , by his trust disposition and settlement dated and registered , conveyed to Y. and Z. the whole estate, heritable and moveable, real and personal, then belonging to him, or which should belong to him at his death, and he appointed his trustees to be his executors: But the said trust disposition and settlement was granted in trust for the purposes therein mentioned, and inter alia (first) for payment of his debts, sickbed and funeral expenses, and the expenses of the trust; (second) for the liferent of his wife, Mrs. I. or X., in the event (which happened) of her surviving him; (third) the testator directed his trustees, on the death of the survivor of himself and his wife, to dispone his lands of eldest son K., on condition of the said K. then relieving the estate of the debt of £1000 due to L., with interest from the death of the said Mrs. I. or X.; (fourth) as regards the house known as Marmion Cottage, Elie, the testator directed that, in the event of any member of his family wishing to buy it, it should be sold at a valuation by competent judges mutually chosen, and failing any member of his family intimating to his trustees within six months after the death of the survivor of himself and his wife an intention to take the same at a valuation (which failure happened), he directed his trustees to dispose of it, the proceeds to be then added to his general estate; (fifth) the testator directed his trustees, six months after the death of the survivor of himself and his wife, to pay the following legacies, namely, (1) to his daughter, me, the said A. the sum of £500, (2) to his son the said C. (who survived the testator) the sum of £500, (3) to his son, me, the said E. the sum of £500, and (4) to the children of his deceased son M. the sum of £300, which legacies amount in cumulo to the sum of £1800; (sixth) the testator provided as follows: - "should my son the said E. ever be in circumstances which enable him to pay up the sum of £550 which was borrowed by me from N. entirely on his account, I wish him himself to get £100 of it, and that the rest of it be equally divided amongst the rest of my family"; and (seventh) the testator directed that if it should be found that there was a deficiency to pay the several legacies above mentioned, each legatee should bear a proportionate share of such deficiency, and should it be found that the amount realised was

more than would pay the said legacies, each legatee should have a proportion added to his or her legacy:

FURTHER (TESTAMENTARY!) WRITING

Further considering that there was also found in the testator's repositories at his death a writing, dated (registered in the on

), in which he expressed a wish that his family should unite in giving in his name, for certain specified religious and charitable purposes, certain small sums, amounting to £50 in all:

TESTATOR'S DEATH AND TRUSTEES' ACCEPTANCE OF OFFICE

Further considering that the testator died on 1st February 1899, and that in virtue of the said trust disposition and settlement the said Y. and Z. accepted office and entered upon the possession and management of the trust estate:

STATE OF FAMILY

Further considering that the testator was survived by his wife the said Mrs. I. or X., and by his children me the said A., the said C., and me the said E., and by us the said F., G., and H., the only children of his deceased son M.:

DEATH OF LIFERENTER AND BALANCE DUE TO HER EXECUTOR
Further considering that the trustees satisfied the liferent of the said Mrs

I. or X. down to the date of her death, which occurred on 1st June 1903, except as regards a sum of £60 due to her on account thereof as at the date of her death, which, with interest thereon, falls to be paid to her executor:

ARRANGEMENTS AS TO E.'S DEBTS TO ESTATE

Further considering that, in addition to the sum of £550 above referred to, the testator advanced a sum of £150 to me the said E. on : That the trustees have been advised by counsel that the said sum of £550 should be called up only in the event of the trustees being satisfied that I the said E. am in circumstances which would enable me to repay the same, and that I am entitled to payment of the said legacy of £500 bequeathed to me as aforesaid (or such proportionate payment in respect thereof as the estate will yield) whether I have or have not repaid the said sum of £550, and the trustees are satisfied that I am not in circumstances which would enable me to repay the same, and we are all satisfied, and hereby agree, that the division shall proceed on the footing of charging against the sum falling to me the said E. only the said sum of £150, without interest, and that the free balance thus appearing as due to me the said E. shall be paid to me:

FULFILMENT OF PRIOR PURPOSES

Further considering that the trustees have now fulfilled all the purposes of the trust so far as known, except as regards the said pecuniary legacies amounting to £1800: Declaring with reference to the said sums, amounting to £50, which the testator desired his family to apply to certain religious and charitable purposes, that the same have been provided for outside the trust:

ACCOUNTS

Further considering that the trustees have made up and submitted to us an account of their intromissions from the testator's death to 31st December 1903, with relative states appended thereto, which have all been examined by or on behalf of each of us, and of which we hereby approve as in all respects full and correct, and of which, with the continuation thereof to date, an abstract is annexed and signed as relative hereto, from which it is seen that the estate available for payment of the said legacies of £1800 is £1460, to which fall to be added, for purposes of division, the following sums, namely, (first) the sum of £150, which, as aforesaid, is to be charged against me the said E., and (second) the sum of £10, being the agreed-on value of certain articles belonging to the estate taken over by me the said A., making a total fund of £1620; and accordingly the said legacies of £1800 fall, in terms of the said trust disposition and settlement, to be proportionally reduced, and the same stand as follows: (first) to me the said A. the sum of £450, from which is to be deducted the said sum of £10, leaving a net sum of £440; (second) to me the said Mrs. B. or C. or D. the sum of £450; (third) to me the said E. the sum of £450, from which is to be deducted the said sum of £150, leaving a net sum of £300; and (fourth) to us the said F., G., and H. the sum of £270 equally among us, being a sum of £90 to each of us, all as shewn in the scheme of division annexed and signed as relative hereto:

PAYMENT AND RECEIPTS

And now seeing that, on condition of these presents being executed, the trustees have instantly paid to us the respective sums foresaid, that is to say, (first) to me the said A. the said sum of £440, (second) to me the said Mrs. B. or C. or D. the said sum of £450, (third) to me the said E. the said sum of £300, and (fourth) to each of us the said F., G., and H. the said sum of £90, of which respective sums we hereby respectively acknowledge the receipt:

DISCHARGE

Therefore we, the whole granters hereof, all as aforesaid, have exonered and discharged, as we do hereby finally, absolutely, and for ever exoner, acquit, and simpliciter discharge the said Y. and Z., and their respective heirs, executors, representatives, and successors, and the factors and agents in the trust and executry, not only of the said legacies bequeathed to me the said A., to the said C., and to us the said E., F., G., and H., as aforesaid, but also of their whole actings, transactions, intromissions, and management in consequence of the said trust and executry, or in relation thereto, or in connection therewith in any manner of way, and of the said trust disposition and settlement and said writing themselves and whole clauses and provisions therein contained, with all that has followed or is competent to follow thereon, and of all omissions which we or any of us, or the said deceased C., can or could lay to the charge of the trustees or executors or the factors and agents in the trust and executry:

DECLARATIONS

1. No Duty on Trustees as to E.'s £550 Debt

Declaring (first) that no duty shall rest upon the trustees in connection with the said sum of £550, or in connection with any other matter or thing whatever, the foresaid payments being made and accepted, and these presents being granted, on the basis of a final settlement and discharge, and that not only as between us and the trustees, but also among ourselves; and particularly, without prejudice to the said generality, we all the granters hereof other than I the said E., hereby for ever discharge the said E. of all liability in respect of the said debts of £150 and £550, and interest thereof respectively 1 :

2. Sum retained for Final Expenses

And (second) that as regards the sum of £20 which has been set apart in the hands of Messrs N. & O., W.S., Edinburgh, to meet final expenses, the claim for an accounting therefor shall be against the said Messrs N. & O. only:

OBLIGATIONS

And I the said Mrs. B. or C. or D., as executrix foresaid, and with special advice and consent foresaid, bind the executry estate under my management, and the parties interested therein, and we the said A., E., F., G., and H. bind ourselves, and our respective heirs, executors, representatives, and successors whomsoever, as follows, namely:

1. Indemnity

(first) to relieve and indemnify the said trustees and executors and their foresaids of, from, and against all claims and demands, of whatever kind or extent, which may be made against the estate of the testator, or against themselves or their foresaids, but that only rateably according to the proportions and up to the amounts of our respective shares;

2. Warrandice

and (second) to warrant our respective rights and titles to the sums paid to us as aforesaid: And we consent to registration for preservation.—In witness whereof.

¹ If, on the other hand, it is intended to discharge the trustees, but to keep up E.'s liability for the £550 and interest, omit this clause after the words "final settlement and discharge," and substitute the following: "but that only so far as the trustees are concerned, these presents being, as the said E. hereby admits, without prejudice to all claims against him in respect of the said sum of £550 and interest, past, current, and future, and also without prejudice to his defences thereto, both being hereby reserved as among us the granters hereof.

ABSTRACT OF ACCOUNTS REFERRED TO IN THE FOREGOING DISCHARGE

CAPITAL ACCOUNT

From 1st February 1899 to 31st December 1903

RECEIPTS

Principal sums given up in invent	tory		•		•	£2900
Price of Marmion Cottage, Elie	•			•		500
Proportion of annuity due by Roy			100			
Proportion of rents to testator's d	•	120				
Proportion of interests and divide		80				
•						
						£3700
	PAYMENTS	Į.				
Estate duty	•	•	•	•	£150	
Less proportion repaid by test	ator's son	K. in	respect	of		
landed estate	•				105	
				-		
					£45	
Funeral expenses	•	•	•	•	30	
Debts	•		•		1956	
Casualty on Marmion Cottage	•	•	•		10	
Proportion of feu-duties to testate	r's death		•		7	
Proportion of rates and taxes	do.		•		7	
Proportion of interests	do.				27	
Proportion of expenses of executry	у.		•		100	
Value of articles taken by benefic	iary		•		10	
Depreciation on realisation .	•				50	
Capital in trustees' hands at 31st	December	1903	•		1458	
•				-		£3700

REVENUE ACCOUNTS

I. From 1st February 1899 to 1st June 1903 (death of liferentrix)

RECEIPTS

Proportion of rents .				•		. £1300
Proportion of interests and d	i vide nds			•		. 170
Return of income tax		•	•		•	. 10
						£1480
•	PA	YMENTS				
Proportion of feu-duties					. £	4 5
Proportion of rates and taxes	,			•	•	70
Proportion of interests					. 1	50
Fire insurance .						15

т.

II. From 1st June to 31st December 1903

RECE	IPTS								
Interests and dividends	•	•	. £30						
PAYMENTS									
Feu-duty		£2 0	0						
Rates and taxes		2 0	0						
Fire insurance		0 7	6						
Expenses		3 12	6						
Balance of revenue for period .		22 0	0						
			- £30						
FUND FOR	DIVISION								
Capital in trustees' hands at 31st Dece	mber 1903 as above		. £1458						
Balance of revenue from period from 1s	st June to 31st Dece	ember 190	3						
as above		•	. 22						
Interest since accrued			0						
Less interest on balance of revenu	e due to liferentrix	1 0	0						
			2						
			£1482						
DEDUC	TIONS								
1. Amount at which debts due by E. v	alued in accounts	£0 5	0						
2. Income tax		0 15	0						
3. Postages incurred by trustees .		1 0	0						
4. Sum set apart to meet final expense	6.	20 0	0						
			22						
Ne	t sum in trustees' h	ands .	£1460						
To which add for purposes of division-	-								
1. Sum to be charged against E.		. £15	i0						
2. Value of articles taken over by A		. 1	.0						
			160						
Fu	nd as for division		£1620						
SCHEME O	P DIVISION								
Beneficiary. Legacies in Will.	A hatement.	ns charge- e against egatees.	Sums Payable.						
A £500		£ 10	£440						
Mrs. B. or C. or D 500	450	_	450						
E 500	450	150	300						
F 100	90	-	90						
G 100	90	_	90						
н 100	90		90						
£1800	Net sum in truste hands as above) · · · · · · · · · · · · · · · · · · ·	£1460						

ANOTHER FORM UNDER DIFFERENT CIRCUMSTANCES

We, the parties following, namely, (first) A., B., and C., the trustees of the late X. acting under his trust disposition and settlement, dated , and deed of assumption granted by us the said A. and and registered , and registered B. in favour of me the said C., dated said A. and B. being also executors duly confirmed of the said X. conform to confirmation granted by the sheriff of , and dated at and (second) Y., D., and E., the trustees acting in the trust created by me the said Y. under the contract of marriage entered into between me the said Y. and O., dated and registered , with consent of me the said Y. as an individual, and I the said Y. for all right, title, and interest competent to me in the premises, Considering that the deceased F. (herinafter called "the testator"), father of the said X. and of me the said Y., by his trust disposition and settlement dated , and with three codicils dated respectively , conveyed to G., H., and K. the whole registered means and estate, heritable and moveable, real and personal, which should belong to him at his death, but that in trust for the purposes therein mentioned, and inter alia, in the first place, he directed his trustees to pay his debts and funeral expenses and the expenses of executing the trust: In the second place, in the event of his wife P. surviving him, he directed his trustees to pay to her the sum of £200, and to hand over to her as her own absolute property the whole furniture and plenishing of every description, including his whole silver plate and plated articles, books, pictures, linens, wines, carriages of every description, horses and harness, and in general the whole furniture, plenishing, and others within and upon the house and grounds and premises connected therewith occupied by him at the time of his death: In the third place, he directed his trustees to convey certain heritable subjects in Dunbar, therein particularly described, and pertinents thereof, to the said X., and that over and above the share of his means and estate thereinafter provided to the said X.: In the fourth place, he directed his trustees, at the first term of Whitsunday or Martinmas after his death, to make payment to L. of a legacy of £300 free of legacy duty: In the fifth place, he directed his trustees, also at the first term of Whitsunday or Martinmas after his death, or so soon thereafter as might be convenient, or as his trustees might deem it expedient, to make payment to his sons the said X. and me the said Y. of the sum of £10,000 equally, share and share alike, but subject to the provisions therein written in the event (which did not happen) of the remainder of the trust estate being insufficient to yield a free income of £400 a year: In the sixth place, he directed his trustees, in the event of his wife surviving him, to pay over to her the whole interests and other produce and income of the residue of his means and estate during her life, but declaring that said liferent and income should never be less than £400 free of all deductions in any one year: In the seventh place, he bequeathed a legacy of £3000 to his daughter M., which legacy he revoked as aftermentioned: In the eighth place, he directed his trustees, as soon as might be convenient after the death of his wife, if she should survive him, to make payment and delivery of the free residue of his means and estate to and

between his sons the said X. and me the said Y. equally, share and share alike, and he declared that the said provisions in favour of his said sons should become vested in them a morte testatoris, and that the same should be in full payment and satisfaction to them of all claims and demands against him or his means and estate competent to them for legitim, dead's part, or in any manner of way whatever: In the ninth place, he provided that the said X., if he survived him, should be bound to take over the lease of the farms of (name them) held by the testator, and the whole stock, cropping, and effects upon the said farms belonging to the testator, at the valuation to be put thereon as therein mentioned, the amount of which valuation should be imputed pro tanto as part of the said X.'s share of the said sum of £10,000, or other share of the testator's means and estate, and that the said X. should thereafter be bound to free and relieve the trustees and beneficiaries of and from the obligations of the lease:

Codicil

And by the said codicil dated , the testator, in lieu and place of the said legacy of £3000 to his daughter the said M., appointed his trustees, as soon as might be convenient after the death of his wife, if she should survive him, to separate and set aside out of his means and estate, and to invest in the manner therein mentioned, the sum of £3000 for the said M. in liferent and her children in fee, the shares of her children vesting at majority in the case of sons, and majority or marriage in the case of daughters; and failing such children and their issue, he directed his trustees to pay said sum to his sons the said X. and me the said Y. equally, share and share alike, all as the said trust disposition and settlement and codicils containing sundry other clauses, and which are here specially referred to and held as repeated brevitatis causa, in themselves more fully bear:

TRUSTEESHIP

In virtue of which trust disposition and settlement and codicils the trustees thereby appointed entered on the possession and management of the trust estate, and the said G. having resigned office, the said H. and K., then the surviving trustees, assumed N. as a trustee, conform to deed of assumption dated

and registered:

PRIOR PURPOSES

Further considering that the testator's trustees have paid all his debts so far as known, and his funeral expenses, and the expenses of the trust to date; that they paid the legacy of £200 to the testator's wife, and implemented the bequest of furniture, plenishing, and others above mentioned in her favour; that they implemented the direction contained in the third purpose of the said trust disposition and settlement to convey the said heritable subjects and pertinents to the said X.; that they paid the legacy of £300 to the said L., and that they paid and accounted to the said X. for the sum of £5000, he taking over the foresaid lease, stock, cropping, and effects, and the amount of the valuation thereof being imputed pro tanto as part of the said sum of £5000, as directed by the testator, and that they paid and accounted to me the said Y. and my said marriage trustees also for the sum of £5000,

making together the said sum of £10,000: Further considering that the testator's trustees paid to his wife the said P. the whole interest and other produce and income of the residue of the trust estate from the death of the testator to her own death, which occurred on : Further considering that the testator's trustees, by their minute of , resolved to hold as representing the sum of £3000 directed to be separated and set aside for behoof of the said M. in liferent and her children in fee, whom failing as aforesaid, three bonds and dispositions in security, namely, (1) bond and disposition in security by over property at for £1500, (2) bond and disposition in security by over property at for £1000, and (3) bond and disposition in security by over property at for £500, all mentioned in the State annexed and signed as relative hereto, and amounting to the cumulo sum of £3000:

ACCOUNTS: RESIDUE

Further considering that the testator's trustees have duly accounted to us for their whole intromissions with his trust estate, and have submitted to us the accounts of their trust from the commencement thereof, and also a State of the trust funds at , a copy of which State is annexed and signed as relative hereto, from which it is seen that the residue of the testator's trust estate amounted at that date to \pounds ; and from the continuation thereof, also hereto annexed, it is seen that the residue for division, after setting aside the said sum of £3000 as aforesaid, amounts to the sum of £19,200:

X.'s SHARE

Further considering that the testator's trustees at the term of Martinmas 1899 assigned to us the trustees of the said X. a bond and disposition in security by

over property at for £5000, and a bond and disposition in security by over property at for £4000, both mentioned in the said State, amounting said two securities to the cumulo sum of £9000, which assignations we have accepted, and hereby accept, as a payment of that amount in cash as at said term of Martinmas 1899 on account of our share of the estate, and that the testator's trustees have now made payment to us of the further sum of £600 as the final payment thereof, the said payments to us the trustees of the said X. thus amounting in cumulo to £9600, being the amount of our one-half of the said residue:

Y.'s SHARE

Further considering that the testator's trustees, as at the term of Martinmas 1899, transferred to us the marriage trustees of me the said Y. two promissory notes by my firm of Y. & Z. and others for the cumulo sum of £5000, and also £2200 Four-per-cent. Guaranteed stock of the Company at closing price on that date, namely, £2860, and on the same date paid us an equalising sum of £1140, and that the testator's trustees have now made payment to us the said marriage trustees of the further sum of £600, said notes, stock, and sums so paid and transferred to us the said marriage trustees amounting to the cumulo sum of £9600, being the equal half of the said residue falling to us the said marriage trustees as in right of me the said Y.:

DISCHARGE

And now seeing that it is reasonable that we should grant the discharge underwritten, Therefore we, all the granters hereof, for our respective rights and interests, do hereby discharge the said G., H., K., and N., and their respective heirs and successors, and the factors and law agents in the testator's trust, of their whole actings, transactions, intromissions, and management in consequence of the said trust, or in relation thereto in any manner of way, and of the said trust disposition and settlement and codicils themselves and whole clauses and provisions therein contained, with all that has followed or is competent to follow thereon, and of all omissions which we or any of us can lay to their charge: Reserving always and excepting any claim which may be or become competent to us in and to the said sum of £3000 in the event of failure of issue of the said M.: And we the respective trustees, granters of these presents, bind the trust estates under our charge respectively, rateably according to the extent and up to the amount of the shares of the testator's trust estate received by us respectively as aforesaid, to free and indemnify the said G., H., K., and N., and their foresaids, of and against all claims and demands, of whatever kind or amount, which may be made against the estate of the testator or his trustees: And I the said Y. undertake a similar obligation of relief and indemnity personally and individually, but only in the proportion and up to the amount of my said one-half share of residue: And we the respective trustees, granters of these presents, bind the trust estates under our charge respectively to warrant our right and title each to one-half of the residue: And I the said Y. warrant the right and title of my said marriage trustees to one-half of said residue: And we consent to registration for preservation.—In witness whereof.

STATE OF FUNDS REFERRED TO IN THE FOREGOING DISCHARGE

Sums in her	itable bonds	[givev e	ry brief d	letails]			•	£12,000
Personal bil	ls .					•		5,000
Stock of the	Com	pany						2,200
Deposit rece	ipts .		•		•			2,445
Sum due by	factor.	•	•	•	•	•	•	50
								£21,695
			CONTINU.	ATION				•
Add—								
(1) Diffe	rence betwee	n price	of the		Compa	ny stocl	c at	
p	ar, as above,	and a	t £130,	being t	he pri	e at w	hich	
tl	he same was	taken o	ver.			. ₤	660	
(2) Inco	me since rece	eived—						
C	n bonds and	bills	•		•	•	300	
0	n stock and	deposit	receipts				140	
		-	-					1,100
								£22,795

Less— Interests paid as follows:—		£22,795			
(1) Liferentrix for proportion (2) M., in respect of her propertion				00	
bank deposit rates fr				50	
				_	150
					£22,645
Pa	YMENTS				•
1. Estate duty	•	. £200	0	0	
2. Factor's fees from to		. 105	0	0	
3. Auditor's fee	•	. 5	5	0	
4. Expenses—					
Agent's general business accoun	nt from	••			
to, as taxed .	•	. 94	15	0	
Expenses of winding up trust a	nd dischargin	ıg			
trustees		. 35	0	0	
5. Miscellaneous payments	•	. 5	0	0	445
					£22,200
Sum set apart for M. in liferent and	her children	in fee .			3,000
	Residue for	division .			£19,200
Sover	or Division				
					60.000
One-half thereof falling to the testam In payment of which they have r	•	ees of A		•	£9600
Assignation of bond by .			£50	00	
Assignation of bond by .	•		40	00	
Cash			6	00	
	As before				£9600
One-half of residue falling to the man	-	s of Y			£9600
In payment of which they have r					
Bills by his firm of Y. &	Z. and other				
sum of		•	£50	UU	
£2200 Four-per-cent. Guar	anteed stock	of the	0.0	20	
Company .	•	•		60	
Cash	A., 1	•	17	40	00000
	As before				£9600

DISCHARGE IN FAVOUR OF EXECUTOR-DATIVE, TERCE— JUS RELICTÆ—LEGITIM—DEAD'S PART, ETC.

We, the parties following, namely, (first) A., (second) B., and (third) C., Considering that D. died on , domiciled in Scotland and intestate, and I the said B. was decerned and confirmed as his executor-dative qua next

of kin, conform to confirmation by the sheriff of dated at , and subsequently sealed in England on : Further considering that the first State annexed and signed as relative hereto is a copy of the inventory given up for confirmation, including estate in England and , and no other estate, heritable abroad, and amounting to the sum of £ or moveable, real or personal, belonging to the said D. is known, and the second State annexed and signed as relative hereto is a list of the debts and funeral expenses of the said D.: Further considering that the said D. having died intestate, leaving me the said A., his widow, me the said B., his only surviving child, and me the said C. (being the son of his deceased daughter E.), his only other surviving issue, and the legal rights of us the said A. and B. being undischarged, our respective rights and interests in the said estate are as follows, namely, (first) I the said A. am entitled to (1) an allowance for mournings and interim aliment, (2) terce out of the heritable security for £500 in which the deceased died infeft, and (3) jus relictæ; (second) I the said B. am entitled to (1) the whole legitim fund, and (2) one-half of the dead's part; and (third) I the said C. am entitled to the other half of the dead's part:

ACCOUNTS AND ARRANGEMENTS

Further considering that the accounts of the intromissions of me the said B., as executor foresaid, have been produced and examined by us all, and we all hereby approve thereof, and the third State annexed and signed as relative hereto is an abstract of the said accounts: Further considering that we have all been advised regarding our rights in the estate and the footing on which the assets, debts, funeral expenses, and all other items fall to be dealt with in order to ascertain the sums falling to us respectively, and particularly it has been arranged amongst us that I the said A., instead of drawing one-third of the income of the said sum of £500 for the remainder of my life, should receive and accept in lieu thereof a lump sum of £70 in addition to my other interests in the estate; and, being advised as aforesaid, we all approve of the scheme of division forming the fourth State annexed and signed as relative hereto, which shews the total sums falling to us respectively to be as follows: (first) to me the said A. the sum of £1130, (second) to me the said B. the sum of £1743, and (third) to me the said C. the sum of £727: And now seeing that I the said B., as executor foresaid, have paid to us the said A. and C. the said sums of £1130 and £727 respectively, and that I the said B. have retained as my own personal beneficial share the said sum of £1743, of which three sums we respectively acknowledge the receipt, and that it is proper that we should grant these presents:

DISCHARGE TO EXECUTOR

Therefore, in the first place, we the said A. and C., for our respective interests absolutely, finally, and for ever discharge the said B., and the factors and law agents employed by him, of their whole actings, transactions, intromissions, and management in connection with the said estate and executry in any manner of way, and of all omissions which we or either of us could lay to their charge:

DISCHARGE inter se

And, in the second place, we all, absolutely, finally, and for ever, severally discharge each other of all questions, objections, and claims in connection with or regarding the basis of division of the said estate, and the accuracy or otherwise of the said scheme of division and of the said shares: And we consent to registration for preservation.—In witness whereof.

STATES REFERRED TO IN THE FOREGOING DISCHARGE

FIRST STATE

[Copy of the assets as in inventory of personal estate.]

SECOND STATE

[List of debts and funeral expenses.]

THIRD STATE--ABSTRACT OF EXECUTOR'S ACCOUNTS

CHARGE £4000 1. Estate as in inventory 2. Increase on realisation 200 3. Revenue . 100 £4300 DISCHARGE 1. Government duty. £105 500 2. Debts and funeral expenses 95 3. Expenses . 700 £3600 FOURTH STATE—SCHEME OF DIVISION 1. A., the Widow £3600 Net estate as above . Deduct-£50 1. Mournings and interim aliment to widow 2. The heritable bond No. of the above list of assets £500 25 Interest thereon included above. 525 of the above list of assets 3. Debenture No. which does not contribute to jus relictæ in respect the term of payment of interest was £200 past at date of death. Interest thereon included above 10 210 785



£2815

Add personal bond No. of the above list of debts which does not fall to be deducted in calculating just relictes in respect the term of payment was past at date						
of death Interest thereon also included a	• • hove	•	. £200 15			
interest thereon also included a	above	•		215		
				£3030		
Whereof one-third is jus relictæ .				£1010		
Mournings and interim aliment as above				50		
Lump sum in lieu of terce	•	•		70		
	Shar	e falling	to A	£1130		
2. B., the A	Son					
(1) Legiti	m					
Net estate as above	•	•	•	£3600		
1. Widow's mournings and interin	n alimen	t	. £50			
2. The heritable security and inte		•	. 525			
	,			575		
				£3025		
Add share of Government dut	v and ex	nenses si	nlicable			
to estate not contributing to l		· ·	piicabic .	23		
Ç	Ü			62010		
				£3048		
Whereof one-third is legitim	•			£1016		
(2) Half Dead	s Part					
Net estate as above	•		£3600			
1. Widow's whole share .		. £1130)			
2. Legitim		. 1016	i			
			2146			
	Dead'	s part .	£1454			
Whereof one-half	•		•	727		
	Shar	e falling	to B	£1743		
3. C., the Gra	ndson					
The other half of the dead's part .	•		•	£727		

			ABSTRAC	AT	
A.	•		•	•	£1130
В.		•		•	1743
C.	•	•	•	•	727
			Estate	as before	£3600

INTERIM DISCHARGE

We, A. and B., considering that under the trust disposition and settlement , and registered , we are entitled, of the late C., dated equally between us, to the residue of his estate which was subject to the liferent of D., who died on : Further considering that the present trustees of the said estate are E. and F., and the now deceased G. was also a trustee: Further considering that the whole accounts of the trustees' inhave been submitted to and tromissions from the testator's death to examined by us, and we are satisfied therewith, as we hereby admit, and we hereby approve thereof: Further considering that it is not yet possible to make a final division, but it has been arranged to make an interim division to the amount of £1000 each on condition of these presents being executed: And now seeing that the said E. and F. have paid to each of us the sum of £1000, of which respective sums of £1000 we hereby respectively acknowledge receipt: Therefore we, for our respective interests, approve of and ratify the whole actings, transactions, intromissions, and management of the said E., F., and G., and the factors and law agents employed by them, under the said trust disposition and settlement, or in relation to the testator's estate in any manner of way, and discharge all objections, if any, which we or either of us could state thereto, and all omissions, if any, which we or either of us could lay to their charge: Reserving always our respective claims to the balance of the said residue: And we bind ourselves, and our respective heirs, executors, and representatives whomsoever, to relieve and indemnify the said E., F., and G., and their respective heirs, executors, and representatives, of and against all claims and demands, of whatever nature or amount, which may be made against them in connection with the said estate, but that only in the proportion of one-half each, and each only to the extent of the sum of £1000 received by us respectively as aforesaid: And we respectively warrant our right and title each to one-half of the said residue: And we consent to registration for preservation.-In witness whereof.

DISCHARGE UNDER RESERVATION

1. When the Reservation relates to a Substantial Asset, but there is no Question of Trustees' Liability in regard to it

[After other parts of narrative, proceed] Further considering that the whole estate has been realised and is ready for division, except only a debenture of the X. Company for £1000 which matures on , and which we desire the trustees to retain in their own names until it matures [figures of rest of estate, payment, and full discharge]: Reserving our right to an accounting for

and payment of the said sum of £1000, or such less sum as the trustees may receive from the said debenture of the X. Company, and all or any interest thereon, under deduction of all relative expenses.

2. When it is a Substantial Reservation and there is a Question of Liability

Further considering that the whole estate has been realised and is ready for division, except only a bond and disposition in security for £1000 granted by X. over property at and arrears of interest thereon [figures of rest of estate, payment, and discharge]: Reserving and excepting always from this discharge the said sum of £1000, and interest, past, current, and future, due and to become due under the said bond and disposition in security, and all our claims of personal liability and otherwise against the said (trustees) in respect of the said investment, and also reserving to the said trustees their defences to these claims. [After the indemnity clause may be added] But this obligation is without prejudice to the reservation and exception hereinbefore contained, and shall not extend to cover any claim or demand in connection with the said bond and disposition in security.

3. When the reserved Assets are Trifling and Uncertain

Reserving our right to share, according to our respective interests, in such sum or sums, if any, as the trustees may in fact receive from any of the following assets or items which are yet unrealised, namely, (1) twenty £1 shares fully paid of the X. Company, (2) a claim of £100 or thereabouts in the liquidation of the Y. Company, and (3) a claim of £50 or thereabouts in the sequestration of the deceased Z., under deduction of all expenses in connection with recovering or attempting to recover the same or otherwise in the premises: But declaring that these presents are granted and accepted on the express agreement that there is to be no duty on the trustees to make any effort to recover or realise the said assets or items, and no liability on their part for omission, failure, or neglect: And we agree that if the trustees should ever, in fact, receive anything from these sources, or any of them, our respective shares thereof may be paid by them as follows, namely, (1) the share falling to us the said A., B., C., and D., as trustees foresaid, may be paid to L., W.S., Edinburgh, and (2) the shares falling to us the said E., F., G., and H. may be paid to M., writer, Glasgow, and the bare receipts of the said L. and M. respectively shall be a full exoneration to the said trustees.

DISCHARGE BY ACTING TRUSTEES TO RESIGNING TRUSTEE

We, A. and B., the trustees acting under the trust disposition and settlement of the late X., dated , and registered in the Books of Council and Session on , Considering that C. has resigned office as trustee under the said trust disposition and settlement, conform to minute of resignation which is to be delivered unico contextu with the delivery of these presents, which he has requested us to grant, and which we have agreed to do: Therefore, in exercise of the power conferred by the Trusts (Scotland) Act, 1867,

and so far as we are thereby authorised, but without incurring any liability or responsibility, we do hereby discharge the said C. of his whole actings, transactions, intromissions, and management under the said trust disposition and settlement, or in consequence of or in relation to the said trust in any manner of way, and of the said trust disposition and settlement itself, and of all that has followed or is competent to follow thereon: [If there is to be any clause of warrandice at all, it will run] And we bind the trust estate under our charge, and the beneficiaries therein (but only so far as we have power to do so), to warrant the foregoing discharge at all hands.—In witness whereof.

DISCHARGE BY ACTING TRUSTEES TO REPRESENTATIVES OF DECEASED TRUSTEE

We, A. and B., the trustees acting under the trust disposition and settlement of the late X., dated , and registered in the Books of Council and Session on , Considering that C., who was also a trustee thereunder, has recently died, and that we have been requested to grant these presents by D. and E., his testamentary trustees and executors, and have agreed to do so: Therefore, in exercise of the power conferred by the Trusts (Scotland) Act, 1867, and so far as thereby authorised, but without incurring any liability or responsibility, we do hereby discharge the said C., and the said D. and E. as his testamentary trustees and executors, and his estate and representatives whomsoever of his whole actings [proceed as in preceding form].

DISCHARGE BY (1) NEW TRUSTEES AND (2) BENEFICIARIES TO RESIGNING TRUSTEE

We, the parties following, namely, (first) B. and C., trustees assumed and acting under the trust disposition and settlement granted by X., dated , and registered in the Books of Council and Session on to which office of trustees we have been assumed conform to deed of assumption granted by A., as sole trustee acting under the said trust disposition and settlement, dated , and intended to be delivered unico contextu with the delivery of these presents, and (second) D. and E., the beneficiaries under the said trust disposition and settlement, Considering that the said A. has resigned office as trustee foresaid, conform to minute of resignation incorporated with the said deed of assumption: Further considering that we the said D. and E. [the beneficiaries] have had the trust accounts submitted to us, and have examined the same, and are satisfied therewith, and that the said A. has delivered to us the said B. and C. [the new trustees] the writs, vouchers, and certificates of the investments specified in the State of the trust assets annexed and signed as relative hereto, and has paid to us the sum of of cash therein specified, of all which we hereby acknowledge the receipt, and that he has requested us the respective granters hereof to execute these presents, which is reasonable, and which we have agreed to do: Therefore we the said B. and C. [trustees], in exercise of the power conferred by the Trusts (Scotland) Act, 1867, and so far as we are thereby authorised,

but without incurring any liability or responsibility, and we the said D. and E. [beneficiaries], do hereby [insert clause of discharge as on p. 919]; and further, we the said D. and E. discharge the said A. of all omissions, if any, which might be laid to his charge: And we the said D. and E. bind ourselves to free, relieve, and indemnify the said A. and his representatives of, from, and against all claims and demands of whatever kind which may be made against him or his foresaids in connection with the said trust in any manner of way, and that in proportion and up to the amount of our respective shares and interests of and in the trust estate received and to be received by us: And we the said D. and E. bind ourselves to warrant the foregoing discharge at all hands.—In witness whereof.

Annex a brief State of trust assets.

DISCHARGE BY (1) TRUSTEE AND (2) SOLE BENEFICIARY IN FAVOUR OF RESIGNING TRUSTEE AND REPRESENTATIVES OF DECEASED TRUSTEE (CLAIMS OF PERSONAL LIABILITY—PART PAYMENT—COMPROMISE)

We, A., sole trustee under the trust deed granted by X., dated and registered in the Books of Council and Session on personally and individually, and B. [the beneficiary], Considering that by the said trust deed, which proceeds on the narrative that the said X. had instantly paid over to C. and D., as trustees thereunder, the sum of £1500, it was provided that the said sum should be held by them in trust for behoof of me the said B. in liferent for my liferent use only during all the days of my life, but with and under the powers, conditions, and provisions therein mentioned, and inter alia power was given to the trustees to make advances and payments out of capital to me the said B., and to purchase an annuity or annuities for my behoof: And it was thereby provided that, in so far as the same might not be so applied, I should have power to settle or convey the same and investments thereof in such way and manner as I might consider proper by any testamentary writing, and that failing such testamentary writing the trustee should pay over the same to and among the nearest heirs whomsoever of me the said B.: And in the last place it was thereby declared that it should be competent for the trustees, with consent of me the said B. and of me the said A. as a sine qua non, to alter and vary the trust purposes, but without such consents the said trust deed was declared to be irrevocable, all as the said trust deed, which contains various other clauses conferring various powers, privileges, and immunities, and which is here specially referred to and held as repeated brevitatis causa, in itself more fully bears: In virtue of which trust deed the said C. and D. entered upon the management of the trust, and continued to act together until the death of the said D., which occurred on , since which date till the granting of the deed of assumption aftermentioned the said C. has been sole trustee: Further considering that from the date of the said trust deed to the date of these presents the whole income of the trust funds, so far as received, has been duly paid to me the said B., as I hereby acknowledge: Further considering that we have

seen and examined an account, which we, being separately advised, accept as an account of the trustees' whole intromissions: Further considering that (apart from the sum of £400 hereinafter mentioned) the trust funds are at present in the position following, namely:—

1.	Principal sum remaining du	e und	er bond	d and di	ispositio	n in	
	security over	•	•	•	-		£700
2.	Deposit receipt with the	P	ank, da	ted			700
3.	Balance due by Y., for which	a clai	m has l	een lodg	ged with	the	
	trustee in his sequestration	•	•	•		•	100
							£1500

Further considering that we have raised questions with the said C. and the representatives of the said D., and have maintained that the said C. and the said D. have incurred personal liability in respect of the said sum of £700 , and the balance of £100 due lent as a postponed loan over by the said Y., which sums we allege will not be recovered in full, which, however, is not yet ascertained, and, in any case, neither the said C. nor the representatives of the said D. admit any liability, but to avoid litigation and without prejudice they have agreed to pay into the trust a sum of £400, contributed by the said C. to the extent of £200 and by the testamentary trustees of the said D. to the extent of the other £200, but that only on receiving a full and absolute discharge, and on the terms and conditions hereinafter written, to all which we, being separately advised, have agreed, it being hereby expressly declared that these presents are intended to embody a full and final settlement on the basis of compromise: Further considering that the said C. being desirous to resign office as trustee, we have requested that I the said A. be assumed as trustee, which has been done, conform to deed of assumption granted by the said C. dated , and he having resigned office, conform to minute of resignation dated (of which intimation is hereby accepted), I the said A. am now sole trustee as aforesaid: And now seeing that I the said A., as sole trustee foresaid, have received and am vested in the said three trust investments or assets before specified, and further that I, as such sole trustee, have instantly received the said agreed-on sum of £400 as follows: £200 from the said C., and the like sum of £200 from E. and F., the testamentary trustees and executors of the said D., out of his estate, of all which I the said A., as sole trustee foresaid, with consent of myself as an individual, and of me the said B., hereby acknowledge the receipt: Therefore I the said A., as sole trustee foresaid, in virtue of the Trusts (Scotland) Act, 1867, and of all other powers, and also I the said A. personally and individually, and I the said B. personally and individually, and we jointly and severally, with joint consent and assent, do hereby exoner, acquit, and simpliciter discharge the said C. and his estate, executors, and representatives, and also the said D. and his estate, and the said E. and F., as trustees and executors foresaid, and all others the representatives of the said D., of the whole actings, transactions, intromissions, and management of the said C. and D., and each or either of them, in consequence of the said trust constituted by the said X. as aforesaid, or in relation thereto in any manner of

way, and of the whole trust funds and estate, and of the said trust deed and whole clauses therein contained, with all that has followed or is competent to follow thereon, and of all omissions which we can lay to the charge of the said C. and D., as trustees foresaid or as individuals, and particularly, but without prejudice to the said generality, of all losses, deficiency, and depreciation which have arisen or occurred, or which may arise or occur, on the realisation of the investments, balance, and claim above mentioned: Declaring, without prejudice to these presents otherwise, that the power of testamentary disposition competent to me the said B., and the powers of alteration, variation, and revocation as aforesaid, and all other powers, shall be held to have been irrevocably exercised to the effect of validating these presents: And further, with reference to the payment of the said sum of £400 as aforesaid, it is hereby specially provided and agreed, and we as aforesaid bind ourselves jointly and severally, that in the event of the sums recovered from the said , and in respect of the said balance due by the said Y., taken together, exceeding the said sum of £400 and simple interest on that sum from at the rate of four per cent. per annum, after deducting the expenses of recovery, then such excess shall fall and belong to the said C. and the estate of the said D. equally pari passu, and we as aforesaid bind ourselves to grant at their expense such deeds as may be desired for enabling the said C. and the representatives of the said D. to recover and receive such excess accordingly, and also to count and reckon with them in the premises, and to pay over such excess if received in the first instance by us; and in respect of their interest on this account, we agree and bind ourselves to exhibit the accounts and vouchers of the trust to the said C., and the trustees and executors and other representatives of the said D., on all necessary occasions free of expense: And I the said A., as trustee foresaid, and we both personally and individually, bind ourselves, all jointly and severally, to free and relieve the said C. and his estate and representatives, and also the said D. and his estate, and the said E. and F. as trustees and executors foresaid, and all others the representatives of the said D., of and from all claims and demands of whatever kind or amount which can or may be made against them in connection with the said trust in any manner of way: And we jointly and severally warrant these presents absolutely: And we consent to registration for preservation.—In witness whereof.

DISCHARGE BY WIDOW OF LEGAL RIGHTS

There ought always to be a document by the widow, whether she is to take her legal or her conventional provisions, assuming that there is no marriage contract containing a discharge of legal rights. Mere lapse of time and drawing the testamentary provisions cannot be relied on; and it appears that the question may be raised even after the widow has so acted and is dead. The following further points may be noted:—

1. If there is involved the accepting of the testamentary provisions in lieu of provisions under an antenuptial contract, the matter ought to be very carefully considered on behalf of the widow, for she may defeat herself in any competition which may afterwards arise with creditors,

- 2. The widow must be separately advised, and her advisers must have full and free access to all documents and information. On the other hand even when she is so represented, the trustees' solicitors ought not to make up particulars and comparative statements of the two sets of provisions; that responsibility should be left with the widow's solicitors, their demands for information being met by communication of papers asked for and the offer of free access to everything. In the same way the discharge ought not to have reference to any details, but ought to bear that the granter has been separately represented (naming her solicitor) and advised by counsel if the fact be so, and that full access has been given to all papers and information, and that all that her agents have called for has been given. If it be (as it often is) the case that the legal rights would certainly or probably come to more than the value of the testamentary provisions, the deed ought to bear that this has been explained to the granter and that she quite understands it, and that her reason for accepting the smaller is (as it often is) that in the full knowledge of all the facts she desires not to disturb her husband's testamentary arrangements.
- 3. In the widow's interest the deed must not be too wide. For even (1) if she accept the will, she may still in addition become entitled to her legal rights in some part of the estate regarding which the trusts of the will have failed, and therefore she ought not to discharge legal rights in such terms as might give rise to even a question whether she has barred herself from this contingent additional benefit, and (2) if she claim her legal rights she may still in addition, if the will contain no clause of forfeiture or election, be afterwards restored to the testamentary provision under the doctrine of equitable compensation, and therefore it would not be right to require her on payment of jus relictor to discharge not only that, but also her testamentary provision in absolute terms, while, on the other hand, the trustees must not be left exposed to a full double claim.

DISCHARGE BY WIDOW WHO HAS ACCEPTED THE WILL.

I, A., widow of B., considering that the said B. died on a trust disposition and settlement, dated and registered in an under which the trustees are C., D., and E.: Further considering that under the said trust disposition and settlement the said B. directed his trustees to make over to me absolutely his household furniture and plenishing, to pay to me £100 as soon as convenient after his death, and to pay to me an alimentary annuity of £200 for the remainder of my life, but only so long as I should remain unmarried, and he declared that if I re-married the annuity should cease as at the date of my re-marriage 3: And whereas I have been and am

the annuity non-assignable and terminable on re-marriage; (b) if the will contains any clause



¹ See p. 805.

² See p. 804.

² (a) Give prominence to any clauses making re legal rights, set it out,

[and have also been separately advised by separately advised, viz., by counsel], and I have through my agent had full access to all papers and information, and all enquiries and demands that have been made on my behalf have been fairly complied with and satisfied, and whereas it has been explained to me, and I clearly understand, that I am not bound to accept the provisions in my favour contained in the said trust disposition and settlement, but may if I in my uncontrolled discretion think fit claim my legal rights in the [heritable and moveable] estate of the said B., the existence, number, amount, extent, and effect of which legal rights have been fully explained to me [A.], and it has also been explained to me, and I clearly understand, that my claiming these legal rights would be greatly [or would probably be] to my pecuniary advantage, but nevertheless with full information and understanding, and being separately advised as aforesaid, I have decided not to do so, being influenced chiefly by my desire not to disturb my husband's testamentary arrangements, and being satisfied with the provisions which he made for me: Therefore I hereby accept the terms and provisions of the said trust disposition and settlement, and discharge my legal rights of terce, jus relictæ, aliment, and mournings [reserving only my claim to an additional benefit if it should happen that any part of the estate of the said B. should fall to be treated as intestate succession, or in any other manner not inconsistent with the said trust disposition and settlement receiving effect], and reserving also all defences to such claim otherwise than in respect of the terms of these presents.—In witness whereof.

DISCHARGE BY WIDOW WHO HAS REJECTED THE WILL

[Preceding form down to A.]; and with full information and understanding, and being separately advised, I have resolved to claim my legal rights: Further considering that various points were disputed between the trustees and me, but finally by way of compromise the sum of £ has been arrived at as the amount to be paid to me as at [date], with interest thereon at the rate of per cent. per annum from that date till paid [which sum is arrived at after inter alia allowing for sums meantime drawn by me from the estate and interest thereon]: And now seeing that I have received from the said trustees the said sum of £ , with interest thereon as aforesaid, as I hereby acknowledge, therefore I hereby in consideration thereof discharge my rights of terce, jus relicto, aliment, and mournings in the estate of the said B. and all interest thereon, and also the said testamentary provisions [if the will contain no forfeiture or election clause, add], but subject always as regards the said testamentary provisions to my claim to resort thereto, if and after the rule of equitable compensation, if applicable, shall have taken effect, and also reserving all defences to such claim otherwise than in respect of the terms of these presents.—In witness whereof.

DISCHARGE OF LEGITIM

I, A., considering that my father B. died on leaving a trust dis position and settlement, dated and registered , under which

1 It is assumed that terce, if any, has been commuted.

his trustees are C., D., and E.: Further considering that the said B. left me an alimentary annuity of £30, and declared the same to be in lieu of legitim: Further considering that being separately advised I have resolved to claim legitim, as to the amount of which various questions arose between me and the trustees, but finally by way of compromise the sum of £ has been arrived at as the amount to be paid to me, with interest thereon at the rate of 4 per cent. per annum from [date] till paid: And now seeing that the said trustees have paid to me the said sum of £ , with interest as aforesaid, of which I acknowledge the receipt: Therefore I hereby discharge my right of legitim in my father's estate, and also the said annuity [if the will contain no forfeiture or election clause, add], but subject always as regards the said annuity to my claim [as in preceding form].

Refer to pp. 647, 804-5, and note-

- 1. When legitim is not claimed a contingent beneficiary should be especially careful about accepting the will. For the reason, see p. 647.
- 2. If a discharge be granted when legitim is not claimed (which is rare) the point as to nevertheless claiming legitim out of any intestate part of the estate applies.
 - 3. If legitim be claimed the point as to equitable compensation applies.
- 4. In any case there is no reason for discharging share of dead's part or executry, or anything but legitim, unless the deed is granted on an ascertained intestacy and a share of executry is being paid as well as legitim. Many deeds err by excess in this respect.

A	1			450 0 1	TEXT.	FORMS.
Acceleration of payment, cond	litions	of		658, 81	5, 858	858
ACCEPTANCE—					31	
bills, presentment of, for terms of .	•	•	•	•	31 31	
intimation of assignation	•	•	•	•	683	
by tenants in mis	circa c	f lot	•	•	000	240
offer, of, when too late	SIVES O	160	•	•	147	240
	•	•	•	•	863	866
trusteeship Accession of creditors to trust	4004	•	•	•	140	000
Accountant of Court, memora		h 00	. 40 55	· ·m·t·	140	
sales in sequestration.	muum	by, as	s w pr	IVALUE	299	
Accrescing shares .	•	•	•	•	656	813
	_ .	•	•	•		019
Accretion, whether bankrupto	y bars	•		•	450	
Accumulation—					000	
restriction of	•	•	•	•	806	0.49
will directing	•	•	• (•		843
Acknowledgment-					_	
of signature need not be ver		•	•	•	5	_
time limit for witnesses sign	ing	•	•	•	3, 5	
remedy under 1874 Act	•	•	•	•	3	
writ of	•	•	•	•	585	
ACQUIRENDA-						
with reference to inhibition	•	•	•	282,	451-2	•
sequestrati	on	•	•	450, 64		
under creditors' trust deed		•_	•	•	141	
marriage contract, diff	ferent s	settlem	ents of	•	763 –5	
Actions—						
submission of cross			•	•		81
discharge on settlement of	•	•	•	•		144
AD factum præstandum securit	y	•	•	. 49	91, 536	
ADEMPTION of legacies .	•		•	•	814	
Adjudication for debt—						
register of	•		•	•	281	
prescription, positive, to give	e prope	rty tit	le .	•	181	
negative, to ext	inguisl	n the a	djudicat	tion .	287	
completion of title .		•	•		286	
notarial instrument following	gon			•		580-1
in competition with ex facie	absolu	te title		•	474	
Administration, Letters of, no	tarial i	nstrum	ent on-			
irredeemable rights (with wi	ll anne	xed)			363	
securities					575	
Advertisements-						
of sales under bonds .					515	
by burghs .					295	
before foreclosure .	•		-		525	
	-	926	•	•		

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Age, admission of, on life policies				техт. 687	FORMS.
AGREEMENTS regarding securities—	•	•	•	001	
contract for loan		•		415	
endurance and rate (back-letter)					440
qualifying ex facie absolute deed				471	£478–480 ,
• • •	•	•	•		706
under s. 47, 1874 Act	•	•	•	535	326
AGRICULTURAL lease (see leases) .	•	•	•	608	
ALIMENT, interim, to widow .	•	•	•	751	770–6
ALIMENTARY provisions— what may, and may not, be so prote	otod			90 909	
a trust is necessary	cieu	•	•	22, 808	
special case of wife	•	•	•	22, 808 424	
widow with young ch	ildren	•	•	766	
beneficiary of, cannot consent to ultr		ectinos	•	884	
except by order of Court.		acome	•	886	
Allocation of feu-duty—	•	•	•	000	
Against superior, consents required		_		243	
1. by memorandum of allocation	•	•	•	246	251
whether binding if not recorde	ed			246	-01
superior's power to allocate				248	
2. by vassal under power in charter				247	322
3. by exhaustion				247	
clauses in feu-right	•				217, 221
augmentation	•			248	
Among vassals inter se .	•	•		249	
when no express arrangement				250	
whether purchaser entitled to super	ior's all	location		153	
memorandum or minute of allocatio		•			251
with augmentations .		•			251
for whole tenement with augme	entatio	n.			251
with creditor's consent .					252
relieving part of property		•			253
clauses in disposition of part of feu-					
relieving purchaser of whole fe	u-duty	•		250	253
putting whole feu-duty on pure	chaser	•			254
ALLOCATION of ground-annual .		•	•	264	
Ancestor's creditors		•		195	i
Annualment, bond of		•	•	464	467
Annuity-					
bond of	•	•	•		14
incorporated with disposition		•	•		334
as affecting sale of property burden	ed with	1.	•	149	
requires trust to make it alimentary		•	•	22	
is a charge on capital if income insu	ifficient		•	651, 808	
chargeable primarily on heritage	•	•	•	809	
disposition creating real burden for	•	•	•	hec	334
provision of, in marriage contract	•	•	•	752	
wills under entails—	•	•	•	808	846
				75	. 700
to widow of heir in possession	•	•	•	754	
-apparent	•	•	•	758	
widower of heiress .	hastima	•	•	769 909	
points requiring attention in constitution	uung	•	•	752, 808	
postponement of arrears of .	•	•	•	418	:
power to restrict beneficiary to	forest	•	•	0=/	785
appointee to, or li	Telent	•	•	850	,

					TEXT.	FORMS.
Anticipation of payment, condi	tions of		•	658,	815, 858	858
APPARENT heir under entail				•	395	
APPOINTMENT of trustees					860, 871	877
service in trust under appoint	tment				727	728
Appointment, powers and deeds	of—					
points on, in examining titles					651	
general powers .					848	
Powers Act					849	
divorce, effect of .		•			849	
ultra vires appointments					849	
election					$\bf 852$	
fraud on the power .		•		•	$\bf 852$	
irrevocable appointments	•	•		•	853	857
partial appointments.	•				853	857
hotchpot clause .					853	857
clauses of discharge	•				854	
ranking of successive par	tial app	ointmen	ts		854	857
ordinary power does not exten			•	•	855	
intimation to trustees	•				855	
appointment in security deed	•				855	
revocable appointment by wi	dow of	funds se	ttled	bv		
self and husband in marria	ge contr	act				856
partial irrevocable appointmen	nt ranki	ng <i>prim</i>	o loco			857
irrevocable appointment, disc	harging	liferent			858	858
wills, in framing, powers held	by test	ator		·	807	
conf	erred by	him	•	•	807	785, 832
APPORTIONMENT—	orrow by		•	•		100, 002
capital and income .					651	831, 845
feu-duty—co-vassals .	•	•	•	•	250	322
seller and purchase	·	•	•	•	305	022
liferent	••	•	•	•	000	673
provisions under powers. See	Annoin	· tment :	· wma	•		0.0
rents	rippon	······································	apra.		158	167
APPRENTICE—	•	•	•	•	100	101
age limits					44	
assignation of indenture	•	•	•	•	45	
cautioner	•	•	•	•	44	
	•	•	• .	•	45	47
discharge of	•	•	•	•	40	45
indentures, writer to the signe law agent (three	ti maatam	. and a		•		40
apprentice's cur	masten	s assiu s	urvive)18,		40
	rawis)	•	•	•		46
other businesses	•	•	•	•	45	46
registration	•	•	•	•		
stamp	•	•	•	•	45	
writing: rei interventus	•	•	•	•	44	005
APPROPRIATION of investments	•	•	•	•	651	835
Arbitration—					40	
capacity of parties .	•	•	•	•	68	•
attorney	•	•	•	•		60
subject-matter .		•	•	•	69	
damages, no implied power to	award	•	•	•	70	77
ancillary submissions.	•	•	•	•	70	
arbiters	•		•	•	71	
oversman	•	•	•	•	72	78 –9
procedure		•	•	•	73	
$\hat{ ext{decree-arbitral}} (q.v.)$.	•	•	•	٠	74	84

					TRXT.	FORMS.
Arbitration—continued—						
decree, interim .	•	•	•	•	75	87
endurance	•		•	•	76	77
prorogation	•	. •	•	•	77	83-4
deeds of submission (see Sub	missior	a) .	•	•		77
orders	•	•	•	•		82
in partnership .	•	•	•	•	102	103
on sales	•	•	•	•		168-9
ARRESTMENT, assignation of	•	• .	•	•		25
ARTICLES of roup—						000
grass parks	•	•	•	•		638
of heritable property by own	1er	•	•	•	F18	171-4
	dholder		•	•	517	175
	ground	-annual	•	•		176
superiority	•	•	•	•		177
ground-annual .	•	•	•	•		177
book debts	•	•		•		126
shares of company .	•	•	•	•		128 665
reversionary interest	•	•	•	•		
life policy	•	•	•	•		697
disposition following on	•	•	•	•		330
Assignations						
	Person	ral Bone	l s			
aquities between debter and	andont				21	
equities between debtor and non-assignable rights.	cedent	•	•	•	21 21	
warrandice	•	•	•	•	21 24	
intimation	•	•	•	•	681	
forms, various .	•	•	•	•	23	24
including decree of re	vietreti	ion	•	•	20	25
diligence	g to ut a u	OII	•	•		25 25
umgence	•	•	•	•		20
	Book	k Debts				
	2500	. 2000				
separate deed	•	•	•	•		132
annexed to articles of roup	•	•	•	•		133
_						
H	leritable	s Securi	ties			
as contrasted with discharge	and nev	w bond,	advante	ages		
and disadvantages		•	•	•	543	
right to assignation—	•	•	•	•	545	
cautioner	•	•		•	546	
over-paying vassal	•	•	•	•	245	
original obligant who has	s sold p	roperty		•	547	
catholic and secondary se	curities	з.	•	•	547	
to prevent extinction confusi	one	•		•	547	563
simplest form of deed.	•	•	•	•		548
of balance of bond .	•	•	•	•		548
part, incorporating discha	rge of b	oalance	•	•		549
with ranking clause	•	•	•	•		549
by assignee	•	•	•	•		550
of two bonds over same prop						550
bond and disposition in				01		271
corroboration and dispo				1		551
bond and disposition in	secur	nty and	ı perso	mai		221
bond of corroboration	•	•	•	•		551
59						

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	TEXT.	FORMS.
Assignations—continued—		
of bond and disposition in security and corroborative		
obligation in gremio of title		552
bond followed by sasine		552
incorporating bond of corroboration		551
new obligation and new security .	547	552
discharge of original debtor	548	552
when original obligation discharged		55 3
of bond affected by restriction and postponement .		553
of balance, part already assigned with prior or post-		
poned ranking		554
bond to which another has been postponed .		555
by three trustees, only one infeft	546	555
trustees to beneficiary		556
in fortification of title.	517	331, 556
when only part sold		557
to cautioner, of interest	546	558
another cautioner, of subsequent interest .	546	559
two cautioners, of interest and expenses, with	OTQ	000
		559
accounting		560
two lenders, shares equal		561
unequal		901
one of two obligants and proprietors, incorporating		EC1 .
discharge of his own share	E 4 F	561
by catholic to postponed creditor	547	562
when a curator bonis pays heritable debt out of	F 4 P	50 0
personal estate	547	563
and of decree of registration		564
of security over recorded lease		564
•		
Various		
		0.5
of decree of registration		25
diligence		25
right of relief	305	335
See Apprenticeship. Real burden.		
Ground-annual. Reversionary interest.		
Leases. Unrecorded conveyances.		
Policies.		
Assignation of rents	158	
Assignation of writs	304	•
Assignatus utitur jure auctoris	21	
application to trustee-beneficiary assigning	654	
indemnities by cedent to trustees	654	
set-off of counter obligations, e.g. under same trust .	655	
assignee of heritable security affected	544	
Assumption of trustees—		
who entitled to assume—		
assumed trustees	860	
exclusion of power	859	
insanity, incapacity, or absence	860	868
quorum	.859	
sole trustee, incorporating his resignation .	859	8 6 8
spouses in marriage trusts (appointment)	860	000
trustees appointed by Court	860	869
terms of the deed	861	865
two trusts under marriage contract	.862	866

	_			TEXT.	FORMS.
Assumption of trustees—continued	l _				
separate special conveyances .	•		•	862	866
acceptance of office	•	•		863	866
stamp duty	•	•	•	863	
completion of title	. • .		•	863	
Assurance policies, sales and mor	tgage of	See	Policies.		
ATTESTATION—				_	
deeds generally	•	•	•	1	•
notarial execution	•	•	•	6	. 8
notarial instrument	•	•	•	364	365
powers of attorney wills	•	•	•	0 4 001	65
	•	•	•	3, 4, 821	847
ATTORNEY, powers of—				40	E O
joint attorneys	•	•	•	48	58
attorneys in succession .	•	•	•	49	64
two or more granters	• .	•	•	49	64
termination of office	•	•	•	49	EO
	not kno	•	•	51 50	58
effect if powers terminated, but constituent's return	HOU KHO	wn .	•	52 50	58
lapse of time	•	•	•	52 53	58
attorney's remuneration .	•	•	•	53	57
rules for his actings	•	•	•	53	51
may present foreclosure petition		•	•	525	
P.A. for use at home, variety of		•	•	020	54
by person abroad with spe	powers vial rafa	ronce i	o Scota		54
succession	CIAI ICIC	rence (o Score		58
for management and sale of	of havital	hla nro	nartv		61
to carry out a sale .	n nonva	ole bro	perty .		62
borrow money and gra	nt geens	ity in	enaviel		02
terms, referring to p	rior deed	l I	speciai		63
be sent abroad with a v			•		63
declaration by witness .	2011 00 50		•		65
certificate by magistrate.	•	•	•		. 66
bills and notes, per procuration	•	•	•	30	00
bonds by attorney	•		•	50, 54	434
denuding and settlement .	•	•	•	66	101
discharge by constituent to atto	rnev .	•	•	00	67
Augmentation—		•	•		•
on allocation of feu-duty .	_			248	251, 260
ground-annual	_		•	265	201, 200
BACK-LETTERS—	-	-	•		
endurance and rate					440
qualifying disposition (see Dispos	ition ex	facie al	solute)	471	478, 480
ex facie absolute assig	mation o	f life p	olicy .		706
BACKHAND rents				158	
as additional security				441	
not liable for entail provisions				75 8	
BAR-					
to adding designation under s. 3	8, 1874	Act .	•	2	
relief under s. 39, 1874 Act	•		•	3, 4	
founding on defects of execut	ion .			´ 9	
want of infeftmen	nt .			290, 544	
intimatio	on .			682	
Beneficiary under lapsed trust—					
completion of direct title by, by	petition	•		875	881
when competent or not .	. •	•	• .	876	
• =					

D 1D 1 W.	TEXT.	FORMS.
Bills and Promissory Notes—	01	
acceptance	. 31	
partial or otherwise qualified	. 31	
ante-dating	. 30	
contingency happening does not cure bill .	. 29	
date of bill payment not essential	. 30	
payment)	Of	
definitions	. 27	
demand, payable on, what is	. 29	
determinable time, what is	. 29	
drawees, alternative or successive, destroy bill	. 29	
discrepancy between words and figures .	. 30	
fatal contents	. 29	
non-fatal	. 30	0.0
indorsements, essentials	. 32	36
conditions, what allowable .	. 32	36
instalments	. 28	35
interest	. 29	35
joint and several liability	. 27	34
negotiation	. 31	
non-fatal elements	. 30	
notice of qualified acceptance	. 31	
dishonour	33	
noting	. 33	
parties—		
corporations	. 30	34
firms		35
married women	. 30	
minors	. 30	
per procuration	. 30	
representative capacity	. 30	34
payees, joint or alternative, or ex officio, allowa	ble . 30	
post-dating	. 30	
presentment—		
attaches fund in drawee's hands	. 28	
for acceptance	. 31	
payment, when necessary	. , 32	
where and when	. 32	
protest	. 33	36
security	. 28	
summary diligence	. 34	
value, reference to, not essential	. 30	
Blind persons—		
witness, incompetent as	. 4	
may sign personally or notarially	. 6	
BONA FIDES—		
in prescription	. 184	
want of, in competition of titles	. 290, 682	
Bonds, personal	•	14
expenses	. 11	676
interest and compound interest	. 10	
penalty	. 11	
remitting charges	. 10	
repayment, conditions of	. 11	
succession, creditor's	. 11	
debtor's	. 13	
See Annuity, Caution, Corroboration, Relief, A		ge.
	J -,	-

					TEXT.	FORMS.
Bonds and assignations in	securi	t y				
over book debts .		•	•		130	133
heritable security			•			436
lease			•		512	438
life policy .		,	•			700
reversionary intere	st .					674-6-9
for second loan .						680, 703
Bonds and dispositions in	securit	y (see	Heritabl	e securiti	es)	•
simplest form					•	430
fire insurance					418	430
ranking clauses .					421	430
in exercise of power .					420	432
by one granter over two	o prope	erties				432
A. and B. over A.'s	ropert	v	•	•		432
proprietors of separa	te pro	y nerties	for same	e debt		433
husband and wife ov	or wife	's nroi	nert.v		424	
pro indiviso propriet		o proj	peruj	•	416	434
attorney	OIB .	•	•	•	50-4	434
firm	•	•	•	•	30-4	435
		•	•			435
to two lenders .	•	1.				
constituting sub-secur			entable	security		436
when taken over by	purch	aser	•	•	151, 535	
entail securities (q.v.).	_		.• .		441–466	
Bonds of Corroboration (s	ee Corr	oborat	ion)		534	
DONDS OF Reflet (see Reflet	()	•	•		483	484
Bonus dividends as betwe	en cap	ital an	d income	э	652	
Book debts	_					
articles of roup .						131
assignation or mandate					130	132-3
decree, diligence .					131	25
sale by trustee in seque	stratio	n			130	
security over		_		_		133
warrandice		_			131	132
BOUNDARIES, particular .					308	
collision bety	voon g	ind nle	n or med	surement		
Boundary Commissioners,	ohana	na pia	de hv	as an onnon	278	
Bounding title	CHAILE	500 III	uc by	•	307	
whether it bars preso	-intion	·		nortinants		
beyond the boundar	inpuot	ı oı j	proper	bermene	317	
		4 !	•	•		
Bowman's case, dicta in,	as to v	esting	•	•	. 643	
Building Conditions (see	reus)	•		•	. 204	
must be qualifications of	or conc	urrent	inieitme	ont .	. 411	410
clauses creating .		•	•	•	•	412
Building contract .		•	•	•	•	135
submission regarding.		•	•	•	•	81
decree-arbitral thereon	•	. ,	•		•	87
BURDENS, public, relief of		•	•		. 150, 187	
Burgage—						
list of burgh registers.			•		. 340	
searches			•	•	. 280	
feus, where to be record	ded	•	•		. 341	
recorded leases .			•	•	. 354	
notice of change of own	ershin	unnec	essarv		. 339	
Burghs—			- J			
deeds, execution of .		_	_		. 6	
disposition by.		-			295	
loans to, and securities	hv		•	•	424	
roans w, and securives	<i>-</i> J	•	•	•		

					TEXT.	FORMS.
CANAL as a boundary .		•			309	ronas.
CAPITAL and revenue-						
apportionment .			•		651	831, 845
bonus dividends .			•		652	
capitalised profits .			•		652	
casualties		•	•		652	
expenses		•			653	
instalment loans .	•	•		•	653	
mines	•		•		652	
partnership payments.	•	•		•	100	
reversionary assets .	•	•	•	•	652	
CARRIAGES, commutation of	•	•	•		254	255
Cash-credit bonds .	•	•	•		469	469
bonds of relief from .	•	•	•	•	483	486
Casualties—						
allocation	•	•	•	•	250	
consents required .		•	•		243	
apportionment between cap	ital and	d incom	e.	•	652	
articles of roup of .	•	•	•	•		177
commutation	•	•		•	256	259
disposition of		•	•			329
incidence between seller an	d purch	aser	•	•	151, 305	
obligation to relieve of	•	•	•	•	305	
purchase of	•	•	•	•	153	165
redemption	•	•	•	•	255	259
when to redeem .	•	•	•	•	259	
partial redemption .	•	•	•	•	258	
CATHOLIC security—						
	•	1	3			
assignation by holder of, to			litor			F.00
assignation by holder of, to	heritag	ge .	ditor—		709	562
	heritag	ge . lic y	litor— : :		703	704
bond of corroboration to co	heritag	ge . lic y	litor—			
bond of corroboration to corpostponement.	heritag	ge . lic y	ditor		586	704
bond of corroboration to corpostponement.	heritag	ge . lic y	ditor : : :			704
bond of corroboration to corpostponement restriction	heritag	ge . lic y	litor		586	704 541
bond of corroboration to corpostponement restriction	heritag	ge . lic y	litor—		586 589	704 541
bond of corroboration to corpostponement restriction	heritag	ge . lic y	ditor—		586 589	704 541
bond of corroboration to corpostponement restriction	heritag	ge . lic y	ditor—		586 589 16 16	704 541 17 19
bond of corroboration to corpostponement restriction	heritag	ge . lic y	ditor—		586 589 16 16	704 541
bond of corroboration to corpostponement restriction	heritag	ge . lic y	ditor—		586 589 16 16 16	704 541 17 19
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company to firm company for apprentice	heritag	ge . lic y	ditor—		586 589 16 16 16 16	704 541 17 19
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company to firm company for apprentice	heritag	ge . lic y	ditor—		586 589 16 16 16 16 44	704 541 17 19
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company to firm company for apprentice firm company	heritag	ge . lic y	ditor—		586 589 16 16 16 16 44 16	704 541 17 19 19
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company to firm company for apprentice firm company interest, effect of .	heritag	ge . lic y	ditor—		586 589 16 16 16 16 44 16 16	704 541 17 19 19
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company to firm company for apprentice firm company interest, effect of . mercantile dealings	heritag	ge . lic y	ditor—		586 589 16 16 16 16 44 16 16 15	704 541 17 19 19 19
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company for apprentice . firm company interest, effect of . mercantile dealings officials	heritag	ge . lic y	ditor—		586 589 16 16 16 16 44 16 16 15 16	704 541 17 19 19 19 17 19 20
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company for apprentice . firm company interest, effect of . mercantile dealings officials part of debt .	heritag life po nstitute	ge . lic y	ditor—		586 589 16 16 16 16 44 16 16 15 16 16 15	704 541 17 19 19 19 17 19 20 17
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company for apprentice . firm company interest, effect of . mercantile dealings officials part of debt .	heritag life poi nstitute	ge . lic y	ditor—		586 589 16 16 16 16 16 16 15 16 16, 21 15	704 541 17 19 19 19 17 19 20 17
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company for apprentice . firm company interest, effect of . mercantile dealings officials part of debt . with securit assignation, right of caution	heritag life poi nstitute	ge . lic y	ditor—		586 589 16 16 16 16 16 16 15 16 16, 21 15 18	704 541 17 19 19 19 17 19 20 17 18
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company for apprentice . firm company interest, effect of . mercantile dealings officials part of debt . with securit assignation, right of caution of interest	heritag life poi nstitute	ge . lic y	ditor—		586 589 16 16 16 16 16 16 15 16 15, 21 15 18 546 546	704 541 17 19 19 19 17 19 20 17
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company to firm company for apprentice firm company interest, effect of . mercantile dealings officials part of debt . with securit assignation, right of caution of interest pleas, equitable	heritag life poi nstitute	ge . lic y	ditor—		586 589 16 16 16 16 44 16 15 16 15 18 546 546	704 541 17 19 19 19 17 19 20 17 18
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company for apprentice . firm company interest, effect of . mercantile dealings officials part of debt . with securit assignation, right of caution of interest pleas, equitable . statutory limitation .	heritag life poi nstitute	ge . lic y	ditor—		586 589 16 16 16 16 16 16 15 16 15, 21 15 18 546 546	704 541 17 19 19 19 17 19 20 17 18
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company for apprentice firm company interest, effect of . mercantile dealings officials part of debt . with securit assignation, right of caution of interest pleas, equitable statutory limitation . CERTIFICATE—	heritag life poi nstitute	ge . licy			586 589 16 16 16 16 44 16 15 16 15 18 546 546	704 541 17 19 19 19 17 19 20 17 18 558–9
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company for apprentice firm company interest, effect of . mercantile dealings officials . part of debt . with securit assignation, right of caution of interest pleas, equitable . statutory limitation . CERTIFICATE— by magistrate attesting por	heritage life poinstitutes	ge . licy			586 589 16 16 16 16 16 16 16 15 16 15 15 15 18 546 546 15	704 541 17 19 19 19 17 19 20 17 18
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company for apprentice firm company interest, effect of . mercantile dealings officials . part of debt . with securit assignation, right of caution of interest pleas, equitable . statutory limitation . CERTIFICATE— by magistrate attesting porthat houses fit for occupation.	heritage life poinstitutes	ge . licy			586 589 16 16 16 16 16 15 16 15 18 546 546 15 15	704 541 17 19 19 19 17 19 20 17 18 558–9
bond of corroboration to corpostponement. restriction CAUTION— bond of by firm company for apprentice firm company interest, effect of . mercantile dealings officials . part of debt . with securit assignation, right of caution of interest pleas, equitable . statutory limitation . CERTIFICATE— by magistrate attesting por	heritage life poinstitutes	ge . licy			586 589 16 16 16 16 16 16 16 15 16 15 15 15 18 546 546 15	704 541 17 19 19 19 17 19 20 17 18 558–9

	TEXT.	FORMS.
CESSIO—	• • •	
heritable property, no title without disposition	900	*
omnium bonorum	. 380	901
sale of, by trustee	301	381
heritable securities	567, 570	
intimation of decree unnecessary	690	
CHANGE of ownership, notice of	336	337
Charge for payment	38	
warrant under Personal Diligence Act	39	40
1874 Act	39	41
CHARTER (see Feu-charter)	199	211
CLARE CONSTAT, write of	709, 729	729
CODICILS (see Wills)	820	846
CO-FEUARS-	222	
conditions, enforcement by	206	215
feu-duty, etc., apportionment of	249	322
compulsory, when	741	
effect of, on succession of deceased	744	
successor	746	
international relations	740	
intimation of election to collate		749
mode of collation	746	
representation, when heir takes by	743	
relation of secs. 1 and 2 of 1855 Act	745	7.40
minute of collation, heritage shared in forma specifica		748
heir retaining heritage, distinction between legitim and executry		748
COMPANY—		140
bills and notes by		
	30	34
bonds of corroboration by, competency of	30 5 35	34
bonds of corroboration by, competency of	30 53 5 16	
bonds of corroboration by, competency of caution by, to, or for .	53 5	3 4 19
bonds of corroboration by, competency of caution by, to, or for	535 16 5	
bonds of corroboration by, competency of caution by, to, or for	53 5 16	
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382	
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429	
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429	
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452	
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397	19
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804	19
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544	19
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544 691	19
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544 691 21	19
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544 691 21 653-5	19
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544 691 21 653-5 654, 889	19 457
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544 691 21 653-5 654, 889 10	19
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544 691 21 653-5 654, 889	19 457
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544 691 21 653–5 654, 889 10 546	19 457
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544 691 21 653-5 654, 889 10 546	19 457
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544 691 21 653-5 654, 889 10 546 656 656	19 457
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544 691 21 653-5 654, 889 10 546 656 656 656 658	19 457
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544 691 21 653-5 654, 889 10 546 656 656 658 656	19 457
bonds of corroboration by, competency of caution by, to, or for	535 16 5 302, 382 429 139 397 452 397 663, 804 544 691 21 653-5 654, 889 10 546 656 656 656 658	19 457

		TEXT.	FORMS.
CONDITIONAL institution—continued—			
question as to issue: Bowman's case .		643	
or substitution, in bequests		813	
safe course		814	333
of heirs of legatee		814	
Confusio—			
ground-annual		265	
heritable debt—			
assignation to prevent		547	563
discharge to clear record			607
servitudes, questions and clauses .		408	413
CONJUGAL Rights Act		294	
CONSENT—			
by heritable creditor to feu-rights .		419	438
allocation of feu-duty	,	246	252
effect on obligation	•	420	
to allocation	•	243	
entail procedure		395, 401	402
	•	330, 401	402
Consignation—		101 5	407
on loan for entail contemplated improvement		464-5	467
purchase, necessary to stop interest	•	152	~~~
redemption by debtor		592	593
sale under bond		519	$\bf 522$
Consolidation—			
by minute		350	352-3
prescription		350	
resignation		349	
double consolidation		350	
effects, title		35 0	
destination		351	
entailed superiority		351	
over-superior		352	
heritable securities	•	352	
disposition of consolidated fees .			321
notarial instrument after	•	361	368
CONTINGENT reversionary interests (see Rev	· zargiona ru	901	500
Interests)	er sionar y	646	676
Continuous infeftment—	•	040	010
entail titles		200	
	•		
trust titles		236	700
CONTRACT of marriage (see Marriage Contract)	•	750	769
Conversion—		000	
limited to purposes of will	•	662	
under collation	•	747	
CO-PARTNERY (see Partnership)		90	102
CORROBORATION, bonds of		534	
sec. 47, 1874 Act		535	
ultra vires when		535	
by disponee			539
firm			540
heir			539
to accumulate interest			540
constitute catholic security .			541
and disposition in security for old and new le	oans over		011
extended premises			541
and disposition in security for two old lo	ans over		VII
separate properties now consolidated			541
acharage broberage non compensaged	•		OAI

	TEXT.	FORMS.
CORROBORATION, bonds of—continued—		
incorporated with assignation	547	551
disposition		327, 335
stamps	542	
Counsel, power to refer	69	
COURTESY, husband's right of	192	
does it apply to what was conquest?	192	
CREDITORS, trust for (see Trusts for Creditors)	139	141
CURATOR cannot complete title	293	
CURATOR bonis—	200	
factor loco tutoris becomes c.b. automatically	877	
completion of title unnecessary	293, 877	
warrant may be recorded de plano, whatever state of	200, 011	
title	977	
	877	500
heritable debt, assignation on payment of	547	563
power to refer	68	
alienate without minor's concurrence .	293	
charge entailed estate with family provisions	755	
improvements .	465	
Custody of deeds and searches—		
purchaser	153, 161	
lender	419	
Damages, arbiters have no implied power to award .	70	
DATE—		
unnecessary in testing clause	1	
bills and notes	30	
DEATH duties	192, 660	
bequests free of	661	823
entailed estate, assessing	455	020
charging on fee	393	
life policy	690	
DEATH of granter—	•	
notary may not add docquet after	8	
testing clause may be filled up after	3	
witness may sign after	5	
Debts-		
ancestor's, preference for	195	
book-, dealings with	130	131
heritable, taken over by purchaser	535	326
incidence of, in succession	808	
DECLARATION by witness attesting power of attorney .		65
Decree of registration, assignation of—		•
personal bond	39	25
heritable bond	40	564
horning required, in absence of	40	001
Decree-arbitral	74	84
	75	87
interim	10	
settling marches		84
and straightening marches		85
adjusting accounts between partners		86
fixing share of deceased partner		87
settling questions regarding a building contract .		87
settling principles of division of succession		87
by oversman		89
DEEDS, execution of (see Execution)	1	
Defrasance—		
of granter does not annul entail provisions	755	
conditions in bequests	815	
· · · · · · · · · · · · · · · · · · ·	B	C_{0000}

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-	-		TEXT.	FORMS.
Defeasance—continued—		-		
vesting (see Vesting)	•		641	
partial, under destinations to children		•	227, 642	
specialty as to life assurance .	•	•	646	
Defeasible conditions			815	
Defects of execution—				
remedies under 1874 Act			${f 2}$	
bars			2, 3, 4	
bars to founding on defects			9	
Delectus personæ—			-	
prevents transfer of certain leases			611	
certain contracts .			. 22	
excludes conditio si institutus			656	
Delivery of—				
titles			153	
search			161	
Denuding-				
by attorney		_	66	67
trustees	•	•	899	٠.
DEPOSIT of life policy as security .	•	•	693	
Description—	•	•	000	
what may suffice			307	
bounding title (see Bounding and Pertinents)		•	307	
	•	•		201
by general name	•	٠	314	321
reference, statutory		•	310	321
common law	•	•	314	
bringing up to date	•	•	315	
seller not entitled to object to .	•	•	315	
warrandice of	•		315	
in notarial instruments	•	•	360	
what is special as distinct from general			· 236	
DESIGNATIONS, errors and changes in .			226	
Destinations-	•			
consolidation, effect of, on			351	
construction of		_	228	
marriage contract, of fee simple estate in	_		759	788
-over suspend vesting			642-8	
Bowman's case		Ť	643	
special, whether altered by general will	•	٠	803	
vesting, construction of, as regards .	•	•	642-9	
Diligenor—	•	•	012-0	
summary on bills and notes			34	
	•	•		40
bonds	•	•	38, 43	40
warrants under Personal Diligence Act	•	٠	39	40
1874 Act	•	•	39	41
assignation of	•	•	39	25, 564
DIRECTION, clause of	•	•	241	241
reference to, in notarial instrument .	•	•	241	
DISCHARGE—				
Personal Bonds				
by original creditor	•			26
assignee	•	•		26
Heritable Securits	ies		•	
•				
variations in circumstances	•	•	594	
searches against creditor	•	•	284	
is completion of title necessary? .	•	٠	596	
•				

No.	TEXT.	FORMS.
DISCHARGE—continued—		
creditor's powers and titles—		
attorneys	59 8	
curators bonis	596	
executors	597	
fiars in succession	597	
liferenter and fiar	597	
liquidators	59 8	
married women	597	
minors	596	
pupils	596	
trustees	597	
in sequestration	598	
cessio		
	598 *00	
stamps on partial discharge	59 8	500
in simplest form		599
on instalments		599
partial		599
of one bond in full and another partially		599
partial, and deed of restriction		600
of three bonds held by same creditor .		600
one bond held by several partial creditors		601
separate bonds by separate creditors		601
bond and disposition in security and separate		
disposition in security		602
personal obligation of original debtor where bond of		
corroboration has been granted		603
new obligation merely in the disposition		603
with concurrence of new proprietor		603
part of debt is paid		604
bond and disposition in security, corroborative		00 4
obligation, and bond of corroboration	•	604
		605
security over heritage and life policies		
sub-security over heritable security.		605
principal and sub-security in one deed	•	606
obligation of one obligant with consent of other .		606
by creditor who is now also proprietor		607
of security over recorded lease		607
Of Trustees	•	
•	00=	
by trustees, effect as against beneficiaries	897	
liability incurred by granting	897	
beneficiaries, effect inter se	. 898	
indemnity clause	898	
by sole residuary legatee		901
to testamentary trustees with various special clauses.		903
abstract of accounts and scheme of division annexed		907
the same, under different circumstances		909
state and scheme annexed		912
to executor-dative (terce, jus relictie, legitim, dead's		
part)		913
states and scheme annexed		915
interim		917
clauses of reservation		917-8
by acting trustees to resigning trustee		918
representatives of deceased trustee		919
		919
new trustees and beneficiaries to resigning trustee.		919

_					TEXT.	FORMS.
DISCHARGE—continued—						
by trustee and sole benefic	iary to	resig	ning tru	stee		
and representative of compersonal liability—com			ee (cranm	8 OI		920
widow, of legal rights	ibromise	·)·	•	•	922	923
testamentary p	• myriaione	•	•	•	$\begin{array}{c} 322 \\ 922 \end{array}$	924
son, of legitim .	CVISION	•	•	•	923	924
power to attorney to dischar	oe trust	AAR	•	•	51	55
			•	•		
	Mis cellas					
of attorney's actings, by con	stituent	•	•	-		67
debtor under trust deed	•	•	•	•	139	02 4
ground-annual	•	•	•	•		274
reserving servitude	. •	•	•	•	48	275
indenture of apprenticesh	ıр	•	•	•	45 286	47
inhibition .	•	•	•	•	200	224
irritancy under feu-charte	er .	•	•	•	688	224
life policy, expense of mutual claims on dissolut	ion of n	watna	mahin	•	000	124
general claims	non or h	er Lotte	ramp	•		144
real burden .	•	•	•	•	496	502
servitude	•	•	•	•	410	414
Discretionary powers .	•	•	•	•	816	785, 832
Discussion, benefit of .	•	•	•	•	13	100,002
DISENTAIL—	•	•	•	•	10	
					394	
when competent . bars to petitioning .	•	•	•	•	396	
consents required .	•	•	•	•	395	
bars to consenting .	•	•	•	•	396	
deeds of consent .	•	•	•	•	401	402
dispensing with consent	•	•	•	•	397	402
valuing expectancies	•	•	•	•	397	
completion of	•	•	•	•	398	
effect	•	•	•	•	398	
instrument of	•	•	•	•	000	401
Dishonour of bills and notes	•	•	•	•	33	401
DISPONERS—	•	•	•	•	00	
distinction between, and sub	atitutes				228	
conditional	, Surveyor	•	•	•	233	
constructive	•	•	•	•	228	
descriptive	•	•	•	•	226	
fiduciary		-	-	-	230	
nominatim		-		_	225	
require no service .					234	
but purchaser may requir	e unnan	ned fig	r to serv	e to		
fiduciary fiar .	•	•		•	231	
DISPOSAL, powers of .	•		•	•	806	
DISPOSITION—						
by (or to) bondholder.	•			•		331
assignation of l	ond in	fortifi	cation		517	331
to himself unde	r 1894	Act				332
pari passu und			•	•		332
burghs .	•		•	•	295	
firms .	•	•	•	•	294	
legatees .	•		•	•		333-5
liquidators .	•	•	•	•	301	
married women	•	•	•	•	294	324-5
ratification	•	•	•	•		325
						_T _

•
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Disposition—continued—					TEXT.	FORMS.
by (or to) minors .					292	
pro indiviso pro	nrietore	•	•	•	292	325
pupils (tutors)	Pricora	•	•	•	292	320
trustees .	•	•	•	•	296	333-6
	stration	•	•	•	298	355-0
cessi		•	•	•	301	
unincorporated		•	•	•	296	
clauses—	DOWLOO	•	•	•	200	
description $(q.v.)$.		_			307	
boundaries .					308	
general name, prescr	ibing				314	321
referri					314	322
reference, statutory					310	321
common la	w .		•		314	
farm names, etc						320
rental annexed .			•			320
ent ry					304	167
obligation to relieve of	casualties				305	
	feu-duties				305	
1	public bur	dens		. 18	50, 187	
pertinents $(q.v.)$.	•		•	•	315	
rents, assignation of					158	
reservations, etc					203	
building conditions			•	. 20	04, 411	
gable, unused half of	•		•		155	330
minerals	•		•	. 18	39, 203	
real burden, capital sun	n to seller		•		491	328
•		party			491	32 8
annuity		- ·			498	334
warrandice	•		•	. 30	07, 318	319
writs, assignation of	•				304	
property conveyed—						
consolidated fees .	•	•	•	•	350	321
landed estate .	•	•	•			319
pro indiviso shares .	•	•	•		416	325
superiority with list of					153	329
	l feu-duti	es but	substan	tial		
	alties	•	• .	. •	153	329
tenement-house, apport	ioning feu	duty,	repairs,	etc.		322
	dditional c			•		323
	sequent sa	ue	•	•		324
specialties—						990
articles of roup, following	ng on	•	•	•	505	330
bond taken over .	.a malaana :	•		•	535	326
bondholder consenting t					420	326
for duty put wholly on		ge orig	in al oblig	ation	420	327, 335
feu-duty put wholly on	purchaser	•	•	•		253 254
DISPOSITION ex facie absolute		•	•	•		254 478
advantages and disadvanta	ores	•	•	•	472	410
back-letters	*Rco	•	•	•	472	478
competition with bona fide	third ner	tioe	•	•	472	410
	s creditors		•	•	472	
	d dispone		•	•	474	
inhibitor			•	•	474	
1111101001	•	•	•	•	414	

						TEXT.	FORMS.
Disposition ex facie abs	solute—	continu	ed—				
creditor's succession	•				•	475	
extent of security	•		•	•	•	473	
leases by creditor	•	•	•	•	•	477	
debtor		•				476	
minute of agreement	or back	-letter-	_				
unspecified, but lin	nited, ac	lvances					478
specified advances,	where	there is	s also a	bend	and		
disposition in sec			•				479
specified advance, y		sonal o	bligation	a.		•	480
postponed security, h	ow to ef	fect, by	deed			474	478
1 1			diligen	ce		475	
realisation, powers an	d auesti	ions				477	
reconveyance .	. 1			_		472	482
DISSOLUTION of partners	hin (see	Partne	rshin)	•	•		102
Divorce—	шр (оо	1 01 0110	топ.р/.				
guilty spouse forfeits	provinie	me				658	
innocent spouse recei			immedi	atalw	•	658	
except jus relicti	100 HB (n ners.	mmoun	*tory	•	658	
under entail	low	•	• ,	•	• .	443	
		•	•		•	849	
powers of appointmen	16	•	•	•	•	043	
Docquer—		1 :		: 4			
on assignations and	notaria	u instr	uments	in tr	ADS-	944	944
missions of unrecor		veyance	28	•	•	344	344
in notarial execution	•	•	•	•	•	7	8
DOMICILE as affecting-							
personal capacity	•	•	•	. •	• •	750	
service of heirs	•	•	•	•'	•	714	
succession .	•	•	•	•	•	658	
DRAINS	•	•	•	•	•	187	
DUPLICANDS							
amount .	•	•		•	•	209	
capital or income	•	•	•		•	652	
incidence of, if due at	t purchs	ser's en	try			152	
Entails—							
clauses implied by sta	tute	•	. •			39 1	
deed of entail.					•		399
destination .	•	•				388	
disentail $(q.v.)$				•		394	
feudalisation .						391	
heirs-portioners						389	
institute—is he bound	d ?					390	
irritant clause						390	
powers of heir in poss	ession—	_		•			
death duties, to cha	arge				_	393	
disentail .	. 6		•			394	
family provisions, t	o grant				754.	760-2	
provincing (charge			•	,	392	
feus .	oBe		•	•	•	199	•
general debt, to ch	arge	•	•	•	•	462	463
improvement expen	diture	to cham	œe œe	•	•	463	466
lease .	aivui e ,	oo onar	5 ^e	•	•	608	700
sale .	•	•	•	•	•	393	
publication of fetters	•	•	•	•	•	391	
		•	•	•	•	288	
register of, search in	•	•	•	•	• .	390	
resolutive clause	•	•	•	• .	. •	อฮ∪	

					TEXT.	FORMS.
Entails—continued—						
trust directions to entail	•	•	•	•	398	F04 F
service under	•	•	•	•	715	724-5
Entail provisions—					754	700
to widow	•	•	•	•	754 788	788
of heir-apparent	•	•	•	•	755 760	790
widower	•	•	•	•	762	700
younger children .	•	•	•	•	760	790
charging	.•		•	•	392	701 0
settlement of, in child's me	arriage c	ontract	•	•	761	79 1–2
obligation as to descent of	estate	•	•	•	759	
Entail securities—						444
1. heirs in possession.	• .	• 1	•	•	441	444
assignation of improve	ement ex	penditu	re .	•	441–3	446
2. heirs-apparent—					440	
financial aspects.	•	•	•	. •	448	450
different forms .	•	•	•	•	449	456
post-obit	•	•	•	•	453	459
use of inhibition.		.•.	• '	•	451	
subsequent completion	n of title,	, risks	•	. •	450-3	
various special matter	ns .	•	•	•	456	
3. heirs-presumptive .	•	•	•	•	460	
4. on the fee-						
(1) general debt .		•	•	•	462	463
(2) improvement expend		•	•	•	463-6	
bond and disposit	ion in se	curity		•	•	466
the same, with lif			1-house,	etc.		466
for contemplated	improve	ments			464	467
bond of annualre	nt .	•	•	•	464	467
assignation of			•	•	441	446
bequest of .	•	•	•	•	804	
personal searches .		•	•		282	
search in register of entails	8.	•	•	. •	288	
sasine search : " liferent "	securities	з.	•		466	
Entailed superiority—						
consolidation				•	351	
casualty commutation					256	
Entry, term of—						
express clause .					304	
implied					304	
in lease .	•				610	
EQUALITY clauses in marriage	contrac	ts.		•	767	
Equities—						
between debtor and cedent			•		21	
when cedent also trustee	•				654, 889	
assignee of heritable securi	ities affec	eted by			544	
Ex FACIE absolute disposition			n).		471	
EXAMINATION of heritable titl	e <i>(86e</i> Tit	tle)	´ .		179	
Excambion, contract of .						405
apportionment of feu-duty,	casualti	es, etc.			405	
narrative		.,			405	
recording	•				405	
service under	•	-				723
stamp	•	•	-		405	
trustees' power .	•	•			405	
warrandice, real, express a	nd impli	ed.	•		404	
personal .	na mpni		•		405	
personar .	•	•	•	•	200	

						TEXT.	FORMS.
Execution—							
combined with public	ation			•		42	
registration for			•	•		38	
Execution of deeds	•		•			1	
proof under 1874 Act		•	•			2	_
notarial .		•				6	8
by blind persons		•				6	
burghs .	•	•		•	•	6	
companies .		•		•	•	5	
liquidators .	•	•	•	•	. :	302-382	
married women	•	•	•	• .	•	4	
Executors, exclusion of							
personal bonds	•	•	•	•	•	12	400
heritable securities	•	•	•		•	487	489
Expectancy—							
entail, valuation	•	•	•	•	•	397	450
dealings with	•	•	•	•	. 4	448-460	456
life policy .	•	:	:	•	• .	686	697
living person, success	ion to, v	hether o	lealing	compete	nt	23	***
reversionary transact	ions	•	•	•	•	641	665
Expenses—						••	050
bond, clause in	•	•	•	•	•	11	676
cautioner .	•	•	•	•	•	546	485
decree-arbitral	•	•	•	•	•	75	85–6
life policy, discharge	of	•	•	•	•	688	
penalty, what it cover	rs	•	•	•	•	11	
title, of clearing		:	•	•	•	196	201 045
trust, as between cap	ital and	ıncome	•	•	•	653	831, 845
Expiry of legal, as affect Factor, judicial—	ting pre	scription	l	•	•	182–4	
completion of title	_					872-6	
loco tutoris becomes c	\dot{b} . autor	natically	•	•		877	
FACTORIES and commissi	ions (see	Attorne	v. Powe	ers of)		48	54
FARM leases (see Leases)				. ′		608	625
FEE and liferent-							
title						228	
apportionment	•					651	831, 845
Feus—							
contract, constitution	of	•				199	
by fiduciary fiars						199	
heirs of entail			•	•		199	
trustees .		•				199	
alienation, prohibition	ı of	•				202	
building conditions		•			. 2	204, 411	
be	tween su	perior a	nd vass	al		204	
	cc	-vassals				206	
burgage property, wh	ere reco	rded	•			341	
duplicands, "over an	d above,	" or not				209	
glebes .	. '					201	
minerals, reservation	of					203	
monopolies of superio		ts				202	
personal obligation, p	erpetua					208	
pre-emption .			•			202	
redemption .						203	
securities, reserved po	wer in.	to grant				419	439
consent to				•		419	438

					TEXT.	FORMS.
Feu-Charter—						
skeleton			•			211
villa site						211
tenement site		_				214
six building lots (feu-contra	ct)			Ī		217
novodamus	00)	•	•	•	222	223
	ion of	•	•	•	341	220
burgage property, registrati	ion or	•	•	•	941	
FBU-DUTY—					944	051
allocation of, against superior		•	•	٠	244	251
among vassals		•	•	•	249	253, 322
purchase of	•		•	•	153	165, 329
FIDUCIARY fee—						
infeftment in	•		•		232	
no bar to beneficial infeft	ment				232	
use of, in protecting bene	ficial fee	_	_		231	
title from or through fiducia				_	230	* *
service to, purchaser may re		•	•	•	231	
powers by Court to fiduciar	r for	•	•	•	201	
	у паг—				400	
borrowing .	•	•	•	•	429	
feuing .	•	•	•	•	199	
FINANCE Acts		•	•	•	193, 660	
Fire insurance—						
feus					245	213
ground-annuals .						267
heir of entail					455	
heritable securities .				_	418	430
liferents	•	•	•	Ĭ.	810	787
sales	•	•	•	•	154	154
	•	•	•	•	104	101
FIRM—						35
bills and notes by .	•	•	•	•	10	7.2
caution by, to, or for .	•	•	•	•	16	19
contract of co-partnery	•	•	•	•	90	102
heritable securities to and b			•		429	435
property, feudal, cannot be	held soci	o n omin	е.		295	
leasehold, may					295	
Fishings—						
bounding title, extra fines	_				308	
salmon					161, 316	165
trout	•	•	•	•	161	170
_	•	•	•	•	101	
FITTINGS—					154 202	164, 320
sales	•	•	•	•	154, 303	104, 320
securities	•	•	•	•	416	
FIXTURES	•	•	•	•	154	
FLOWERS in case of sale .	•	•	•	•	155	165
Foreclosure—						
advertisements .			•	•	525	
decree					526	
disposition following on						332
exposure	-				524	
infeftment	•	•	•		529	
jurisdiction	•	•	•	•	528	
	•	•	•	•	527	
pari passu creditor .	•	•	•	•	526	
personal obligation of debto	r.	•	•	•		500 E90
petition	•	•	•	•	525	529-532
attorney may present	•	•	•	•	525	
defenders	•		•	•	525	
remit	•	•	•	•	525	
60						

	TEXT.	FORMS.
Foreclosure—continued—		
re-exposure	. 526	
reference to burdens	. 529	
review	. 528	
stamp	. 527	
surplus, certificate of no	. 526	
title indefeasible	527	
Forehand rents.	. 158	
Foreign wills, execution of	3, 4	
Foreshore—	, -	
boundary on, between estates	. 309	
FURNITURE, provision of, in marriage contract	752	771
will.	. 102	823
=== .	. 155	023
GABLE, mutual, in case of sale	. 155	900
disposition with clause regarding		330
GAME lease does not bind purchaser	. 161	
condition of sale contra	•	170
GARDEN, provisions as to, on sale	•	165, 169
General name—		
adoption of	. 314	321
reference to		322
service under	•	723
GLEBE, feuing of	201	
GOODWILL in partnership		103-4-11
GOVERNMENT duties (see Death Duties).		
Grain feu-duty, conversion of	254	254, 260
Grass parks, conditions of letting	. 201	638
GROUND-ANNUAL	261	
		. 200
active title	. 263	
allocation	. 264	070
assignation of allocated ground-annual	•	272
when part of property freed .	•	273
of allocated part only	•	273
augmentation	. 265	
confusio, extinction by	. 265	
contract of	•	266
discharge	•	274
partial	•	274
of money obligations reserving servitudes	•	275
irritant and resolutive clauses	. 263	268
offer to purchase	. 153	166
personal obligation	. 262	270
recording	263	2.0
redemption	. 265	271
remedies	. 263	271
reservation in bond of power to create	. 420	10.00
GUARANTEES, mercantile	. 16	19-20
HABITABLE condition—	100	
statutory certificate	. 162	
Heir of A.—		
disposition to	. 226	
cannot be ascertained till A.'s death	. 227	
Heir of last surviving trustee—		
completion of title by	. 875	
Heritable or moveable—		
conversion or not ·	. 662	
intestacy	. 662	

ERITABLE or moveable-	continued	_		TEXT.	FORMS.
legal rights		ē		. 663	
minor's capacity to test	•	•	•	. 662	
sales		•	•	. 154–7	
securities .	•	•	•	. 416	
ERITABLE property, sale	and nurchs	se of (e	امامک مع	. 146	164
ERITABLE securities—	and parone	OI (81	ic Duite,	. 140	104
agreement for loan .				. 415	
assignation $(q.v.)$	•	•	•	. 543	548
back letter	•	•	•	. 010	440
by (or to) attorney .	•	•	•	. 50-4	434
burgh .	•	•	•	. 424	101
	•	•	•	. 429	
company . fiduciary fiar	•	•	•	. 429	
firm .	•	•	•	. 429	435
heirs of entai	ıı ·	•		. 429	
married wom		•	•		444
minor .	an .	•	. •	. 424	433
		•	•	. 424	494
<i>pro indiviso</i> j trustees .	hrohuewis	•	•	. 416	434
tutor .	•	•	•	. 427	
•	nautica	•	•	. 424	400 =
two or more	parties	•	•	. 421	432–5
consolidation as affecting	.g	•	•	. 352	700
discharge $(q.v.)$		•	•	. 594	599
disposition with consent			•		326
where debt		•	•	. 535	326
by heritable					331
			er 1894		332
	u creditor	under ti	at Act	. 522	332
endurance, agreement f	or .	•	•	•	440
enforcement of—					
adjudication .	•	•	•	. 524	
foreclosure $(q.v.)$.	•		•	. 524	
maills and duties (q.	".) .		•	. 506	
personal diligence .	•	•	•	. 506	
poinding the ground	<u>.</u> .	•		. 512	
sale (see Sale by Her	itable Cred	itor)	•	. 513	
exclusion of executors	•	•		. 487	489
feu, power to	•			. 419	438
fire insurance	•			. 418	430
fittings	•	•	•	. 416	
for cash credit .				. 469	469
future advances (ex	facie absolu	ute)	•	. 471	478
relief				. 483	484
ground-annual, power t	o create		_	420	
heritable, what is? .				. 416	
inhibition against credi	tor .		-	. 284	
	g creditor		-	. 285	
margin		•	•	. 415	
notarial instruments (q, q)	v.)	•	•	. 565	567
over heritable security		tv)	•	. 500	436
pro indiviso shares		~ J / ·	•	•	434
recorded lease .	•	•	•	•	434
_	•	•	•	. 586	
postponement $(q.v.)$.	•	•	•		587
powers, created under	•	•	•	. 420	431
reserved in, to				. 419	438
cre	ate ground		в.	. 420	40-
	prior	debt	•	. 420	y G009
				Digitized b	4 000

				TEXT.	FORMS,
HERITABLE securities—continue	ed ·				
ranking, clauses of real burdens (a.v.)		•		. 421	430
			•	. 491	
redemption $(\overrightarrow{q.v.})$.	•			. 590	593
restriction	•			. 589	590
title deeds, custody of			•	419	
valuation			•	. 415	
warrandice	•	•	•	. 423	
Heritors' assessments .		•	•	. 150	
Horning, when still necessary		•	•	. 39, 40	
House—					
contract for erection of, or o	other bu	ildings	•	•	135
lease of	•		•	. 609	613, 623
liferent of	•	•		. 809	787, 845
habitable condition, certifice	te of			. 162	
submission as to building		•		•	81
Householder, protest of bill b	Dy.			. 33	37
Husband's consent to wife's	deeds ji	udicially	dispense	d	
with	. •	. •	. •	. 294	
HYPOTHEC as affecting sub-ten	ant			. 611	
IDENTITY of property .				. 185	
ILLEGITIMATE children—					
claim for maintenance prefer	able to c	hildren's	successio	n 653	
IMPROVEMENT expenditure—					
bequest of		_		. 804	
charging on fee .				. 463	467
by curator bonis .		•	•	. 465	
fiduciary fiar .		•	•	. 429	
security over	•	•	•	441-3	446
Income—	•	•	•		
apportionment in respect of	time			. 651, 809	836
between cap	ital and	•	•	. 651	831, 845
Incumbrances—		•	•		001,010
is casualty?				. 151	
feu-duty?	•	•	•	. 153	
lease?	•	•	•	. 156	
private knowledge .	•	•	•	. 290, 682	
search of	•	•	•	. 276	
warrandice, exception from	•	•	•	. 423, 683	
Indemnities to insurance com		•	•	. 425, 685	
Indemnities to trustees—	herrice	•	•	. 032	
alimentary beneficiaries				. 884–6	
apportionment of loss.	•	•	•	. 889	
beneficiaries unequally inter	rooted	•	•	000	
classification of	Caveu	•	•	. 883	
	•	•	•	. 883	891
consent only .	•	•	•		031
contingent beneficiaries	•	•	•	. 655, 885	001 8
forms	•	•	•	. 900	891-5
liferenter and fiar .	•	•	•	. 890	
trustee-beneficiary .	•	•	•	. 889	
Trusts Act, 1891				. 886	4 5
INDENTURE of apprenticeship (see App	renticesh	np	. 44	45
INDORSEMENT of bills and note	8.	•	•	. 32	36
INFANTS Relief Act—					
does not apply to Scotland	•	•	•	. 424	
Infertment—				000	
continuous, of trustees	•	•	•	. 236	

•					1	EXT.	FORMS.
INFEFTMENT—continued—			•				
direction, under clause	of	•	•	•	•	241	241
ex propriis manibus .		٠.	•	•		237	
firm cannot be infeft so		nıne	•	•	•	295	
liferent, non-transmissil of constructive fiar	pie	•	•	•	•	238	
		•	•	•	•	229	230
fiduciary fiar . beneficial fiar after	_	•	•	•	•	232	
poinding of ground requ		•	•	•	•	232	
prescription requires .		•	•	•	. 100	512	
security, to discharge, i		tmont n		, 9	. 180,		
survivorship	is inici	omene n	occosai y	*	•	596 238	
Inhibition—		•	•	•	•	200	
acquirenda						282	
assignation of			•	•	•	202	25
					•	286	20
entail securities, to sup	port	•				451	459
discharge of entail securities, to sup when inapplicable	ė					452	100
consent to use of .							459
ex facie absolute dispos	ition, i	nhibitio	n agains	t grante	r		100
as affecting—	•		Ü	U			
further advances		•				474	
realisation .					. 283,	285	
estate affected .		•			•	282	
future voluntary deeds	alone	affected	•		. 283,	284	
heritable creditor—							
assignation or discha	rge aft	er		•	•	284	
selling after .				•	•	285	
search against .		•		•	•	285	
intimation of .		•		•	. 285,		
notice of		•	•	•	•	281	
personal to person inhil	bited	•	•	•		286	
prescription .		•	•	•	. 281,		
registers		•	•	•	•	280	
renewal		•	•	•	•	282	
sequestration — inhibition must be ve	م اسمط					900	
trustee may sell not				•	•	300	
Initials, signature by—	WI CHIS CAL	numg	•	•	•	300	
granter						4	
witness		•	•	•	•	5	
Insanity—			•	•	• '	U	
dealings with spes succe	eei onie					23	
of heir of entail, powers	mav.	or may	not, be	eranted	465.		
Instalments—	·,	oJ	,	B-11111011	100,	•••	
apportionment between	capita	l and ir	come		_	653	
bills and notes payable	by	•	•			28	35
interest on	•	•	•			96	121
Institutes and substitute	8	•	•	•	•	228	_
conditional		•				233	
Insurance							
against death		•		•		686	697
survivorsh		•		•	•	646	
devolution unde					•	442	
fire, purchaser	must e	ffect		•	•	154	
issue	_	•	•	•	•	659	
liquor licence, l	oss of	•	•	•		622	

					TEXT.	FORMS.
Insurance—continued—						
against loss on investr	nents	•				833
name risk	•				455	
INTEREST, disqualification	a of—					
arbiter .	•				72	
witness .					5	
Interest of money-						
assignation of .	_	_	_		546	558
bills and notes			•		29	35
compound .	•	•	•	•	10, 546	•
consignation required	to ston	eoeinst	Durche	 ser	152	
creditor in possession	w swp,	og on my	Purcha		511	
creditors' trust, when	gumlug	•	•		140	
entail provisions	bui piuo	•	•		761	
instalments .	•	•	•	•	96	121
	•	•	•	•		121
legacies .	•	•	•	•	810	
rate	•	•	•	•	652, 810	0.07
trust advances	•	•	•	•	656 , 815	837
warrandice, risk as to		• .	•		544	556
Interruption of prescri	ptive po	seession	•		183	
INTESTACY, to avoid, in	wills	•	•		812	840–2–3
Intimation of assignation	ns					
appointment, deed of,	require	s no int	mation		85 5	
bankruptcy, sequestra	tion and	l cessio (∞ mplet	e without	689, 69 0	
but in registered ti	tles it is	a race	of dilige	nce .	682	
bars to claiming prior			Ū			
competing duty			•		682	
personal knowledge					682	
terms of deed			•		683	
cedent sole trustee					682	
contingent interests,	specialty	zas to	competi	tion with	•••	
trustee in bankrup					682	
debtor also assigner		•	•	•	681	
delegated acceptance		•	•	•	684	
furth of Scotland	•	•	•	•	684	
informal .	•	•	•	• •	684	
	•	•	•		683	
international law		i			003	
recording in sasine re	giater ed	[mi varien	r, in rig	HIM SHECK	040	
ing heritage	•	•	•		240	
registered titles	•	•	•	•	682	
renewing .	•	•	•		685	
sole trustee assigning		•	•	•	682	
tantum et tale not app	plicable	•	•	• •	682	
to ex facie disponee	•	•	•		474	
heir of entail in po		•	•		452	
insurance company	· .		•		683	707
qu orum .					683, 685	
tenant .					239	240
trustees			•		683	
Intimation, requisition, Creditor)	and pro	test (see	Sale by	Heritable	513	520
Irritancy—	•	•	•	• •	010	620
clause of .						214, 268
discharge of .	•	•	•	•		214, 200
	onted ha	· alloost	ion	• •	245	444
ob non sol. can. as aff				mohibitis:-		
subinfeudation, impo	· r verticé ()	, ili reisi	· non to I	· · ·	186	

						****	TODYO
JEDGE warrants .						т ех т. 290	FORMS.
JUDICIAL factors, comple	etion of t	itle	•	•	•	872	
Jus mariti, exclusion of			•	•	•	294	
Jus relictæ, discharge of		ormatic	n sen	arate ad	vice.	923	923-4
as regards personal b			л, сер	arabe ae	1100	12, 13	020-1
Jus relicti does not accr		vorce	•	•	•	658	
as regards personal be		10100	•	•	•	12, 13	
Jus superveniens accresc		•	•	•	•	12, 10	
whether bankruptcy	hars					450	
Land tax, financial year		•	•	•	•	150	
redemption o	· f	•	•	•	•	150	
LAPSED trusts—	•	•	•	•	•	100	
appointment of truste	es by he	neficia	ries `			875	
appointment of trust		ourt	. 100	•	•	861	
		ouses	•	•	•	860	
completion of title by			•	•	•	875	881
completion of title by	trustees		•	•		871	877
Law agents have no pov			•	•	•	69	011
lien .	WC1 00 10	101	•	•	•	419	
LEASES-	•	•	•	•	•	*10	
agricultural .							625, 632
assignation .	•	•	•	•	•	611	020, 002
attorney, power of, to	·	•	•	•	•	011	55
by burghs	Rigin	• .	٠.	• •	•	608	00
granter and grante	o of ar t	<i>ania</i> ah	goluta	dianosi:	tion.	476	
heirs of entail	e or ear	wite an	BUILLIO	dishosi	иоп	608	
heritable creditors	in mosso	mion	•	•	•	510	638
liferenters .	ш ровье	991011	•	•	•	609	000
married women	•	•	•	•	•	608	•
	•	•	•	•	•	608	
minors .	•	•	•	• .	•	608	
pupils .	•	•	•	•	•	608	
trustees .	•	•	•	•	•	609	•
constitution . encumbrance, is it?	•	•	•	•	•	156, 161	167 170
	•	•	•	•	•	610	167, 170
entry implied .	•	•	•	•	•	611	
hypothec . liferent .	•	•	•	•	•	611	
	•	•			•	011	613-4
missives of . notice of termination	•	•	•	•	•	612	013-4
	•	•	•	•	•	012	695 699
of arable farm	•	•	•	•	•		625, 632 638
grass parks .	•	•	•	•			
house	•	•	•	•	•		613, 623 616-9
public-house		1 am 1:a	•	•	•		618
agreement for, co	marandia	i on ne	ence	•	•		622
with licence insur	rance	•	•	•	•		
sheep farm .	•	•	•	•	•		636 634–5
small holdings		. •	•	•	•		
partnership, lease in o	oneract (JI	•	•	•	295	118
firm hold socio nom	ine .	•	• .	•	•	610	
real right .	had 1		.hli	iona hi-			
singular successors, wi	iiri ierse	s and c	nnigat	מוט מווטו	uı.	157, 161	
sporting rights	•	•	•	•	•	161	
sub-letting .	•	•	•	•	•	611	
transmission inter vive		•	•	•		611 612	
mortis ca	usa	•	•	•	•	012	
LEASES, recorded—	and						255 7
assignations of, whole	and par	ı	•	•	•	•	355–7

				TEXT.	FORMS.
Leases, recorded—continued—			•		
notarial instruments .	•	•	•	•	385
registration, effects of.	•	•	•	. 355	
renunciation	•	•	•	•	358
requisites	•	•		. 354	
security over	•	•	•	•	438
assignation of	•	•	•	•	564
discharge of .	•	•	•	•	607
servitude, is lease basis for?	•	•	•	. 409	
LEGAL, expiry of .	• '	•		. 182–4	
LEGAL rights	•	•	•	•	
LEGAL rights as affecting title .	•		•	191–2, 663	
Harring Contract	8	•	•	. 768	
wills .		•		. 804	
discharge of				. 922	923-5
equitable compensation		•		. 804	
forfeiture, limits of .	•		•	. 805	
Legitim-					
collation, questions regarding				. 747	
				. 925	924
equitable compensation	•			. 804	
exclusion, must there be subs	titute	d provisi	ion ?	. 768	
forfeiture, limits of .	•	•	•	. 805	
liferent and fee, liferent forfei	ted			. 805	
vesting failing, claim of				. 647	
"younger children," danger is	disch	arge lin	nited to	. 768	
Lien, law agent's-		•			
common agent barred.		•		. 419	
but only against lender				. 419	
life policy, over	•		•	. 692	
waiver of				. 419	
Liferent					
alimentary, requires trust				. 808	
apportionment as to time				. 809	
between capite	al and			. 651	
assignation of				•	673
double				. 652	
dwelling-house, of .				. 664	838, 845
fee or				. 662	
subject to defeasance if ch	ildren	١.		. 643	
want of taxative words				. 228	
gifts of, in marriage contracts	3			•	778
wills .				. 809	831, 845
under a power					822
infeftment cannot be transmi	tted			. 238	
notarial instrument on liferen		osition			366
power to restrict beneficiary t		•		. 850	785
renunciation of .		•		. 858	858
restriction on creation of		•		. 806	-
Light and air—	*	-	-		
rights of				. 190	
servitude		•	•	. 150	412
Liquidator—	•	•	•	•	
deeds, execution of .				. 302, 382	
notarial instruments, irredeen	nahla	riohte	•	. 302, 302	38 3
redeems			•	. 502	572
power to refer .	-010	•	•	. 69	0,3
bound to reter	•	•	•	. ,00	

						TEXT.	FORMS.
Liquidator—continued							
power to sell heritag		•				301	
title, completion of,	unne	ecessary	•		•	302	
Loan, contract of		•	•			415	
MACHINERY, sale of			•			157	165
security over .		•				416	
MAILLS and duties—						ž	
accounting, rules of					•	510	
competent, when an	d to	whom				507	
pari passu creditor		•				507	
postponed creditor						508	
petition in sheriff co	urt						508
power to lease					_	510	
petition for .	•			-			511
proprietor in natural	lnos	session		_		508	
real burden, not con	meta	ent for	•	•	•	497	
summons in court of			. •	•	•	101	509
MANDATE-	. 606		•	•	•		000
	e ee	signation				130	132
book debts, instead)1 US	gigingrion	•	•	•	93	102
partnership .	•	•	•	•	•		
service .	•		•	•	•	712	70.04
MARCHES, submissions			•	•	•	900	79, 84
MARCH stones as bound			•	•	•	309	
MARK incompetent as a	ugna	ture .	•	•	* •	4	
MARRIAGE contract—							
capacity of parties	•		•	•	•	750	
date, what is antenu			•	•	•	768	
discretionary powers		•	•				785
insolvency of husban	ıd	•	•		•	750	
legal rights .					•	768	
Policies of Assurance	Act	ե, 1880		•	•	793	769
postnuptial .		•	•			$\bf 792$	
regulating law		•				768	
revocation of will						76 8	•
trustees' powers and	imn	nunities (see	Wills)			767	
unilateral deed			. '			750	
	n			e 117.			
	rov	isions by H	usoama j	or w	aow		
aliment, interim	•	•	•	•	•	751	770
alimentary clauses		•	•		•	22, 650	
annuity .		•	•		•	752	
entail powers .		•	•	•	•	754	788–90
fee-simple estate	•	•				758	788
funds, transfer of		•	•			754	
furniture .		•				752	771
life insurance .		•				753	776
liferent of house		•				751	787-8
mournings .		•				751	770
security, extent and	rank	king .				753-8	
*			~			** .	
	_	Husband for		ren.	1. The		
entailed estate, oblig	atio	n as to desc	ent of	•		759	
fee-simple estate, des	tina	tion or settl	\mathbf{lement}		•	759	788
title, completion of					•	760	
• •	9	Younger (or	anhola\	Child-	on		
	4.	i ounger (or	wiiois)	Juur		H00	700 *
entailed estate	•	•	•	•	•	760	790-1
fee-simple estate	•	•	•	•	•	762	788

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MARRIAGE contract—continued—	TEXT.	FORMS.
other forms	762	
security, ranking with widow	753	
security, familing with widow.	100	
Provisions by Wife		
entailed estate	762	
fee-simple estate	763	
general conveyance	763	779
carries only estate vesting during marriage .	763	• • • •
capital sums	764	
different kinds of, and different results	765	
exception of small legacies, etc	764	780
legacies to wife on condition that not to pass to	101	100
marriage trustees	764	
	764	780
how this may be effectuated		100
savings and investments of excepted property .	765	
trust purposes	766	
Provisions by Third Parties		
•		
disposition to spouses in liferent and children in fee .	767	
equality clauses	767	
Government duty	767	
income, obligation by wife's father for	767	
<u>_</u>		
Forms .		
short form based on Married Women's Policies of		
Assurance Act	769	
obligation to maintain policy.		
destination of policy moneys. discharge of legal rights.		
another short form without a trust	770	
alimentary annuity to widow.		
interim aliment and mournings.		
furniture absolutely. alimentary liferent of wife's estate to husband.		
discharge of legal rights.		
provision of small definite sums to children in lieu of legitim.		
another form without a trust, including substantial		
provisions for children	772	
obligation to subscribe to annuity fund.		
keep up policy.		
furniture.		
 obligatory provisions for children. wide powers reserved to father. 		
hotchpot clause.		
wife's estate to husband in liferent and children in fee.		•
powers reserved to wife.		
full form, with two trusts	775	
alimentary annuity to widow, restrictable on re-marriage.		
mournings and interim aliment through trustees.	•	
furniture absolutely to widow.		
obligation to maintain children.		
renunciation of husband's rights.		
assignation of life policy by husband to trustees. full obligation for maintenance of policy	•	
powers of sale, surrender, etc.		

			TEXT.	FORMS.
MARRIAGE contract—continued—	•			
full form, with two trusts—continued	•			775
trust purposes—				
 expenses. income, if any, during husband's l 	1:60			
3. income during widow's survivance	J. 1116.			
4. capital to children and issue.	•			
5. resulting trust for husband.				
general conveyance by wife to trustees. exceptions.				
trust purposes—				
1. expenses.				
2. wife's liferent.				
 surviving husband's liferent. capital to children and issue. 				•
5. resulting trust for wife.				
exclusion of rights of husbands of female be	neficiarie	.		
spouses' legal rights.			* *	
legitim. trustees' powers and immunities.				
form containing the provisions on one side	onlv		•	782
settlement by trustees of wife's father		•	783	782
postnuptial settlement			792	794
MARRIED women—		-		
alimentary protection		424,	689, 766	
bills and notes by		. ′	30	
disposition by and to			294	325
heritable security by and to			424-7	433
husband's consent judicially dispensed with	h.		294	
lease by			608	
marriage trust, protection under, without	alimen	tary		
clause	•	٠.	424	
legal rights, exclusion of			294, 427	325
earnings, savings, and investments of separa	ate prop	erty	294	
onus of proving that not settled .	•		765	
property acquired after judicial separation			294	
Policies of Assurance Act, 1880 .	•		793	
wife may not sell policy under .	•		689	
ratification	•			325
refer, power to	•		68	
signature by maiden name	•		4	
witnesses, instrumentary, may be .	•	•	5	
MARRIED Women's Policies of Assurance Act	•		689, 793	769
MARRIED Women's Property Acts .	•		294	
Measurements—				
collision between, and boundaries or plan	•	•	310	
MINERALS—			071	
lease, recorded, of	٠.,	;	354	
profits (landlord's or tenant's) as between	capital	and	050	
income	•	•	652	
reservation of	•	•	203	
is it objection to title of house?	1 .	•	189	
superiority with reserved minerals, risk on	1 Saie	•	154	
Minors—			900	
disposition by and to	•	•	292	
heritable security by	•	•	424	
lease by	•	•	608	
quadriennium utile	•	•	292	
refer, power to	•	•	68 6 62	
testamentary capacity	•	•	004	
				_

MINUTE of consolidation (see Consolidation) .	. TEXT.	говия. 352
MINUTE or missives of sale of heritage .	. 146	164-8
1	. 302	104-0
See Articles of Roup.	. 502	
MINUTES for summary warrants—		
	. 39	41-2
Conveyancing Act, 1874 Personal Diligence Act MOURNINGS in marriage contract	. 39	40-1
Mournings, in marriage contract	751	770
NAME—	. 751	770
- ·	. 226	
change of, authority unnecessary		
except in case of notary	. 226	400
condition as to, in titles	. 649	400
construction of, not necessarily surname .	. 400	
failure, effect of	. 649	
insurance against risk	. 455	
protection under entails	. 442	
but not in case of prospective heir .	. 455	
vesting as affected by	. 649	
errors in	. 226	
married woman may sign her maiden .	. 4	
Nominee of purchaser, must seller dispone to?	. 318	
Notarial execution	. 6	
blind persons	. 6	_
_ docquet	•	8
Notarial instruments—		
Irredeemable Rights		
•		
attestation	. 364	
burdens, reference to	. 362	
consolidated fees	. 361	368
deduction of title	. 364	
description of property	. 360	
direction, clause of	. 241, 364	
disposition, specification of general	. 362	
nature and function	. 359	
necessary, when	. 359	
part-sale, after	. 362	36 8
prescription, is n. i. sufficient without warrants?	. 182	
probates, etc., on	. 363	
survivorship	. 364	
warrants of	. 360	
assignee of general disponee .		375
general disponees called as a class	. 375	376
legatees unnamed		374
of residue		374
in liferent and fee	•	373
liferenter	•	366, 373
liquidators	. 382	383
pro indiviso proprietors	•	377
trustees, assumed		370
bankruptcy, cessio	. 380	381
sequestration	. 379	380
trust deed		382
marriage contract		365
no conveyance to	. 371	372
substituted		372
	-	

					TEXT.	FORMS.
NOTARIAL instruments—continue						
in favour of trustees, testame		•	•			366
wife in liferent u	nder m	arriage	contrac	t.		366
completing title to—						
assignations of unrecorded	convey	ances	•	•	343	384
indefinite property.	•	•	•	•		374
leasehold rights .	•		•	•		385
<i>pro indiviso</i> shares .	• .		•			368, 377
property subject to real bu	rden	•	•			369
two properties .	•	•	•	•		367
Н	eritable	Securi	ties			
					ECE	
narrative of bond .	•	•	•	•	565	
Tran	ısmissio	n inte	r vivos			
heritable or moveable inter vi	2200				566	
in favour of assignee under de		furthe	· r nurna		200	567
assumed trustees		1 al one	i purpos	<i>7</i> 0.		568
liquidators	••	•	•	•	,	572
original creditor	•	•	•	•		567
trustees in bankı		ceesio	• .	•	570	501
u deces in banki	upwy,		tration	•	570	570
		trust		•	570 570	
		trust	ieeu	•	510	571
Trans	miss io1	ı morti	s causa			•
alternative methods, vidimus	of				572	
confirmation of executors					574	
heirs, heirs of provision					576	
in favour of assignees, genera	l					578
special						582
executors-dative			•			582
nomina		-		-		576
heir .		-	-	Ţ.		582
universal legatory	7		•			577
on adjudication .		_				580
bond and adjudication		·				581
leasehold security .	-		_	·		584
letters of administration of	r proba	tes		·	575	001
several bonds .	Proce			Ť	0.0	579
security partly extinguished	ed.			•		583
unrecorded securities				·		583-4
	•	•	•	•		000 1
	Real 1	Burden	8			
necessity for, whether any					495	
warrants, what are required?	•	•	•	•	494	
in favour of executor .	•	•	•	•	101	502
trustees .	•	•	•	•		500
series of	records	d trans	emissions	•		500
testator			311110010112	•		500 501
Note, promissory (see Bill)		٠.	•	•	27	35
Notice—	•	•	•	•	41	JJ
					209	707
assignation of life policy	•	•	•	•	683 336	707 337
change of ownership .	•	•	•	•		337
dissolution of partnership	· of	•	•	•	98	
prior incomplete right, effect	UΙ	•	• •	•	290, 682	
Noting of bills and notes	•	•	•	•	33	

					TEXT.	Porms.
Novodamus .			•		222	223
burgage feus .	•	•	•		342	}
Objections—						
to service, stated in p	etition	•	•		716	
title, time for	•		•		195	
Occupier, removal of	•	•	•		158	170
OFFERS to purchase—						
endurance and recal	•	•	•		147	
feu-duties .	•	•	•	•	153	
garden .	•	•	•			165
ground-annuals	•	•	•		153	
house for occupation	•	•	• '		•	164
landed estate .	•		•			165
manufacturing proper	ty	•	•			165
salmon fishings	•	•	•		. 161	
tenement for investme	ent	•				164
part of .	•	•	•		162	
unfinished property	•	•	•		162	
OMNIBUS security	•	•	•		421	-
ORKNEY, searches	• .	•	•		. 277	ĺ
PARI passu bondholder-	_					_
in possession.		•	•		507	
purchase by .	•	•			. 527	
sale by .	•	•			. 522	-
_ · disposition on		•			•	332
Partnership						
appointments held by	partner	8			. 94	
arbitration clause		•			. 102	
assignation of partner	's share	•			. 98	
bankruptcy .	•				. 94	
business, nature of	•	•			. 90)
capital, shares of	•				. 90)
and income	•				. 92	2
capitalising profits	•				. 92	
conveyances of prope	rty		•	•	. 97, 294	L
death		•	•	•	. 94	Į.
diligence against part	ner's sh	are			. 9	5
dormant partner	•		•		. 98	-
drawings by partners			•	•	. 99	2 105
endurance .	•			•	. 90	
at will, wh	at is cor	ısistent	with ?	•	. 90, 10	
firm name .	•			•	. 9	
goodwill .	•	•	•	•		0 103-4-11
gratuitous services		. '		•	. 94	-
guaranteed minimum	share	•		•	. 9	
interest on capital	•	•		•	. 9:	
instalmen	it paym e	nts		•	. 9	
profits instea	ıd of, on	dissolut	ion	•	. 9	
introduction of new p		•	•	•	. 9	
liabilities, transmission	on of, be	tween ol	d and r	new firms		
limitations of manda		•	•	•	. 9	-
marriage of female p	artner	•			. 9	
notice of dissolution	•	•	•		. 9	-
premium, return of	•			•	. 9	-
partners' whole time		•	•	•	. 9	
profits, share of, to e	xecutors	for good	lliwi		. 9	
realisation .	•		•	•	. 9	5 107

_	TEXT.	FORMS.							
Partnership—continued—	101	100 110							
restraint of trade	101	103, 112							
salaries of partners	92								
shares of capital and profits different	91								
stamp duty questions	97	00							
submission regarding accounts		80							
decree-arbitral therein		86, 87							
winding up	94	106-9							
Forms (and see above)									
between two partners		102							
among three		108							
new business, equal shares		102							
going business		103-4							
unequal, minimum, and increasing shares		104							
fuller form		105							
farmers		112							
medical men .		110							
discharge, mutual		124							
dissolution, agreements for		121-4							
extension, minute of		120							
lease in gremio of co-partnery deed		118							
securities by and to firm	429	435							
PASTURE farm—									
lease of	٠,	636							
legal terms of payment of rent	158	•							
Prinality—									
in bonds	11								
decrees-arbitral	75								
Personal right under 1874 Act—	••								
common law, and statutory alterations	730								
completion of title under s. 10	731								
first heir, incompetent	731								
second or subsequent heir, optional if service	,01								
possible	731	734							
heirs portioners	.01	738							
disponee of unserved heir—		100							
	732	735							
intervening heir alive dead	732	735							
	1.02	735							
testamentary trustees		737							
partial		739							
	733	100							
consequences of vested right	733								
infeftment	732								
procedure	733								
proof · · · · ·	100								
PERTINENTS—	316-7								
bounding title, whether always fatal	316								
express clause advisable	317								
possession	317								
prescriptive title	317								
rights incapable of alienation .									
which require express alienation	316								
cannot be reserved	316								
PHYSICIANS— contract of co-partnery between		110							

					TEXT.	FORMS.
PLACE— in testing clause, un	necessarv				1	
PLAN—			•	•	-	
collision between bo	undaries a	nd			310	
Poinding, assignation						25
the ground		ble secu i	rities		512	
•	real bu		•		497	503
	as prelimi	nary to	adjudio	ation .	497	
Policies of life assurar	ice—					
articles of roup	•	•	•	•		69 7–8
assignations .	•		•		607	699
admission of age back-letter .	•	•	•	•	687	706
bankruptcy .	•	•	•	•	689	100
bonuses .	•	•	•	•	686	
	•	•	•	•		(444-7,
bonds over	•	•	•		696–7	700-3
certificate of title					692	, ,,,,
death duties .	•				69 0	
death, proof of					687	
deposit .					691-3	
discharge, expense o	f .				688	
English law .	•				683 , 693	
indisputability	•	•			687	
informal security	•		•			693
inquiries .	•	•	•	•	691	
insurable interest	•	•	•		687	
international law	•	•	•	• •	683, 693	707
intimation .	•	•	•	•	683 691	707
lien lost policies, indemn	ition	•	•	•	692	
marriage contract pi		•	•	•	032	769, 776
Married Women's Po		•	•	• •	689, 793	769
set-off by company	110100 1100		•	•	691	
survivorship policies	•	•	•		646, 697	
undelivered documen					692	
world-wide licence	•	•	•		687	
1 4					coc =	(444-7,
loan transactions	•	•	•	•	696–7	700_3
assignation						704
postponement	•		•			588
discharge	•		•			605
sales	• .				694–5	697_9
re-purchase agreer	nent .				400	705
trusts .		•		•	689	
Possession—					183	
explanatory . prescriptive .	•	•	•	•	183	
of pertine	anta	•	•	•	317	
POSTNUPTIAL settlement			•	•	792	794
Post obit .	· ·				449	459
POSTPONEMENT of secur	ities—	•	•	•	1.5	100
annuity, of present a		arrears	of		418	589
catholic security			•		586	
consents required		•			586	
clauses of .	•				422	549, 588
effect of, on other sec	curities, a	nd vice t	ersa		586	
heritable security		•				587
						T

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5		_			TEXT.	FORMS.
POSTPONEMENT of securities-			_			
heritable security incorpor	ated in	new secu	ırity			588
life policy, security over	•	•		•		. 588
warrant of registration	•	•	•		587	
Powers—						
appointment $(q.v.)$.					848	856
attorney $(q.v.)$.					48	54
· ·- ·					010	773,785
discretionary under trusts	and de	stination	8.	•	816	788,832
entail $(q.v.)$	_	_		_	754	, ,
securities under	·				420	431-2
trustees' (see Wills) .	•		•	•	816	832-5
Pre-emption—	•	•	•	•	010	002-0
company's, of its shares					125	129
superior's	•	•	•	•	202	125
as affecting sale	•	•	•	•	202	
Premonition by debtor—	•	•	•	•	200	
heritable security .					590	E 0.9
	•	•	•	•		593
personal bond .	•	•	•	•	11	477
cash-credit	•	•	•	•	400	471
real burden	•	•	•	•	496	
Prescription—						
land rights, positive .	•	•	•	•	180	
adjudications	•	•	•	•	287	
inhibitions		•	•	•	281-7	
consolidation by .		•	•	•	35 0	
Printed deeds		•	•		1, 2	
Pro indiviso proprietors—						
disposition					416	325
notarial instrument						368, 377
security					416	434
Probates						
notarial instruments on, irr	redeem	ble righ	ta.		363	
		le rights		_	575	
PROMISSORY notes (see Bills)			_		27	35
PROPERTY tax, financial year	•	•	•	•	150	•
Propriis manibus infeftment	·	•	•	•	237	
Propulsion—		•	•	•	201	
entail, petitions and consen	ta				396	
infeftment, want of, cured		•	•	•	452	
Prorogation of submission	υy.	•	•	•	77	83-4
Protest of bills and notes	•	•	•	•		
	•	•	•	•	33	36
Public house—						C1C 00
leases of	•	•	•	•		616-22
agreement for .	•	•	•	•	000	618
licence insurance .	•	•	•	•	622	622
Pupil—						
disposition on behalf of, an	d to	•	•	•	292	
lease on behalf of .	•	•	•	•	608	
securities		•	•	•	424	
QUADRIENNIUM utile .	•	•	•	•	292	
RANKING, clauses of—						
assignations			•			549
bonds	•	•	•		421	430
RATIFICATION by married won	nan	•			294	325
REAL burdens						_
advantages and disadvanta	ges				497	
61	J				*	
						

		TEXT.	FORMS.
REAL burdens—continued—			
constitution—			
ad factum præstandum	•	491	
amount	•	491	
creditor		491	
general disposition and notarial instrument	•	492	369
petition under 1874 Act			739
disposition creating			328
for annuity			334
dispositive clause, must be in		492	
intention, express, to affect property	_	492	
publication	-	492	
transmission inter vivos—	•		
assignation, forms of			498 -9
effect of unrecorded restriction or discharge	•	493	200 0
inquiries of the debtor	•	493	
transmission on death, intestate	•	493	
testate	•	494	
	•	494	500-2
notarial instrument, if and when necessary .	•		000-Z
warrants	•	494	200
under burden of	•	492	369
enforcement of, remedies	•	497	700
summons of poinding ground		400	503
premonition	•	496	500
restriction	•	496	502
extinction and discharge	•	496	503
Reconveyance—			
by ex facie absolute disponee	•	472	482
REDDENDO, changes in—			
attorney, power of, to make	•		55
allocation against superior		244	251
relation to irritancy ob non sol. can.		245	
among vassals		249	253-4
of taxed casualty		250	
carriages, commutation	_	254	255
casualties, discharge		255	259
commutation	•	256	259
conversion of grain to money	•	254	254, 260
	•	243	201, 200
REDEMPTION—	•	210	
casualties		255	259
	•	203	200
feu, power to superior to redeem	•	265	271
	•	200	211
heritable securities—		590	
by whom	•		
conditions	•	591	
consignation	•	592	F00
notarial certificate	•	FA-1	593
notice—to whom?	•	591	593
land tax	•	150	
real burden	•	496	
Reference, description by—			
common law	•	314	
statutory		310	321
may be to invalid deed		312	
REGALIA		316	

				TEXT.	FORMS.
REGISTERED titles— competition with trustee in bank	mintar			682	
REGISTERS—	rupwy	•	•	002	
burgh, list of				340	
entails	•	•	•	288	
	•	•	•	280	
personal	•	•	•	276	
property	•	•	•		
REGISTRATION of deeds	•	•	•	38	
decree-arbitral .	•	•	•	75	
bar to adding designations .	•	•	•	2	
RBI interventus—					
apprenticeship	•	•	•	44	
execution of deeds	•	•	•	9	
feu	•	•	•	199	
lease	•	•	•	609, 610	
marriage contract	•	•	•	. 9	
sale	•		•	147	
Relief—					
bonds of	•	•	•	483	484
and disposition in secur for cash-credit obligations of . title to .	ity .	•	•		484
for cash-credit .	•	•	•	483	486
obligations of		•	•	3 05	
title to				305	335
is it communicable to sub-v	assals ?			261	
of trustees (see Indemnity) .				883, 898	891, 912
REMITTING charges, liability for .			-	10	•
Removal—			_		
exclusion of executors.				487	489
occupant on sale				158	170
tenants, notices to				612	
RENTAL incorporated in disposition	•		•		320-9
Rents-	•	•	•		
apportionment between seller an	d purchas	er .	_	158	167
legal terms: forehand and back	hand		•	158	= -, -
RENUNCIATION—	ilana .	•	•		
leasehold					358
liferent	•	•	•	858	85 8
Repairs—	•	•	•	000	000
apportionment of, or otherwise				150	323
clause in disposition of tenemen	t hanga	•	•	100	323
REPAYMENT—	LIGUSE	•	•		020
heritable security		•		590	593
nericable security	•		•	11	030
personal bond	•	•	•	496	
real burden	· .	•	•	430	705
RE-PURCHASE, agreement for, of life	e poncy	•	•	100	105
RESERVATIONS in title	•	•	•	188	
of minerals	•	• •	•	203	
RESIGNATION ad rem.—				. 940	
consolidation by	•	•	•	349	
novodamus, preparatory to .	•	•	•	223	
RESIGNATION of trustees—				0.04	
executors	• •	•	•	864	
non-gratuitous trustee .	•	•	•	863	
sole trustee	• •	•	•	864	
intimation	•	•	•	865	
divestiture	•	• •	•	865	
forms	• •	• •	•		868–70

				TEXT.	FORMS.
RESTRAINT of trade .		•		101	112
RESTRICTION—					
in title		•		188 , 2 04	
co-vassals		•		206	215
must qualify infeftment		•		411	412
of security for debt .		•		589	590, 600
entail provision	٠.	•		757	
feu-duty		•		249	252
real burden		•	•	496	502
Reversionary interests—					
alimentary clauses .		•		650	
annuities		•		651	
appointments under powers		•		651	
appropriation of investments				651	
articles of roup .		•	•		665
assignation of legacy .		•			666
liferent.					673
specific heritage					673
residue.		•			667
share of,	vested.				667
·	contingen	t.			669
	with surv				670
	without	. *			670
various interests	in variou	s funds			671
bankruptcy, effect of, defeasib	le interesta	3.		646	
	nt interes			646	
capital and revenue		•		651	
claims against the estate				653	
beneficiary-	_		•		
debts		_	_	653	
indemnit	ies .		•	654, 883	
	on accou	nt .		655	
intere	•			656	
set-off				655	
trusteesh	ip .			654, 889	
classification (see Vesting)				641	
conditio si institutus		-	•	656	
testator .		•	•	656	
contingent interests—	•	•	•	•	
adjudication excluded		_	_	646	
assignation competent		•	•	646	669
bankruptcy does not carry:	vesting o	rder .	•	450, 646	
indemnities affecting			•	654, 885	
life assurance, amount and	terms .		•	647	
survivorship assigned or res			•	014	670
qualifications o	f .		•	647	0.0
death duty			•	660	
domicile	•	•	•	658	
divorce	•	•	•	658	
future births	•	•	•	659	
heritable or moveable	•	•	•	662	
interest on advances	•	•	•	656	
intimation $(q.v.)$.	•	•	•	681	
issue, insurance against .	•	•	•	659	
legal rights	•	•	•	663	
liferent, assignation of	•	•	•	000	673
of dwelling-house	•	•	•	664	010
or amountaine.	•	•	•	UU-X	

				TEX	r. Forms.
Reversionary interests	-continue	d			
liferent or fee		•	•	. 66	2
mutual wills .		•		. 66	4
purchases by trustee	3	•		. 66	4
security over vested	interest .	•		•	674
conting	ent interes	t and polic	у.	•	676-9
	econd loan		•	•	680
assignation		•	•	•	680
discharge		•		•	681
RIGHT of way .		•	•	. 41	
River as boundary				. 30	8
Road-					
boundary .		•	•	. 30	9
construction, cost of		•		. 18	7
servitude .		•		. 41	0 410
Roof, maintenance of				. 160, 18	8
Ross and Cromarty, sea	rches .	•	•	. 27	7
SALE and purchase of h	eritable pr	operty—			
allocation of feu-duty	·	· .		. 15	3
alterations intended l	y purchas	er .	•	. 14	9
annuity affecting pro	perty .		•	. 14	9
apportionment of ren	t and oute	oings .		. 15	0 167
articles of roup-	J	Ü			
by bondholder					175
proprietor			•		171
short form			•		174
when title i	s to be gro	und-annual		. 15	
				. 15	
superiority			٠.	. 15	
bonds, arrangements	regarding	•'		. 15	
by heir of entail		•		. 39	
heritable creditors	(see below) .	•	. 51	3 175
liquidators.			•	. 30	
trustees .		•	•	. 29	6
cessio .				. 30	ĺ
sequestration				. 29	
private barge	ain .			. 29	
casualties .				. 15	1 170
change of ownership,	notice of		•	. 15	2 170
consignation .				. 15:	2
custody of deeds				. 15	3
doubtful points on tit	le, duty to	disclose		. 14	3
expenses of clearing t	itle .			. 19	6
feu-duty, allocation of				. 153	3
fire, fire insurance				. 150-	4 167
fishings .				. 16	l
fittings .			•	. 15	
flowers .	•			. 15	
gables .				. 15	5
heritors' assessments		•	•	. 150	
interest on price			•	. 15	
jurisdiction .				. 14	
leases .				. 156, 16	
machinery .		•		. 15	
occupant, removal of		•		. 15	
of feu-duties .		-		. 15	
ground-annuals		•		. 15	
9	•	•	•		

Care and numbers of basisable		L		TEXT.	FORMS.
SALE and purchase of heritable	proper	ty—	-conuntaea—	•	164
of house	•	•	•	•	164
landed estate	•	•	•	•	165-6
taking over debt	. •	•	•	•	168
farm stoc		•	•	•	169
furniture	-	•	•	•	169
leasehold	•	•	•	•	169
manufacturing property	•		•	• .	165
salmon fishings .	•		•	. 161	165
tenement			•	•	164
probative writing required	•		•	. 146	
rei interventus .	•		•	. 147	
rents			•	. 158	167
roof, maintenance of .			•	. 160	
repairs				. 150	
searches				. 161	170-5
stipend			_	. 150	167, 216
teinds.				. 162	,
time, limit of, for acceptance	•	·	•	. 147	164
"title as it stands"	•	•	•	. 163	101
unfinished property .	•	•	•	. 162	
use intended by purchaser	•	•	•	. 149	
Sale by heritable creditor—	•	•	•	. 170	
advertisements .				. 515	
	•	•	•	. 517	175
articles of roup .	· - •:	•	•	517	331
assignation of debt in fortific	RUON	•	•		331
bar	•	•	•	. 299	
by assignee	•	•	•	. 515	700
pari passu bondholder	•	•	•	. 522	523
combined sale	•	•	•	. 518	
consignation	•		•	. 519	
certificate of no surplus for	r.	•	•		522
delay	•	•	•	. 517	
depreciatory conditions			•	. 517	
notices, to whom?	•		•	. 513	
address unknown			•	. 514	
partial sale				. 518	
place of sale	•		•	. 518	
schedules of intimation, etc.			•	•	520 –1
SALE of book debts (see Book D	ebts)		•	. 130	131
SALE of shares—	,				
calls			•	. 125-6	128-9
conditions of sale .	•		•		126-8
expenses				. 126	
pre-emption			-	. 125	129
rejection		·		. 125	129
restrictive regulations.	•	•	•	. 126	120
time for settlement .	•	•	•	. 126	
warrandice	•	•	•	. 126	
Salmon fishings—	•	•	•	. 120	
				. 309	
boundaries	•	•	•		
bounding charter .	•	•	•	. 308	300
missives of sale .	•	•	•	. 161, 316	165
SEA boundaries	•	•	•	. 308–9	
SEARCHES-				000	
agreement to dispense with	•	•	•	. 289	
burdens not disclosed by	•	•	•	. 290	

					TEXT.	FORMS.
Searches—continued—					222	
delivery of .	•	•	•	•	. 289	
burgage .	•	•	•	•	. 280	
entail	•	•	•	•	. 288	
obligation for .	•	•	•	•	. 288-9	
personal .	• .	•	•	•	. 281–7	
property private knowledge	•	•	•	•	. 276–80 . 291	
SECURITIES—	• .	•	•	•	. 291	
over book debts					. 130	133
entailed estates	<i>1999</i> Ente	il Secui	· ritios)	•	. 441	444
heritable proper				· ies)	. 415	430
securit			Document	103)	. 437	436
leaseholds		•	•	•	. 101	438
life policies	•	•	•	•	. 686, 696	700
reversionary inte	rests	•	•	•	. 641	674
SEQUESTRATION—	7.0000	•	•	•		0,1
arbitration in .	_	_	_	_	. 69, 76	
competition with-	•	•	•	•	. 00, .0	
assignee of continge	nt inter	est		_	. 682	
ex facie absolute di	sposition	1	•		. 474	
inhibition .	· Position				. 285	
registered titles	•	•	•	•	. 682	
debt paid in ignoranc	A	•	•	•	. 691	
notarial instrument, i	rredeem	able	• •	•	. 379	380
	edeemab		•	•	. 570	570
sale of book debts				•	. 130	0.0
heritage					. 298	
	rivate ba	roain	•		. 299	
personal estate		. 8		•	. 689	
tantum et tale.			•	•	. 450, 682	
vesting order .	•		•	•	. 450	
Service—	•	•	•	•		
ancestor's infeftment					. 713	
character of heir: err		•		•	. 710, 711	
combined services				•	. 714	
description .					. 712	
disponee requires no			•	•	. 234	
but purchaser may	require.	to fidu	ciary fia	r	. 231	
domicile .			. •		. 714	
general and special, n	ow inter	change	ble		. 709	
induciæ .	•	. ~	•		. 716	
jurisdiction .					. 714	
mandates .			•	•	. 712	
objections to petition				•	. 716	
petition, contents of			•	•	. 712	
procedure .		•	•	•	. 716	
proof		•	•		. 716	
propinquity .			•	•	. 713	
transmissibility		•		•	. 709–10	
-	General	Service	(1) as i	Heir-at-l	aeo	
by eldest son .						717
of eldest	. son	•	•	•	•	717
second son, the eld		heat	•	•	•	717
daughter, only chi	ly rer nerrif	s ubau	•	•	•	718
		· more	•	• .	•	718
two daughters, he	rs-horne	TIGIA	•	• •	•	110

				•	TEXT.	FORMS.
Service—continued—			•	•		
by daughter and grandson, l	ieirs-porti	ioners	•			718
daughter, all others dead		•	•			718
immediate younger broth	er	•	•	•		719
father	•	•	•	•		719
(2)	As Heir	of Provi	nion			
eldest son as heir-male		_	_	_		719
grandson through a daug	hter as h	eir-femal	e	•		719
eldest daughter under ex						720
son and daughter as child			•			720
•	2. Specia	l S ervi ce	!			
eldest son	•					720
in two properties, decease	d infaft	under	noterie	i		120
instrument, separate extr		under	1100ai ia	•		721
by heir of provision .	arous	•	•	•		722
where part of property has h	oen sold	•		,		$72\overline{2}$
under excambion part	has blos	nart. sco	mired	•		723
lands have a statutory			14	•		723
under an entail .	Borroran		•	•		724
•	•		·	•		
3. Combined	l Special	and Gen	eral Ser	vices		
by heir of line .	•			•		724
provision .		•	•	•		724
entail .		•				725
	_	_				
	Pro	of				
what must be proved .					725	
proof in petition by eldest so	n					726
	r, all othe	rs dead		•		726
•	-					
	Trust S	ervices		•		
substitute trustee under des	tination	•			726	727
new	appoint	ment		•	727	728
heir of last trustee under 18	74 Āct	•		,	727	728
Servitude—						
building conditions .	•				411	412
bounding title .		•	•		407	
constitution	•	•	•	•	407	
discharge			•		410	414
extinction			•	•	408	
leasehold rights .	•	•	•	•	409	
light by constitution .	•	•	•			412
reservation .	•	•	•	•		413
prescription still forty years	•	•	•	•	407	
purchaser, how affected	: ,	•	• .	•	190	
reservation of, on discharge	of ground	-annual		•		275
revival or not on severance of	of domina	nt and s	ervient .	•	408	413-4
way, right of .	•	• , .	•	•	410	410
warrandice, exception from	•	•	•	•	409	
SET-OFF (see Compensation)	F.,				200	
SETTLEMENT, voluntary, under	rngush k	aw .		•	693	
SHARES, sale of (see Sale)	•	•	•	•	125	128
SHEEP farm, lease of	•	•	•	•	OP P	636
Shetland, searches .	•	•	•	•	277	

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		TEXT.	FORMS.
Shifting clauses—			
in destinations, construction of ·	•	763	
Shooting lease—		1.01	
does not bind purchaser	•	161	170
sale condition contra	•		170
Shop, lease of	•		613–4
Signature—		4	
granter	•	4	
by initials	٠	4	
mark	•	4	
stamp	•	4	
wife's maiden name	•	4	
witnesses, time for—		ĸ	
may be after granter's death	٠	5 5	
quære after repudiation by a party.	•	5	
not after deed registered or judicially founded on	•	4	
Solemnities of execution	٠	1	0
notarial	•	6	8
SPES successionis—		646	
adjudication incompetent	•	646	
assignation valid	٠	646	
quære as to living person's estate	•	23	
bankruptcy—		0.40	
does not vest in trustee	•	646	
vesting order	•	450	
bankrupt may not assign .	•	646	
discharge may be conditional on assignation	•	646	
intimation in competition with trustee .	•	682	
infeftment, difficulty as to	•	450	
survivorship, life assurance	•	647	
Stamps—		0.00	
assumption of trustees	٠	863	
condition of sale regarding, is void	•	163	
corroboration, bond of	•	542	
foreclosure decree	•	527	
life policy, title to	٠	690–5	
partial discharge	•	598	
STIPEND—		150	
apportionment between seller and purchaser .	•	150	
obligation of relief	•	305	195
STRIKE clause	•	000	137
SUBINFEUDATION, prohibition of	•	202	
as objection to title	•	186 611	
SUB-LEASE	•	011	
SUBMISSION— general to sole arbiter			77
arbiters and oversman	٠		
	•		78–9
to settle building dispute	٠		81 81
cross actions	•		82
marches	•		79
	•		80
partnership accounts See Arbitration, Decree-Arbitral.	•		OU
Sub-purchaser		318	
Sub-purchaser	•	910	
over heritable security, constitution			436
discharge	•		605-6
personal rights	•		133
horania rema	•	Di	Coodle
		Digitized by	Joogic

			•	
Succession—			TEXT.	FORMB,
heritable, table of			708	
collation	•	•		
	•		740	
heritable securities, bonds	• .	• •	192, 487	
ex facie absolute	•	•	475	
personal bonds, creditor	٠.	•	11	
debtor .	•		13	
personal right under 1874 Act	•		730	
real burdens	•		. 493	
vesting	•		641	
SUMMARY diligence—				
bills and notes			34	36
bonds			39	40
heritable securities	•		506	
under 1874 Act	•		39, 535	41
Superiority—			•	
articles of roup				177
notarial instrument	_			361
purchase	-		153	165
sale	•	•	154	100
disposition	•	•	101	329
Supplement—	•	•		023
letters of, for edictal intimation			685	
	•		009	
SURVIVORSHIP—			090	
infeftment accrues on death	•	•	238	005
notarial instrument may contain	•	•	364	365
trust title implies	•		238	
vesting is suspended by .	•	•	648	
warrant of registration need not repe	at	•	238	
Tantum et tale—				
assignee of personal rights .	•		21, 654	
heritable bonds .			544	
real burdens .	•		493	
trustee in bankruptcy—				
ex facie absolute dispositions		•	472	
registered titles .			682	
unintimated assignations			682	
unrecorded bonds .			450	
discharges			570	
Trinds			162, 190	
Tenants' claims.			157	167, 320
		•	162	162
TENEMENT property offer to purchase		•	102	164
M	•	•	191	ZVI
Terce Testamentary powers—	•		101	
distinguished from inter vivos.			848	
most riching honoficiary to liferent and	•		851	795
restricting beneficiary to liferent and	•		802	785 891
TESTAMENTARY writings (see Wills)	•	•	-	821
Testing clause	•	•	1	
of deed executed notarially .	•	•	8	
Time—			3.45	
limit for acceptance of offer .	•		147	164
infeftment	•	•	186	212
Crown writs	•	•	729	
objections to title .	•		195	
obligations for search	•		288	
witness signing after granter	's acknov	vledgment	3, 5	
• • •		-		

6 0.				TEXT.	FORMS.
TIME—continued—			*		
loan, time-bargain	•	. •	. •		440
TITLE to heritage—					
"as it stands"	•	. •	•	163	
building conditions	•	•	•	186, 204	
courtesy	•	•	•	192	
death duties	. •		•	193	
decrees in absence		. •		. 184	
expense of clearing	•	•	•	196	
feu-duties and casualties .	•		•	191	
gables, walls, roads, drains .			•	187	
identity of property				185, 315	
knowledge of defects				189, 290	
leasehold may be rejected .				355	
light and air	•	٠.	•	190	
liquor traffic, prohibition of .			•	189	
minerals, reservation of .				189	
possession	•			183	
pre-emption	•			202	
preference of ancestor's creditors				195	
prescription				180	
reservations and restrictions .	-			188	
servitudes	-			190	
roof, maintenance of		·		188	
stamps	•	•	•	185	
subinfeudation, prohibition of	•	•	•	186	
time for objections	•	•	•	195	
Trout fishings—	•	•	•	130	
lease of, does not bind purchaser				161	
condition of sale contra .	•	•	•	157	170
Trust deeds for creditors—	•	•	•	10.	110
				139	
company may not grant . creditors' accession and actings	•	•	•	140	
	•	•	•	140	
death of debtor, effect on title	•	•	•	139	149
discharge of debtor	•	•	•	139	143
form of trust deed	•	•	•	141	141
heir's title to reversion .	•	•	•	141	
illegal preferences, reduction of		•	•	139	
interest, how computed, if surplu	18 .	•	•	140	
trustee's powers	•	•	•	140	
of sale .	•	•	•	140	
security		•	•	140	005
TRUST disposition and settlement (s	ee Wills)	•	•	802	825
Trustees—				0.00	
appointment	•	•	•	860	
codicil named in, infeftment of	•	•	• "	227	
completion of title—					
lapsed trusts	•	•	•	871	877
necessity for, or not .	•	•	59	96, 862–3	
discharge of $(q.v.)$	•	•	•	897	901
disposition by and to	•	•	•	296	
heritable securities by and to.	•	•		427	
indemnities to $(q.v.)$	•	•	•	883	8 9 1
powers—					
assumption	•	•	•	859	865
borrowing	•		•	427	834
discharge of other trustees .	•		•	897	
-					

m (* . ?	TEXT.	FORMS.
Trusters—powers—continued—	405	201
excamb	. 405	834
feu	. 199	8 34
lease	. 608	834
purchase heritage	. 297	833
sell	. 296	83 4
purchase of trust estate by	. 664	
service by	. 726	727
See Wills.	•	
Титов—		
completion of title unnecessary	. 292	
borrowing	. 424	
selling	. 292	
ULTRA vires appointments	. 849	
Urra orres appointments		
Unincorporated bodies, dispositions by and to	. 296	040
Unrecorded conveyances, assignations of	. 343	346
warrants of registration on	. 344	
UTERO, child in—		
effect on succession	. 642	
as to revocation of will	. 656	
Vesting-		
absolute	. 641	
advice for wills and settlements	. 810	
appointment, ordinary power of, does not authorise	A	
interference with vesting	. 855	
but may	. 855	
may result in defeasance	. 642	
conditional institution suspends vesting .	. 648	
though only to being		
though only to heirs	. 643	
but not applicable to direct heritable destinations		
defeasance of	. 641	
appointment, by exercise of power of	. 642	
conditional institution of heirs or children (nov		
probably contingent)	. 642	
failure of whole class	. 645	
future births (partial)	. 227, 642	
gift to A. with rider for children	. 643	
to A. for life and to A.'s issue, whom failing to B	644	,
destinations of heritage direct to heirs and children	. 228	
-over suspend vesting	. 648	
express clause	. 811	
may fail as repugnant	. 649	
intention of testator	. 648	
mutual wills	. 819	
name, condition as to assuming	. 649	
	. 648	
presumption a morte or dissolution of marriage	. 648	
survivorship suspends vesting		
but may not in second generation .	. 649	
nor in sole survivor	. 648	
WAIVER of irritancy, deed of	•	224
Walls—		
boundary	. 309	
liability for, on sale	. 187	
WARRANDICE—		
by heritable creditor selling	. 176	331
assigning	. 544	556
husband and wife		324
•		

					TEXT.	FORMS.
WARRANDICE—continued—						
by <i>pro indiviso</i> proprietors	•	•	•			326
testator	•	•	•		816	
third party as cautioner	•		•		324	
trustees in bonds .	•	•			54, 423	
distinction between, and inde	emnity .				692	
qua	lification	of	dispos	itive		
·	lause	•			423	
exception of bonds taken over	er					327
feu-rights						320
unreco	rded		_			320
leases and tenan			•			320
real burdens		_				328
servitudes		•			409	020
in assignations of heritable s	ecurities	•	•	•	544	
personal rights .	004110105	•	•	•	24, 695	
burgage titles, 1847–68	•	•	•	•	341	
corroborative assignation	of bond	•	•	•	041	556
denuding by trustees	or bolla	•	•	•	900	334
discharge of trustees	•	•	•	•	898	906-12
	•	•	•	•	090	
disposition .	•		•	•	404	320
excambion			•	•	404	405
heritable securities by tru	stees	•	•	•	54, 423	
novodamus	•	•	•	•	223	223
sale of book-debts .	•	•	•	•	131	132-3
shares .	•	•	•	•	126	
sub-sale	•	•	•	•	318	319
wills	•	•	•	•	816	
of modernised description	•		•	•	315	
WARRANTS of registration—						
completion of title to unreco	rded conv	eyan	ces		344	344
descriptive disponees .		•		•	$\boldsymbol{227}$	227
execution also .	•	•	٠.	•	43	
fiar truly but nominally lifer	renter	•			229	230
fiduciary					231	232
postponement					587	
preservation also .					43	
survivorship					238, 560	
WATER rights—						
restrictions on communicating	12				316	
WAY, right of	•				410	410
Wills—	·		-	•		
accumulation		_	_	_	806	843
accrescing shares .		•	-	•	813	0.0
adamption	•	•	•	•	814	
advances by testator .	•	•	•	•	815	
alimentary protection.	•	•	•	•	808	831
annuities .	•	•	•	•	808	846
codicils	•	•	•	•	820	846
conditional institution or sul	hatitution	•	•	•	813	
of hei			•	•		833
		•	•	•	814	
cumulative or substitutional	•	•	•	•	820	
debts, incidence of .	•	•	•	•	808	
defeasible conditions .		•	•	•	815	
destinations, subsisting speci	ai .	•	•	•	803	man as-
discretionary powers .	•	•	•	•	816	785, 832
entail improvement expendit	ture	•	•	•	804	

TILLS— continued—						TEXT.	FORMS.
execution, formalities	s of En	elish s	nd fore	ion wills		3, 4, 821	
interest on advance	a o	.B		-6	•	815	
legacies		•	•	•	•	810	
intestacy .		•	•		•	812	. 840–2
legal rights .	•	•	•	•	•	804	. 010-2
liferent to child, ar	nd fee 1	o rem	oter iss	ue : clair	m of	004	
legitim .				, ,		805	
liferent rights, bequ	est of			•	•	809	845
	iction o		•	•	•	806	010
mutual wills .				•	•	818	824-5
powers of administra	etion—	•	•	•	•	010	021-0
to abate rents	BUIO11						834
appropriate in	• vaetman	to.		•	•		835
borrow .	V COULTOI		•	•	•	427	834
continue testat		· ·	r oblice	tions.	•	817	835
excamb .	MI P COL	LOIUIIAI	y optige	FUOTE	•	405	834
	•	•	• •	•	•		834
feu .	•	•	•	•	•	199	
give time	•	•	•	•	•	817	835
grant long leas		•	•	•	•		834
insure investm	ents	•	•	•	•		833
invest .	.:	•	•	•	•	817	833
postpone realis	ation	•	•	•	•	817	829
sell .		•	•	•	•	296	816
sinking fund,	form	•	•	•	•		833
powers of appointm	ent—						
conferred by test	ator	•		•	•	807	
held by him	•	•		•	•	806–7	
powers, discretionar			•	•		816	785, 832
trustees' immunities	8.	•	•	•		818	830
vesting .	٠.	•	•	•		810, 819	
warrandice .	٠.	•	•		•	816	
		Forme	with I	rusts			
bequeathing whole	estate t	o one j	erson	•			821
special	heritag	ge to A	and r	esidue to	В		821
by wife bequeathing	g estate	to hus	band a	nd exerc	ising		
power of giving							822
(1) bequeathing peo	uniary	and ot	her leg	acies, (2)) ap-		
pointing special	destina	tion to	stand,	and (3) g	iving		
residue to a cha	rity			•		• .	82 3
pecuniary leg	acies.					•	
liferent of fur	rniture, j	ewellery	, etc.		. • .		
confirmation				landed e	state,		
with legacy legacy of wea			л.		•	•	
residue,							
mutual will by hus	hand an	d wife					824
	e sister		•	. •			825
trust disposition			ne mba	n 'aamtin			020
trust not intende	y The po	опеше	no whe	n contin	ıuıng		905
				•	•		825
debts, funeral ex	penses, s	and trus	t expens	66,			
legacies. implement of ma	urriage-co	ntract 1	rovision	R.			
landed estate to					nuity		
to widow.		•			•		
residue to childr		y, vesti	ng at de	ath: dedu	ctions		
in certain case apportionment o		re-contr	ect funde	L			
trustees' powers				-			

Was a southern I	TEXT.	Forms.
Wills—continued— trust disposition and settlement, with continuing trust for liferent of widow and fee to surviving children.	•	831
for liferent of widow and fee to surviving children . legacy to widow. alimentary liferent to widow, special clause as to ascertainment of income. capital to children and issue. power to restrict beneficiaries to an alimentary liferent. power to settle shares of female beneficiaries on marriage. full investment clause. insurance of investments, purchase of redeemable securities at a premium, other powers— to realise in various ways. borrow. lease. grant deeds. arrange securities, grant abatements of rent. accept renunciations of leases.		831
make meliorations. give time to partners. continue cautionary obligations.		
carry on business. appropriate investments.		
trust disposition and settlement giving liferent to widow, terminating on re-marriage, and fee to surviving issue attaining twenty-five		836
liferent, including all income not actually receivable during testator's life. capital to children and issue surviving and attaining 25. power to apply income and advance capital. variation of these powers.		
trust disposition and settlement giving widow liferent of house, furniture, etc., during viduity, and annuity restrictable on re-marriage: fee to children		838
liferent of house, furniture, etc.; house to be put into repair; clauses as to incidence of charges. consumable stores to widow. annuity to widow, restrictable on re-marriage. burden of maintaining children. fee to surviving issue attaining twenty-five, no vesting till the respective periods of payment. power to apply income and advance capital.		
residue to two liferenters and surviving issue respec- tively, with clause to prevent lapse.	•	840
power to appropriate investments residuary clause giving son's share absolutely, and daughters' shares in liferent and their issue in fee, with powers to apportion and (failing issue) to test; clause to prevent lapse		841 841
son's share absolutely. daughters' shares, liferent. fee to issue. failing issue, power to test. provision to prevent lapse.		711
residuary clause in favour of three beneficiaries in equal shares vesting at death, conditional institu-		
tion of issue, clause against lapse		842

WILLS—continued—	TEXT.	PORMS,
residuary clause in favour of three beneficiaries in unequal shares; otherwise as above trust disposition and settlement providing for accumulations for twenty years, subject to limited payments to beneficiaries		843 843
codicil		846
changes in trusteeship. legacies, revocation. reduction. increase.		
docquet for execution in English form		847
Winding-up-		
co-partnery (see Partnership)	94	
trust, precautions on	8 99	
WITNESSES-		
competent, or otherwise	4	
designations, when they may be added	2, 3	
signatures not by initials	. 5	
after granter's death	5	
repudiation	5	
interval after acknowledgment	3, 4	
not after deed registered or judicially	-	
founded on	4	
Writ of acknowledgment	585	
Writ of clare constat	729	
Writs, assignation of	304-5	
"Younger children"—		
entail provisions	760	
legitim, discharge of, should not be limited to .	768	

Ex. a. L. P. 1/20/05.



